APPELLATE REVIEW OF FINAL AND NON-FINAL ORDERS IN FLORDIA CIVIL CASES—AN OVERVIEW

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I

INTRODUCTION

The rule in Florida,[1] as in most other jurisdictions,[2] is that generally an appeal will lie only from a final judgment or order. This final judgment rule is of such importance in Florida that it is embodied in provisions of the Florida Constitution that confer a constitutional right to appeal from a final judgment or order, but which authorize appellate review of interlocutory orders only where specifically permitted by rules adopted by the Florida Supreme Court.[3]

This rule, which restricts the right to seek immediate review of nonfinal or interlocutory orders in civil cases, has great impact on the functioning of the trial and appellate courts, including their relationship to each other.[4] It also affects interests vital to litigants.

This article will discuss the Florida law authorizing appellate review of final and nonfinal orders. An attempt will be made to identify those interests or policies which support the final judgment rule as well as those competing interests or policies which justify allowing interlocutory review of nonfinal orders.

An attempt will also be made to evaluate whether Florida's civil appellate law

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1. In Brannon v. Johnston, 83 So. 2d 779, 780 (Fla. 1955), the court stated: "Unless provision is made by Rule or Statute for an appeal from an interlocutory order, it is the general rule to which we have consistently adhered that an appeal will lie only from a final judgment or decree." To the same effect, see Goldfarb v. Bronston, 154 Fla. 180, 17 So. 2d 300 (1944).

2. R. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 3.1, at 52 (1981).

3. Article V, Section 4(b)(1) of the Florida Constitution provides that appeals may be taken as a matter of right to the district courts of appeal from final judgments or orders of trial courts not directly appealable to the Florida Supreme Court or a circuit court. Article V, Section 3(b)(2) confers jurisdiction on the Florida Supreme Court to hear appeals from final judgments entered in bond validation proceedings. Article V, Section 4(b)(1) also confers jurisdiction on the district courts of appeal to review interlocutory orders to the extent provided by rules adopted by the Florida Supreme Court. Under Article V, Section 5(b) and Section 26.012(1), Florida Statutes (1981), the legislature has conferred jurisdiction on the circuit courts (trial courts of highest original jurisdiction) to review final orders of county courts (trial courts of limited jurisdiction) except those declaring invalid a state statute or a provision of the state constitution.

4. Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

properly balances the competing interests or policies involved. For purposes of this discussion, the phrases "final judgment rule" and "final order rule" will be used interchangeably to refer to the rule requiring finality, however defined, as a precondition to appellate review.[5] As will be shown, the concept of a final order, from which an appeal may be taken, includes orders that are not commonly considered to be final judgments under res judicata or other doctrines.

II

HISTORICAL BASIS OF THE FINAL JUDGMENT RULE

Our rule postponing appellate review until the entry of final judgment had its origin in common law decisions involving the writ of error.[6] In early English practice, the King's Bench used the writ of error as the method to review decisions of other common law courts.[7] Since the proceeding on the writ of error was apparently regarded as a new action and not simply a continuation of the case in the inferior court,[8] it was necessary to bring the whole record to the King's Bench before the case could be reviewed.[9] Apparently, the nature of the record was such that it was difficult for the trial court and the King's Bench to review its contents simultaneously.[10] This was a significant reason behind the general rule that in common law actions an appeal lies only from a final judgment.[11]

In equity, however, there was no such rule limiting appellate review to final decrees.[12] The procedure in equity was more flexible and the final judgment rule was unsuited to its needs.[13]

The English common law final judgment rule was accepted early in the United States and applied to both legal and equitable actions.[14] Its wide acceptance was not based on reasons similar to those promulgated by the English common law courts;[15] rather, considerations of judicial economy and the need for prompt and efficient resolution of disputes[16] prompted American courts to adopt the final judgment rule.

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5. Rule 9.020(e) of the Florida Rules of Appellate Procedure defines an "order" as a "decision, order, judgment, decree or rule of a lower court . . . ." Florida Coast Bank v. Mayes, 430 So. 2d 607 (Fla. Dist. Ct. App. 1982).

6. Crick, *The Final Judgment Rule as a Basis for Appeal,* 41 YALE L.J. 539, 541 (1932).

7. *Id.*

8. *Id.* at 543.

9. Metcalfe's Case, 6 Coke 38a, 77 Eng. Rep. 119 (1615).

10. *See id.*

11. 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 54.19, at 211 (2d ed. 1982); Holhorst v. Hamburg-American Packet Co., 148 U.S. 262 (1893). The "single judicial unit theory" finds its genesis in the same rationale that supports the final judgment rule.

12. *See* Crick, *supra* note 6, at 540-41.

13. *Id.* at 548.

14. *Id.* at 549; McLish v. Roff, 141 U.S. 661 (1891).

15. At common law, the final judgment rule was never thought of as a means of preventing excessive appeals. *See* Crick, *supra* note 6, at 540-44.

16. *See* McLish v. Roff, 141 U.S. 661 (1891); Frank, *Requiem for the Final Judgment Rule,* 45 TEX. L. REV. 292 (1967).

III

POLICIES SUPPORTING THE FINAL JUDGMENT RULE

Maintaining the appropriate relationship between the trial and appellate courts is one of the vital purposes of the final judgment rule.[17] Being the court of original jurisdiction, the trial court is responsible for making the initial determination of law regulating procedure and discovery, fashioning temporary remedies, controlling the conduct of counsel, witnesses, parties, and disposing of the case by settlement or trial in an orderly, just, and expeditious manner. In order to perform these responsibilities, it is essential that the trial court be granted wide discretion with regard to many rulings and ample authority to control the case.[18]

Indiscriminately permitting immediate appeal of every trial court ruling not only disrupts the trial court process, but also creates an intolerable intrusion by the appellate court into the trial court's function, resulting in the appellate court directing the trial judge in the conduct of each case.[19] This would impair not only the proper functioning of the trial court, but also the proper functioning of the appellate court.

In addition to fostering a proper relationship between the trial and appellate courts, the final order rule serves to eliminate unnecessary delay,[20] expense,[21] duplication,[22] harassment,[23] waste,[24] and burden on the appellate court's docket[25] necessarily incident to allowing unlimited interlocutory review of pretrial orders.

Moreover, postponing appellate review of most pretrial rulings avoids appellate court review of erroneous trial court rulings in cases where either the trial court corrects its own error,[26] a settlement is reached,[27] or the party suffering the adverse ruling prevails in the litigation.[28] Delaying appeal until final judgment also allows the appellate court to review the challenged ruling with the entire case

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17. Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

18. 15 C. WRIGHT, A. MILLER & J. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 430 (1976).

19. *See* Ford Motor Co. v. Edwards, 363 So. 2d 867, 870 (Fla. Dist. Ct. App. 1978); Girten v. Bouvier, 155 So. 2d 745, 748 (Fla. Dist. Ct. App. 1963); C.G.J. Corp. v. Engel, 135 So. 2d 431, 432 (Fla. Dist. Ct. App. 1961); Taylor v. Board of Pub. Instruction, 131 So. 2d 504, 506 (Fla. Dist. Ct. App. 1961); Beck v. Barnett Nat'l Bank, 117 So. 2d 45, 48 (Fla. Dist. Ct. App. 1960).

20. Hawaiian Inn of Daytona Beach, Inc. v. Snead Constr. Corp., 393 So. 2d 1201, 1202 (Fla. Dist. Ct. App. 1981); Ford Motor Co. v. Edwards, 363 So. 2d 867, 870 (Fla. Dist. Ct. App.. 1978).

21. *See* 15 C. WRIGHT, A. MILLER & J. COOPER, *supra* note 18, § 3913, at 523.

22. *Id.*

23. Cobbledick v. United States, 309 U.S. 323, 325 (1940); Hawaiian Inn of Daytona Beach, Inc. v. Snead Constr. Corp., 393 So. 2d 1201, 1202 (Fla. Dist. Ct. App. 1981).

24. *See* R. STERN, *supra* note 2, § 3.1, at 53.

25. *See* Frank, *supra* note 16, at 293; Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure,* 45 TENN. L. REV. 161, 217 (1978). In fact, it is stated in Crick, *supra* note 6, at 539, that "The policy behind this rule is said to be that it is the only way in which the appellate court can prevent itself from being swamped with appeals."

26. The trial court has inherent authority to control its own interlocutory orders prior to final judgment. North Shore Hosp., Inc. v. Barber, 143 So. 2d 849 (Fla. 1962).

27. 15 C. WRIGHT, A. MILLER & J. COOPER, *supra* note 18, § 3907, at 431.

28. Ford Motor Co. v. Edwards, 363 So. 2d 867, 870 (Fla. Dist. Ct. App. 1978).

in perspective, thereby permitting the appellate court to determine better whether harmful error occurred.[29]

Additionally, it has been observed that in most cases the substantive rights of the parties are not affected until the final order is entered.[30] Moreover, in the usual case, where the litigation period is short and the legal issues are relatively simple, the final order rule works well on balance and avoids waste that would result from a rule allowing excessive interlocutory review of pretrial rulings.[31]

IV

FINAL JUDGMENT RULE: DEFINITION AND CHARACTERISTICS

Many Florida cases, particularly older ones, define a final judgment as an order disposing of the entire controversy on the merits, leaving nothing but the enforcement of that which has been determined.[32] An exception to this definition was recognized early with respect to orders finally determining a distinct and separate branch of the controversy.[33] A further exception to this definition emerged in cases holding that a dismissal of an action is a final order for appellate purposes even though the dismissal is without prejudice and does not adjudicate the rights of the parties for purposes of res judicata.[34]

Perhaps because of the recognition that a dismissal without prejudice is a final appealable order, the most prevalent and authoritative current definition of the final order or judgment rule in Florida does not include a requirement of an adjudication on the merits but instead focuses on whether there has been an end to the judicial labor in the cause. This definition of a final judgment or order is stated in *S.L.T. Warehouse Co. v. Webb*,[35] in the following words:

> [T]he 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.[36]

Appreciation of this definition has led courts to characterize the following

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29. *Id.*

30. Beck v. Barnett Nat'l Bank, 117 So. 2d 45, 48 (Fla. Dist. Ct. App. 1960); *see* R. STERN, *supra* note 2, § 3.1, at 53.

31. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 101, at 504 (4th ed. 1983); Frank, *supra* note 16, at 293.

32. Gore v. Hansen, 59 So. 2d 538, 539 (Fla. 1952); Hillsboro Plantation, Inc. v. Plunkett, 55 So. 2d 534, 536 (Fla. 1951); Howard v. Ziegler, 40 So. 2d 776, 777 (Fla. 1949); Alderman v. Puritan Dairy, Inc., 145 Fla. 292, 295, 199 So. 44, 45 (Fla. 1940); State Road Dep't v. Crill, 99 Fla. 1012, 1017, 128 So. 412, 414 (Fla. 1930).

33. State Road Dep't v. Crill, 99 Fla. 1012, 1015, 128 So. 412, 414 (Fla. 1930) ("there is authority to support the proposition that where a distinct and separate branch of the cause is finally determined, although the suit is not ended, there may be an appeal . . . .").

34. Derma Lift Salon, Inc. v. Swanko, 419 So. 2d 1180 (Fla. Dist. Ct. App. 1982); Boeing Co. v. Merchant, 397 So. 2d 399, 401 (Fla. Dist. Ct. App. 1981); Gries Inv. Co. v. Chelton, 388 So. 2d 1281 (Fla. Dist. Ct. App. 1980); Gibbs v. Trudeau, 283 So. 2d 889, 890 (Fla. Dist. Ct. App. 1973).

35. 304 So. 2d 97, 99 (Fla. 1974).

36. Referring to this definition of a final judgment or order, the Florida Supreme Court stated in State Farm Mut. Auto. Ins. Co. v. American Hardware Mut. Ins. Co., 345 So. 2d 726, 728 (Fla. 1977), "We have held steadfastly to this definition . . . we are not convinced that a change of the rule is necessary although application in some cases is difficult." In Cowles v. Phares, 430 So.2d 995 (Fla. Dist. Ct. App. 1983) the court held that absent the entry of a written final order or judgment, the judicial labor in the lower tribunal has not been completed.

holdings as final appealable orders: an order setting aside an arbitration award in favor of an insurer and directing rearbitration and fixing liability for attorney fees,[37] an order enforcing settlement,[38] and an order denying a petition for intervention.[39]

On the other hand, under this "end of judicial labor" definition an order leaving an issue open for further determination, such as the amount of rental arrearages,[40] interest,[41] or damages,[42] is not a final order because the judicial labor has not concluded. Reservation of the right to tax costs[43] or attorney fees[44] after the entry of the final judgment, however, does not affect its finality for appellate purposes.

V

WORDS OF FINALITY

Under the "end of judicial labor" definition of finality, the trial court is required to use language in its order that conclusively demonstrates that judicial labor has ended. Difficulties in doing this have been experienced by Florida trial courts mainly where the order was in favor of the defendant. The "magic words" determining finality are, of course, that the plaintiff "take nothing by this suit, and the defendant go hence without day."[45] Such magic words are not always required. Any equivalent words that have the effect of dismissing the action against the defendant will suffice.[46]

The mere granting of a motion for summary judgment,[47] a motion for judgment on the pleadings,[48] or a motion to dismiss,[49] however, without any further words dismissing the complaint or action, will not be sufficient to render the order final and appealable. And, although there is a conflict of opinion on the issue, it has been held that an order granting a motion to dismiss plaintiff's complaint with

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37. South Carolina Ins. Co. v. Gonzalez, 386 So. 2d 829 (Fla. Dist. Ct. App. 1980).

38. Travelers Indemnity Co. v. Walker, 401 So. 2d 1147 (Fla. Dist. Ct. App. 1981).

39. Citibank, N.A. v. Blackhawk Heating & Plumbing Co., 398 So. 2d 984 (Fla. Dist. Ct. App. 1979).

40. Morton v. City of Miami Beach, 376 So. 2d 279 (Fla. Dist. Ct. App. 1979). *See also* Heritage Paper Co. v. Farah, 440 So. 2d 389 (Fla. Dist. Ct. App. 1983) (amount of unpaid commissions).

41. Chipola Nurseries, Inc. v. Division of Admin., State Dep't of Transp., 335 So. 2d 617 (Fla. Dist. Ct. App. 1976).

42. Brannon v. Johnston, 83 So. 2d 779 (Fla. 1955).

43. Roberts v. Askew, 260 So. 2d 492 (Fla. 1972).

44. General Accident Fire & Life Assurance Corp. v. Kellin, 391 So. 2d 305 (Fla. Dist. Ct. App. 1980).

45. Catchings v. Florida-McCracken Concrete Pipe Co., 101 Fla. 792, 793, 135 So. 561, 562 (1931); Allstate Ins. Co. v. Collier, 405 So. 2d 311, 312 (Fla. Dist. Ct. App. 1981).

46. Slatcoff v. Dezen, 72 So. 2d 800, 801 (Fla. 1954) ("and the garnishee be discharged from this cause"); Florida Farm Bureau Ins. Co. v. Austin Carpet Serv., Inc., 382 So. 2d 305 (Fla. Dist. Ct. App. 1979) (plaintiff's "request for distribution of proceeds is denied").

47. Renard v. Kirkeby Hotels, Inc., 99 So. 2d 719 (Fla. Dist. Ct. App. 1958); Danford v. City of Rockledge, 387 So. 2d 967 (Fla. Dist. Ct. App. 1980); Arline v. Wometco Enter. 429 So. 2d 63 (Fla. Dist. Ct. App. 1983). *But see* Allstate Ins. Co. v. Coller, 405 So. 2d 311, 312 (Fla. Dist. Ct. App. 1981).

48. Sgrignuoili v. Barakat, 384 So. 2d 657 (Fla. Dist. Ct. App. 1980).

49. Gries Inv. Co. v. Chelton, 388 So. 2d 1281, 1282 (Fla. Dist. Ct. App. 1980); Atria v. Anton, 379 So. 2d 462 (Fla. Dist. Ct. App. 1980).

prejudice, but not actually dismissing the complaint, is not a final appealable order.[50]

VI

ORDERS DISMISSING LESS THAN ALL CLAIMS OR PARTIES IN A CASE

A. Multiple Claims

Generally, a case is held to be a single judicial unit, even though it involves multiple claims or more than two parties.[51] An order of dismissal disposing of less than all of the claims is considered to be a nonfinal order for appellate purposes.[52] An exception to this single judicial unit rule has been recognized in the leading case of *Mendez v. West Flagler Family Association*,[53] recognizing that an order dismissing a distinct and severable claim arising out of a transaction or set of facts which is separate from and not legally interrelated with the remaining claims is final.[54] The reason given in *Mendez* for this exception is that there is no "advantage to be gained in terms of court time and labor in not allowing" the dismissed claim to be appealed immediately.[55]

The best explanation supporting this reasoning appears to be as follows: If the dismissed claim involves facts and issues different from those of the remaining claims and is not so interrelated with the remaining claims that a trial of the dismissed claim will require litigating substantially the same facts and issues as those involved in the remaining claims, a reversal of the dismissal will not result in having to relitigate substantially the same facts and issues. Therefore, delaying the trial of the remaining claims, until appeal of the dismissal is decided, is not necessary in order to avoid duplication. Conversely, where an interrelated claim is dismissed, the trial court, to avoid duplication, would have to choose between delaying the trial on the remaining claims until the appeal of the dismissal is decided or risk the possibility of having to try substantially the same facts and issues twice.

The wisdom of requiring an immediate appeal of the dismissal of a distinct and severable claim as mandated in *Mendez* is, however, subject to question. A major difficulty is that in many cases it will be difficult to determine from the state of the record at the time of the dismissal whether the claim in question involves separate or interrelated transactions and facts. If the dismissed claim is in fact distinct and severable, the plaintiff must appeal the dismissal immediately or lose his right to appeal the dismissal. This creates a strong incentive to file protective appeals in

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50. Lawler v. Harris, 418 So. 2d 1239 (Fla. Dist. Ct. App. 1982); Gries Inv. Co. v. Chelton, 388 So. 2d 1281, 1282 (Fla. Dist. Ct. App. 1980). *Contra* Cordani v. Roulis, 395 So. 2d 1276, 1277 (Fla. Dist. Ct. App. 1981); Segal v. Garrigues, 329 So. 2d 475 (Fla. Dist. Ct. App. 1975).

51. S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974); Goldfarb v. Bronston, 154 Fla. 180, 184, 17 So. 2d 300, 302 (1944).

52. S.L.T. Warehouse Co. v. Webb, 304 So. 2d at 99; Goldfarb v. Bronston, 154 Fla. at 185, 17 So. 2d at 302.

53. 303 So. 2d 1, 5 (Fla. 1974).

54. *Id.*

55. *Id.*

order to avoid the risk of losing the right to appeal, and there is evidence that the rule in *Mendez* has generated such protective appeals.[56]

It has been suggested that such protective appeals are avoidable by allowing the plaintiff the option of appealing from the dismissal immediately or waiting until the entire case is concluded by a final judgment.[57] This suggestion has been adopted in an amendment to the Florida Rules of Appellate Procedure which becomes effective on January 1, 1985, the text of which is set forth *infra* in the discussion of Rule 54(b) of the Federal Rules of Civil Procedure. Although this suggestion has some merit, it would allow the plaintiff to determine unilaterally whether to delay the ultimate disposition of the dismissed claim. Delay, however, affects the rights of the defendant as well. Moreover, avoiding unnecessary delay is the keystone to proper caseload management.[58] The decision whether an appeal should be delayed should therefore be a judicial one.

The question whether there is good reason to delay an appeal of an order dismissing a severable and distinct claim requires an evaluation of many variables. The trial date in a given case may be only months away when the order of dismissal is entered. The legal issue on which the dismissal is entered may be a close one and events in the case subsequent to the dismissal may cause the court to reconsider and correct its erroneous dismissal if the jurisdiction to do so has not been lost. There also may be a possibility that the parties will settle the case or that the plaintiff will win on his pending claims and be satisfied or lose on his pending claims for reasons that convince him that he could not prevail at trial on the dismissed claim.

The possibility that the case will be terminated without the necessity of an appeal of the dismissal may justify a short delay in allowing the appeal. On the other hand, the trial date may be years away and the disadvantages of delaying the appeal may greatly outweigh competing considerations. These are but some of the variables illustrating that under some circumstances a dismissal of a severable and distinct claim should be subject to immediate appeal and that under others such right to appeal should be delayed until the remaining claims are disposed of.[59] The above considerations suggest that a better solution than that provided in *Mendez* is needed to determine when an appeal of a dismissal of a distinct and severable claim should be permitted.

B. Orders Dismissing Claims against Some But Not All of the Parties

Another exception to the single judicial unit rule has been made for orders dismissing fewer than all of the parties, even where the claims involved are not severable as required in *Mendez.* Although statements can be found in some of the

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56. *See e.g.,* One Thousand Oaks, Inc. v. Dade Sav. & Loan Ass'n, 417 So. 2d 1135 (Fla. Dist. Ct. App. 1982); Thomson v. Petherbridge, 406 So. 2d 1279 (Fla. Dist. Ct. App. 1981); Fetters v. U.S. Fire Ins. Co., 399 So. 2d 427 (Fla. Dist. Ct. App. 1981); Venezia A., Inc. v. Askew, 314 So. 2d 254 (Fla. Dist. Ct. App. 1975).

57. Haddad, *Partial Final Judgments,* 53 FLA. B.J. 204, 207 (1979).

58. *See* CHURCH, CARLSON, LEE, AND TAN, JUSTICE DELAYED! THE PACE OF LITIGATION IN URBAN TRIAL COURTS, (National Center for State Courts Publication No. R0041A, 1978).

59. See generally the discussion of policies supporting the final judgment rule, *supra* text accompanying notes 17-31.

earlier cases that severability of claims against multiple parties is a factor in determining the finality of an order dismissing some but not all of the parties,[60] this is apparently no longer the law. The cases now routinely hold that where a dismissal totally disposes of the case between the parties affected by it, it is a final appealable order, even though the dismissed and pending claims involve interrelated facts and issues.[61] The reason given for this rule is that such dismissal constitutes an end to the judicial labor on the claim between the affected parties.[62]

The advantages of this rule are its simplicity and certainty, but it too has serious disadvantages. Unlike the *Mendez* rule, this rule forces the trial court to make a choice between delay and duplication where interrelated facts and issues are involved. If the trial court wishes to try the interrelated facts and issues only once, it must wait until the appeal of the dismissed claim is concluded before trying the case against the remaining parties. Otherwise, if there is a reversal, the interrelated facts and issues will have to be retried in a second trial between the parties to the dismissed claim.

Moreover, where the claims are for the same damages, a plaintiff successful against the remaining parties will often have no need to appeal the dismissal. This is true whether the plaintiff is successful by way of settlement or trial. This rule requiring an immediate appeal of the dismissal of a party does not permit the trial court to weigh the advantages and disadvantages of delaying the appeal of the dismissal.[63]

VII

FEDERAL RULE 54(B)

As shown above, the rules requiring an immediate appeal from orders dismissing distinct and severable claims or some but not all of the parties to the case do not permit a determination to be made in the individual case as to whether there are good reasons to delay an immediate appeal from such orders. Moreover, the difficulty in determining whether a claim is distinct and severable from pending claims leads to protective appeals.

As a means of remedying the problem of determining when to appeal a partial final judgment and codifying in rule form the requirement of an immediate appeal from orders dismissing some but not all of the parties to a case, the Florida

60. *See, e.g.,* Hillsboro Plantation, Inc. v. Plunkett, 55 So. 2d 534 (Fla. 1951); Evin R. Welch & Co. v. Johnson, 138 So. 2d 390 (Fla. Dist. Ct. App. 1962).

61. *See, e.g.,* Hotel Roosevelt Co. v. City of Jacksonville, 192 So. 2d 334 (Fla. Dist. Ct. App. 1966); Leeward & Hart Aeronautical Corp. v. South Cent. Airlines, Inc., 184 So. 2d 454 (Fla. Dist. Ct. App. 1966). Both of these cases were cited with approval in State Farm Mut. Auto. Ins. Co. v. American Hardware Mut. Ins. Co., 345 So. 2d 726, 728 (Fla. 1977). *See also* City of St. Petersburg v. Circuit Court of the Sixth Judicial Circuit, 422 So. 2d 18 (Fla. Dist. Ct. App. 1982); Windhover Ass'n v. Gulf Oil Realty, 407 So.2d 603 (Fla. Dist. Ct. App. 1981); Logan v. Flood, 346 So. 2d 1243 (Fla. Dist. Ct. App. 1977).

62. Niesz v. R. P. Morgan Bldg. Co., 401 So. 2d 822, 823 (Fla. Dist. Ct. App. 1981). However, an order dismissing two of the named defendants with leave to amend did not constitute an end to the judicial labor. Braddon v. Doran Jason Co., 8 F.L.W. 2546 (Fla. Dist. Ct. App., Oct. 18, 1983).

63. See discussion relating to the considerations underlying the final judgment rule, *supra* text accompanying notes 17-31.

Supreme Court has added subsection (k) to Rule 9.110 of the Florida Rules of Appellate Procedure:

> (k) Except as otherwise provided herein, partial final judgments are reviewable either on appeal from the partial final judgment or on appeal from the final judgment in the entire case. If a partial final judgment totally disposes of an entire case as to any party, it must be appealed within thirty days of rendition.[64]

It is suggested that a better rule to govern the appealability of such orders would be one comparable to Rule 54(b) of the Federal Rules of Civil Procedure,[65] which provides:

> *Judgment upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, crossclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Although Federal Rule 54(b) does not provide a perfect solution to the problems involved in determining the appealability of orders dismissing fewer than all of the claims and parties in a suit,[66] it does provide, on balance, a better solution than that currently available under Florida law.

VIII

ORDERS PERMITTING OR DENYING CLASS ACTIONS

The Florida Supreme Court recently held that an order holding that certain parties were proper members of a plaintiff class in a class action suit is a nonfinal order that does not determine jurisdiction of the person within the meaning of Florida Appellate Rule 9.130(a)(3)(i), authorizing interlocutory review of orders determining jurisdiction of the person.[67] The reasoning supporting the court's holding in this case would also exclude orders allowing a class action to be maintained from the category of nonfinal orders determining jurisdiction of the person

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64. This and other recommendations were contained in a petition of the Florida Bar Appellate Rules Committee filed in the Florida Supreme Court on March 28, 1984. In accordance with these recommendations, the Florida Supreme Court approved certain changes to the Florida Rules of Appellate Procedure, effective January 1, 1985. *See* Rules of Appellate Procedure - Amendment, 9 F.L.W. 369 (Fla. Sup. Ct., Sept. 13, 1984).

65. The principles governing the applicability of Rule 54(b) are set forth in Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956). For an excellent discussion of Rule 54(b), see J. MOORE, W. TAGGART, & J. WICKER, *supra* note 11, at § 54.01. The use of Rule 54(b) was rejected by the Appellate Rules Committee of the Florida Bar as a method of coping with the uncertainties created by *Mendez*.

66. *See* Haddad, *supra* note 57, at 207; 6 J. MOORE, W. TAGGART & J. WICKER, *supra* note 11, at § 54.43[5]. *See also* Taussig v. Insurance Co. of North Am., 301 So. 2d 21, 22 (Fla. Dist. Ct. App. 1974) ("Inherent in the adoption of the rule [54(b)] were the competing policy considerations of the inconvenience and cost of a piecemeal review on one hand and the danger of denying justice by delay on the other.").

67. National Lake Devs., Inc. v. Lake Tippecanoe Owners Ass'n, 417 So. 2d 655 (Fla. 1982).

under the above rule.[68]

The Florida Supreme Court has not yet expressly determined whether an order denying class action status is a final order. The First District Court of Appeal of Florida, however, has held, in *Cordell v. World Insurance Co.*[69] and in two other cases,[70] that an order denying class action status is a final order. In *Cordell,* the court held that although such an order did not "finally dispose of the case it was final as to the proposed class."[71] In reaching this conclusion, the court relied on the case of *Shute v. Keystone State Bank,*[72] holding that an order dismissing less than all defendants is a final order, and the case of *Mendez v. West Flagler Family Association,*[73] holding that the dismissal of a distinct and severable claim is a final order.

The *Cordell* court's reliance on *Mendez* seems clearly inappropriate because Rule 1.220 of the Florida Rules of Civil Procedure authorizes class actions that include claims that are interrelated as opposed to severable as those terms are defined in *Mendez.*[74] This rule permits a class action where "the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class."[75]

Moreover, the court's reliance on the rule which holds that a dismissal of less than all of the defendants is a final order is questionable. Apart from the fact that the wisdom of this rule itself is debatable as discussed previously in this article, it is somewhat strange to say that a potential member of a class who has not yet become a party to the action has suffered a dismissal of his claim by an order denying class action status. This is particularly true where the potential class member may not even choose to be included in the class. As stated in *National Lake Developments, Inc. v. Lake Tippecanoe Owners Association,* "Unlike a defendant who cannot unilaterally withdraw from the jurisdiction of the court, the members of the plaintiff class may choose not to be members and thus not be bound by the judgment."[76]

Although not relied on in *Cordell,* the rule that an order denying intervention is a final appealable order[77] might be urged in support of the *Cordell* holding. However, a person seeking to intervene in litigation has expressed his active interest in being a party to the case, whereas a potential class member may or may not have such an interest.

These technical objections to the holding of *Cordell,* however, are not the most important ones. Whether an order granting or denying class action status should

68. *Id.* at 657.
69. 352 So. 2d 108 (Fla. Dist. Ct. App. 1977).
70. Smith v. Atlantic Boat Builder Co., 356 So. 2d 359, 361 (Fla. Dist. Ct. App. 1978); Cordell v. World Ins. Co., 418 So. 2d 1162 (Fla. Dist. Ct. App. 1982). The Third District Court of Appeal has followed *Cordell* in Dade County Police Benevolent Ass'n v. Metropolitan Dade County, 452 So. 2d 6 (Fla. Dist. Ct. App. 1984).
71. 352 So. 2d at 109.
72. 159 So. 2d 106 (Fla. Dist. Ct. App. 1963).
73. 303 So. 2d 1 (Fla. 1974).
74. *Id.* at 5.
75. FLA. R. CIV. P. 1.220(a).
76. 417 So. 2d 655, 657 (Fla. 1982).
77. Citibank, N.A. v. Blackhawk Heating & Plumbing Co., 398 So. 2d 984, 986 (Fla. Dist. Ct. App. 1981).

be subject to interlocutory review is problematic.[78] As argued in *Coopers & Lybrand v. Livesay*,[79] which held that an order denying class action status is *not* a final order, the class action serves a vital public interest and should be governed by special rules of appellate review to guarantee that trial courts receive adequate supervision and control with respect to their decisions permitting or denying class action status.[80] The appealability of trial court decisions denying class action status should be determined by rules which evaluate the important policies involved in such determinations, and not by reliance on technical rules of finality that fail to weigh and balance these policies.

IX

SEPARABLE AND COLLATERAL ORDERS

An order entered during the pendency of an action, which determines the substantive rights of the parties affected by the order and which is sufficiently separable from and collateral to the main proceeding may constitute a final order.[81] Similar principles have been applied in holding that certain orders entered in a case after entry of final judgment are appealable.[82]

An analogous rule is followed in probate and guardianship cases. These proceedings are often prolonged and involve a series of orders, some of which may effectively determine the rights of outside parties.[83] In recognition of the special nature of probate and guardianship proceedings, Rule 5.100 of the Florida Rules of Probate and Guardianship Procedure provides the following:

> All orders and judgments of the court determining rights of any party in any particular proceeding in the administration of the estate of a decedent or ward shall be deemed final and may, as a matter of right, be appealed to the appropriate district court of appeal. . . .

The test of finality under this rule is whether the "order is such as to clearly manifest that the right of the party aggrieved has been finally determined and all judicial labor regarding the matter in controversy has been completed."[84]

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78. 15 C. WRIGHT, A. MILLER & J. COOPER, *supra* note 18, § 3912, at 522.

79. 437 U.S. 463 (1978).

80. *Id.* at 470.

81. In Hatch v. Minot, 369 So. 2d 974 (Fla. Dist. Ct. App. 1979), the court found to be final an order entered in an eminent domain proceeding directing the mortgagors to pay to the mortgagee funds which were deposited into the registry of the court by the condemning authority and withdrawn by the mortgagor. The court concluded that such an order "was a final determination of a particular matter which had a character distinct and independent from the original action and which, therefore, was separable from and collateral to that action." *Id.* at 975. *See also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 54 (1949).

82. For examples of post judgment orders held to be final, see Small v. Small, 313 So. 2d 749 (Fla. 1975) (order denying modification of divorce judgment with respect to alimony); Shannon v. Shannon, 136 So. 2d 253, 257 (Fla. Dist. Ct. App. 1962) (order granting former wife's petition that her former husband be required to contribute his share of the costs of improvements of the family home); Thomas v. Cilbe, Inc., 104 So. 2d 397 (Fla. Dist. Ct. App. 1958) (order holding that property owner was entitled to the possession of the premises as of the date of the final decree).

83. *In re* Estate of Cook, 245 So. 2d 694, 695 (Fla. Dist. Ct. App. 1971).

84. *In re* Estate of Herlan, 239 So. 2d 274, 276 (Fla. Dist. Ct. App. 1970); *see also In re* Estate of Beeman, 391 So. 2d 276 (Fla. Dist. Ct. App. 1980); Cook v. Palmer First Nat'l Bank and Trust Co. of Sarasota, 245 So. 2d 694 (Fla. Dist. Ct. App. 1971); *In re* Estate of Nolan, 114 So. 2d 341, 343 (Fla. Dist. Ct. App. 1959).

X

POLICIES JUSTIFYING INTERLOCUTORY REVIEW OF NONFINAL ORDERS

The final order rule, however, is not invariably just or efficient. In certain circumstances, permitting interlocutory review of a pretrial order may be desirable in order to prevent irreparable harm,[85] unwitting forfeiture of the right to appellate review,[86] or unnecessary delay, expense, and inconvenience resulting from unwarranted and fruitless litigation.[87]

Allowing interlocutory review can, in some circumstances, reduce delay in the ultimate determination of a case,[88] lead to the development of the law on pretrial issues not ordinarily reviewable on appeal from a final judgment,[89] provide needed guidance to the trial court, particularly in protracted litigation,[90] and satisfy the necessity of immediate review of severable issues of such a nature that there would be no advantage in delaying their review.[91]

These policies can, of course, conflict with the policies supporting the final order rule. Courts have usually attempted to avoid, or at least reduce, this conflict by allowing interlocutory appeal as of right of specified categories of nonfinal orders and discretionary interlocutory review of other nonfinal orders which satisfy certain criteria.[92] Florida follows this pattern.

XI

INTERLOCUTORY APPEALS OF NONFINAL ORDERS

Article V, Section 4(b)(1) of the Florida Constitution authorizes the Florida Supreme Court to promulgate rules permitting review by the district courts of appeal of interlocutory orders.[93] The 1977 revision of the Florida Rules of Appellate Procedure governs interlocutory appeals from nonfinal orders under Article V, Section 4(b)(1). This revision of the Florida Rules of Appellate Procedure made substantial changes in the former rules of appellate procedure regulating interlocutory review of nonfinal orders.

The 1977 Revision of the Florida Rules of Appellate Procedure abrogated

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85. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. 1292(b)*, 88 HARV. L. REV. 607, 609 (1975); American Bar Association Standards Relating to Appellate Review, § 3.12, at 27 (1977).

86. In Doctor's Hospital of Hollywood, Inc. v. Madison, 411 So. 2d 190, 192 (Fla. 1982), the Florida Supreme Court stated, "An interpretation preventing unwitting forfeiture of a right to appeal is preferable to one which permits such." *See also* Cobbledick v. United States, 309 U.S. 323, 325 (1940).

87. *See* National Lake Devs., Inc. v. Lake Tippecanoe Owners Ass'n, 417 So. 2d 655, 657 (Fla. 1982), wherein the court stated,"[i]t is true that avoidance of unnecessary inconvenience and expense, for litigants and for courts, is one of the reasons for allowing certain interlocutory appeals . . . ." *See also* Sobieski, *supra* note 25, at 220.

88. *See* R. STERN, *supra* note 2, § 3.1, at 54; Frank, *supra* note 16, at 293.

89. Note, *supra* note 85, at 609.

90. Frank, *supra* note 16, at 293.

91. C. WRIGHT, *supra* note 31, at 504-05.

92. Sobieski, *supra* note 25, at 221.

93. Article V, Section 4(b)(1) of the Florida Constitution (1968 Revision) provides, in pertinent part, that "District courts of appeal . . . may review interlocutory orders in such cases to the extent provided by rules adopted by the Supreme Court."

provisions of the Florida Appellate Rules, 1962 Revision, as amended,[94] which authorized interlocutory appeals from all orders entered in civil actions formerly cognizable in equity[95] and which permitted the trial court to certify to the appellate court questions of law that were "determinative of the cause and . . . without controlling precedent in this state."[96] This abrogation represented a shift in policy in favor of the final order rule by limiting interlocutory review as of right.

Rule 4.2(a) of the Florida Appellate Rules, 1962 Revision, as amended, which allowed interlocutory appeals from orders granting partial summary judgment on liability in civil actions was replaced by Rule 9.130(a)(3)(C)(iv) of the Florida Rules of Appellate Procedure, 1977 Revision. The new rule allows interlocutory appeal of orders "determining liability in favor of a party seeking affirmative relief."[97] The new rule is more expansive in one manner than the old one since it includes all orders determining liability in favor of a party seeking affirmative relief rather than just orders granting partial summary judgment on liability.

The intent of the present appellate rules authorizing interlocutory appeals is to minimize interruption of the trial court proceedings resulting from interlocutory appeals by providing for an expedited method of review. The changes associated with the expedited review include the substituting of an appendix in lieu of a record, requiring appellant's brief accompanied by an appendix to be filed within fifteen days of the filing of the notice of appeal, and permitting the trial court, in the absence of a stay, to proceed with the case short of entering a final order.[98] By rules limiting interlocutory appeals to the "most urgent interlocutory orders,"[99] interruption of trial court proceedings is minimized further.

Rule 9.130 authorizes interlocutory appeals to be taken to the district courts of appeal and circuit courts sitting in their appellate capacity from the following nonfinal orders: orders which (1) concern venue;[100] (2) grant, continue, modify, deny or dissolve injunctions;[101] (3) determine jurisdiction of the person;[102] (4)

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94. See amendments effective October 1, 1968, 211 So. 2d 198, and effective September 30, 1970, 237 So. 2d 138.

95. Fla. App. R. 4.2(a) (1962 Revision), *as amended in* 211 So. 2d 198, 199 (Fla. 1970).

96. *Id.* 4.6; *see* Palm Beach Newspapers, Inc. v. Parker, 417 So. 2d 323 (Fla. Dist. Ct. App. 1982).

97. FLA. R. APP. P. 9.130(a)(3)(C)(iv) (1977 Revision). The underlying purpose behind this rule is to afford a party who is being sued a right to an immediate appeal from a court order which imposes liability upon him *without a trial.* Dauer v. Freed, 444 So. 2d 1012 (Fla. Dist. Ct. App. 1984) (Hubbart, J., concurring). To deny such a defendant his constitutional right to a trial and impose liability upon him by court order "is a serious and far-reaching judicial act which in all fairness should be made immediately appealable." *Id.*

98. *See* FLA. R. APP. P. 9.130 committee notes (1977 Revision).

99. *Id.*

100. The court in Bedingfield v. Bedingfield, 417 So. 2d 1047, 1048 (Fla. Dist. Ct. App. 1982), stated in dicta that Rule 9.130(a)(3)(A) applies only to orders concerning venue within the State of Florida.

101. *See, e.g.,* DeLisi v. Smith, 401 So. 2d 925, 927 (Fla. Dist. Ct. App. 1981); Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco v. Provende, Inc., 399 So. 2d 1038, 1039 (Fla. Dist. Ct. App. 1981).

102. In American Health Ass'n v. Helprin, 357 So. 2d 204, 205 (Fla. Dist. Ct. App. 1978), jurisdiction of the person was held to refer to orders pertaining to service of process or the applicability of the long arm statute to nonresidents. The Florida Supreme Court agreed with this interpretation in National Lake Devs., Inc. v. Lake Tippecanoe Owners Ass'n, 417 So. 2d 655, 657 (Fla. 1982). The court in Keehn v. Joseph C. Mackey & Co., 420 So. 2d 398, 400 (Fla. Dist. Ct. App. 1982) held that an order denying a motion to dismiss a complaint on the grounds that the corporation lost its capacity to sue was not an order

determine the right to immediate possession of property;[103] (5) determine the right to immediate monetary relief or child custody in domestic relations matters;[104] (6) determine liability in favor of a party seeking affirmative relief;[105] (7) grant motions for new trial in jury and nonjury cases;[106] (8) pass on motions filed under Rule 1.540 of the Florida Rules of Civil Procedure;[107] and (9) other nonfinal orders entered after final order on authorized motions.[108] Effective January 1,

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determining jurisdiction of the person under Rule 1.930(a)(3)(C)(i). *See also* Page v. Ezell, 452 So. 2d 582 (Fla. Dist. Ct. App. 1984) (order denying a motion to dismiss on grounds of sovereign immunity nonappealable under Rule 9.130(3)).

103. This provision, Rule 9.130(a)(3)(C)(ii), was held applicable to an order of taking which gives a condemning authority the right to take possession and title to real property in advance of final judgment. Niles v. County of Volusia, 405 So. 2d 1046 (Fla. Dist. Ct. App. 1981). See also to the same effect, FLA. R. APP. P. 9.130 committee notes (1977 Revision). On the other hand, it has been held that this provision does not apply to an order appointing a receiver, on the grounds that the provision "refers to possession by a party with an adverse interest and not to possession by the court." Mann v. Stein, 379 So. 2d 978 (Fla. Dist. Ct. App. 1980). Compare, however, Forgay v. Conrad, 47 U.S. 201 (1848), holding that an order immediately transferring property to a trustee in bankruptcy was a final appealable order, although an accounting of the rents had yet to be determined by the trial court.

104. *See, e.g.,* Agudo v. Agudo, 411 So. 2d 249 (Fla. Dist. Ct. App. 1982) (an order which changed the temporary "residence" of a daughter from the mother to the father was held to be an order determining right to custody and thus reviewable under Rule 9.130 (a)(3)(C)(iii)).

105. An order denying a motion to vacate a default has been held to be an order determining liability in favor of a party seeking affirmative relief, reviewable under Rule 9.130(a)(3)(C)(iv). Doctor's Hosp. of Hollywood, Inc. v. Madison, 411 So. 2d 190 (Fla. 1982). An order determining insurance coverage, entered before a determination of liability on the part of the insured defendant, is an order not subject to interlocutory appeal under this rule. Travelers Ins. Co. v. Burns, 429 So. 2d 317 (Fla. Dist. Ct. App. 1984). However, such an order may be reviewed by certiorari. Sunshine Dodge, Inc. v. Ketchem, 427 So. 2d 819 (Fla. Dist. Ct. App. 1984). The purpose of this rule is to afford a party who is being sued a right to an immediate appeal from a court order which imposes liability upon him *without a trial.* Dauer v. Freed, 444 So. 2d 1012 (Fla. Dist. Ct. App. 1984) (Hubbart, J., concurring). It is doubtful whether an order directing a verdict for the plaintiff entered in a bifurcated trial at the conclusion of the trial on liability would be appealable. *Id.* Florida Courts have held, however, that under Rule 9.130(a)(3)(c)(iv) a defendant has the right to appeal an adverse summary judgment on liability which has been entered against him without a trial, Aetna Casualty & Surety Co. v. Meyer, 385 So. 2d 10 (Fla. Dist. Ct. App. 1980), or an order denying a motion to vacate a default, Sunny South Aircraft Serv., Inc. v. Inversiones, 1120 C.A., 417 So. 2d 676 (Fla. 1982); Doctor's Hosp. of Hollywood, Inc. v. Madison, 411 So. 2d 190 (Fla. 1982).

106. An order granting a new trial is reviewable by the method prescribed in Rule 9.110, which is the method provided for appeal from final orders. The Committee Notes to Rule 9.110, reported in *In re* Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370, 1381 (Fla. 1980), state: "This rule is intended to clarify the procedure for review of orders granting a new trial. Rules 9.130(a)(4) and 9.140(c)(1)(C) authorize the appeal of orders granting a motion for a new trial. Under Section (h) of this rule the scope of review of the Court is not necessarily limited to the order granting a new trial. The Supreme Court has held that 'appeals taken from new trial orders shall be treated as appeals from final judgments to the extent possible . . . .' Bowen v. Willard, 340 So. 2d 110, 112 (Fla. 1976). This rule implements this decision."

107. FLA. R. CIV. P. 1.540(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment or decree is void; (5) the judgment or decree has been satisfied, released or discharged or a prior judgment or decree upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment or decree should have prospective application

See, e.g., Potucek v. Smeja, 419 So. 2d 1192 (Fla. Dist. Ct. App. 1982); Smith v. Weede, 433 So. 2d 992 (Fla. Dist. Ct. App. 1983).

108. *See, e.g.,* Mogul v. Fodiman, 406 So. 2d 1225 (Fla. Dist. Ct. App. 1981) (citing Rule 9.130(a)(4)); *cf.* Peterson v. Peterson, 429 So. 2d 83 (Fla. Dist. Ct. App. 1983).

1985, Rule 9.130 will be amended to provide also that nonfinal orders determining "whether a party is entitled to arbitration" are also appealable. In addition to the foregoing, Rule 9.100(d)(1) of the Florida Rules of Appellate Procedure, 1977 Revision, provides for immediate interlocutory review of trial court orders excluding the press or public from access to "any proceeding, any part of a proceeding, or any judicial records, if the proceedings or records are not required by law to be confidential . . . ." This rule implements the requirement of "strict procedural safeguards," required by the United States Supreme Court for activities protected by the First Amendment.[109]

The objectives implemented by allowing an interlocutory appeal from the nonfinal orders specified in Rule 9.130 appear to be as follows: (a) prevention of the risk of irreparable harm resulting from decisions concerning the right to immediate possession of property, the right to immediate monetary relief or child custody in domestic relations cases and injunctions; (b) recognition of the traditional value of allowing early review where the trial court's legal authority is questioned so as to avoid the wastefulness of needless proceedings resulting from an erroneous ruling on venue or jurisdiction over the person;[110] (c) avoidance of the waste involved in trying a case only on damages where the court has erroneously determined liability in favor of a party seeking affirmative relief; (d) prevention of an improper denial of the constitutionally protected right to trial;[111] (e) avoidance of the burden and expense of a needless trial resulting from an order erroneously granting a new trial; and (f) provision of a method of appellate review of nonfinal orders under Rule 1.540 of the Florida Rules of Civil Procedure or under other rules authorizing nonfinal orders after entry of final judgment or order.

The advantage of designating specific types of orders from which an interlocutory appeal can be taken as of right is that it provides certainty as to which orders are subject to interlocutory appeal, an advantage not present with a case by case method.[112] The disadvantage of this approach is that appellate review is permitted automatically for all orders within a designated category, which may include many orders not worthy of interlocutory review when considered on their individual merits.[113]

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109. National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977); *see* FLA. R. APP. P. 9.100 committee notes (1977 Revision). *See, e.g.*, State *ex rel.* Pensacola News-Journal, Inc. v. Fleet, 388 So. 2d 1106 (Fla. Dist. Ct. App. 1980); State *ex rel.* Tallahassee Democrat, Inc. v. Cooksey, 371 So. 2d 207 (Fla. Dist. Ct. App. 1979).

110. National Lake Devs., Inc. v. Lake Tippecanoe Owners Ass'n, 417 So. 2d 655 (Fla. 1982).

111. "The requirement that the absence of triable issues be shown conclusively [before the granting of a summary judgment] is not new . . . . This conclusive showing is justified because the summary judgment procedure is necessarily in derogation of the constitutionally protected right to trial." Holl v. Talcott, 191 So. 2d 40, 48 (Fla. 1966).

112. Sobieski, *supra* note 25, at 222.

113. *Id.*

XII

OTHER METHODS OF INTERLOCUTORY REVIEW

A. The Writ of Mandamus

Extraordinary writs, such as the writ of mandamus, are available in limited circumstances to obtain interlocutory review of trial court orders. The writ of mandamus is used, however, only in extraordinary situations to avoid defeating the sound purposes of the final order rule.[114] Thus, mandamus is generally unavailable unless no other adequate remedy exists.[115]

An exception to the general rule restricting the use of mandamus is recognized for certain cases presenting jurisdictional issues. In *Wincor v. Turner,*[116] the Florida Supreme Court stated:

> Respondent argues that, inasmuch as the petitioner had an adequate remedy at law, namely prohibition, mandamus would not lie. In this connection, it should be borne in mind that both prohibition and mandamus are legal remedies and in many instances have been used interchangeably. Prohibition is designed to prevent the exercise of unlawful jurisdiction and is negative in nature, whereas mandamus is a writ designed to compel the performance of some ministerial act, often one requiring a court to dismiss actions where such dismissal is required because of intervening events or *because the court is about to proceed in excess of its jurisdiction.* (emphasis added)[117]

One court declared another exception in *Sarasota Manatee Airport v. Alderman,*[118] allowing both mandamus and common law certiorari as remedies to review a trial court decision denying the right to jury trial on an issue.[119]

Where no other adequate remedy exists, except as qualified above, mandamus is available to compel a trial court to perform a ministerial act required by law and involving no exercise of discretion.[120] If the judicial decision involves the exercise of some element of discretion, such as the decision whether to approve the settlement of a minor's claim, mandamus will not lie.[121]

To be entitled to relief under the writ of mandamus, the petitioner must, in addition to the requirement of lack of other remedy, establish the existence of a clear legal right on his part and an indisputable legal duty on the part of the respondent.[122] The legal right which the petitioner seeks to enforce by mandamus must already be established clearly; mandamus is not a proper remedy to establish

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114. *See* C. WRIGHT, *supra* note 31, § 102, at 715.

115. Shevin *ex rel.* State v. Public Serv. Comm'n, 333 So. 2d 9 (Fla. 1976); Sturdivant v. Blanchard, 422 So. 2d 1028 (Fla. Dist. Ct. App. 1982).

116. 215 So. 2d 3 (Fla. 1968).

117. *Id.* at 5.

118. 238 So. 2d 678 (Fla. Dist. Ct. App. 1970).

119. *Id.* at 679. *See also* Suntogs of Miami, Inc. v. Burroughs Corp., 433 So. 2d 581 (Fla. Dist. Ct. App. 1983). Mandamus has been used in the federal courts to require a jury trial where it was improperly denied. Beacon Theatres, Inc. v. Westover, 358 U.S. 500, 511 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479-80 (1962).

120. Wincor v. Turner, 215 So. 2d 3, 5 (Fla. 1968); Federated Stores Realty, Inc. v. Burnstein, 392 So. 2d 573, 574 (Fla. Dist. Ct. App. 1980).

121. Bullard v. Sharp, 407 So. 2d 1023, 1024 (Fla. Dist. Ct. App. 1981).

122. Dep't of Health and Rehabilitative Servs. v. Hartsfield, 399 So. 2d 1019, 1020 (Fla. Dist. Ct. App. 1981).

the existence of a legal right in the first instance.[123] Mandamus is also unavailable to correct trial court errors of procedure or judgment which do not satisfy the above principles.[124]

Illustrative of the proper use of the writ of mandamus is an appellate court ordering a trial court to exercise its rightful jurisdiction over a case[125] or to render a decision in a case.[126] The limitations stated above will prevent the widespread use of the writ. Fortunately, as a result of its limited function, the writ of mandamus has not been used to unduly intrude into trial court proceedings in violation of the policies underlying the final order rule.

B. The Writ of Prohibition

The basic principles governing the writ of prohibition in Florida were set forth in *English v. McCrary,*[127] and are as follows: Prohibition is an extraordinary writ issued by an appellate court to prevent a lower court from exceeding its subject matter jurisdiction.[128] The writ is preventative, and not corrective, in that it is available to prevent a future exercise of jurisdiction over a matter not within the jurisdiction of a court or tribunal, but is not available to revoke an order already entered or to compel the undoing of something already done.[129] Prohibition does not lie to prevent a lower court from erroneously deciding a matter within its jurisdiction; such errors must be corrected by appeal or, where proper, by common law certiorari.[130] Moreover, where a court's jurisdiction depends upon a fact which it is required to ascertain, the court's determination of the existence or nonexistence of such fact is conclusive on the question of jurisdiction until set aside or reversed by direct proceedings.[131]

Prohibition is unavailable to prevent a court's improper exercise of jurisdiction over a party, for two reasons. First, prohibition is available only where there is no

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123. *Id. See also* Slaughter v. State *ex rel.* Harrell, 245 So. 2d 126, 128 (Fla. Dist. Ct. App. 1971).

124. Chapnick v. Hare, 394 So. 2d 202, 203 (Fla. Dist. Ct. App. 1981).

125. State *ex rel.* Locke v. Sandler, 23 So. 2d 276, 278 (Fla. 1945); Cooper v. Gordon, 389 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980).

126. Flagship Nat'l Bank v. Testa, 429 So. 2d 69 (Fla. Dist. Ct. App. 1983); Chapman Realty Corp. v. Madeira Management, Inc., 414 So. 2d 1180 (Fla. Dist. Ct. App. 1982); *see also* A.B.C. Business Forms, Inc. v. Spaet, 201 So. 2d 890 (Fla. 1977) (mandamus available to require trial court to exercise its judicial discretion as to whether to grant a motion for continuance and to disregard statute which unconstitutionally required the trial court automatically to grant members of the legislature a continuance even where a request for emergency relief was involved).

127. 348 So. 2d 293 (Fla. 1977).

128. *Id.* at 296; School Bd. v. Angel, 404 So. 2d 359, 361 (Fla. Dist. Ct. App. 1981).

129. English v. McCrary, 348 So. 2d at 296; *see also* State *ex rel.* Dep't. of Health and Rehabilitative Servs. v. Upchurch, 394 So. 2d 577 (Fla. Dist. Ct. App. 1981); Baptiste v. Johnson, 434 So. 2d 56 (Fla. Dist. Ct. App. 1983).

130. English v. McCrary, 348 So. 2d at 298; *see also* Lawrence v. Orange County, 404 So. 2d 421 (Fla. Dist. Ct. App. 1981).

131. English v. McCrary, 348 So. 2d at 298. See, however, Sherrod v. Franza, 427 So. 2d 161, 163 (Fla. 1983), in which the Florida Supreme Court held that prohibition would lie to review a trial court order allegedly denying a right to speedy trial. Chief Justice Alderman pointed out in his dissent that determining whether there has been a speedy trial rule violation "requires a fact finding to some degree." *Id.* at 165.

other appropriate and adequate legal remedy,[132] and Rule 9.130 of the Florida Rules of Appellate Procedure provides an adequate legal remedy by way of interlocutory appeal of orders determining jurisdiction of the person.[133] Second, regardless of the appellate rules, the common law does not permit the use of prohibition (except where a court is attempting to exercise jurisdiction over a person not served by process or who does not submit himself to the court's jurisdiction by voluntary appearance or waiver)[134] to challenge a court's jurisdiction over a party.[135]

Courts use prohibition to review, *inter alia,* trial court decisions in which: a trial judge refuses to disqualify himself,[136] a trial court attempts to conduct contempt proceedings to punish a party for acts which do not constitute contempt,[137] or a trial court premises its order on a prior void order.[138] Prohibition is also available to prevent a trial court from exercising jurisdiction over a governmental entity entitled to sovereign immunity.[139]

As stated in *English v. McCrary,* the writ of prohibition is "extremely narrow in scope and operation"[140] and will be invoked "only in emergency cases to forestall an impending present injury . . . ."[141] Consequently, the writ of prohibition does not appear to undermine, in any substantial fashion, the sound policies of the final order rule.[142]

C. The Writ of Common Law Certiorari[143]

Some types of interlocutory orders, other than those from which statutes and rules authorize interlocutory appeal, are subject to review under the writ of common law certiorari. This writ, however, is not used to circumvent the policies which underlie the rules governing interlocutory appeals[144] and the final order

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132. English v. McCrary, 348 So. 2d at 297. Both mandamus and prohibition may be used in some cases involving jurisdictional issues. *See* Wincor v. Turner, 215 So. 2d 3, 5 (Fla. 1968).

133. *See* FLA. R. APP. P. 9.130 committee notes (1977 Revision). However, the writ of prohibition provides an adequate remedy "in cases involving jurisdiction of the subject matter."

134. Rehrer v. Weeks, 106 So. 2d 865, 867 (Fla. Dist. Ct. App. 1958).

135. State v. Herin, 80 So. 2d 331 (Fla. 1955).

136. Hayslip v. Douglas, 400 So. 2d 553 (Fla. Dist. Ct. App. 1981); Pistorino v. Ferguson, 386 So. 2d 65 (Fla. Dist. Ct. App. 1980).

137. Wilkes v. Revels, 245 So. 2d 896 (Fla. Dist. Ct. App. 1970).

138. Columbo v. Legendre, 397 So. 2d 1043, 1044 (Fla. Dist. Ct. App. 1981) (court tried to cite for contempt an individual who violated patently void order). Judgments of criminal contempt are final appealable orders, Local Lodge Number 1248, International Ass'n of Machinists v. St. Regis Paper Co., 125 So. 2d 337, 341 (Fla. Dist. Ct. App. 1960). Orders of civil contempt have been held to be subject to interlocutory appeal. Langbert v. Langbert, 409 So. 2d 1066 (Fla. Dist. Ct. App. 1981). This holding seems correct where the civil contempt order is entered to enforce an order subject to interlocutory appeal under Rule 9.130 of the Florida Rules of Appellate Procedure, 1977 Revision. Otherwise, common law certiorari may be the appropriate method of review. *See, e.g.,* Alger v. Peters, 88 So. 2d 903, 908 (Fla. 1956).

139. Department of Natural Resources v. Circuit Court of the Twelfth Judicial Circuit, 317 So. 2d 772 (Fla. Dist. Ct. App. 1977).

140. 348 So. 2d at 296.

141. *Id.* at 297.

142. *See* C. Wright, *supra* note 31, § 101, at 707.

143. For an excellent discussion of the law of common law certiorari in Florida, including Florida law governing review of decisions of Circuit Courts sitting in their appellate capacity, see Haddad, *The Common Law Writ of Certiorari in Florida,* 29 U. FLA. L. REV. 207 (1977).

144. *See* Ford Motor Co. v. Edwards, 363 So. 2d 867, 870 (Fla. Dist. Ct. App. 1978).

rule.[145] The writ is an extraordinary remedy available only in exceptional circumstances where justice requires immediate appellate review unavailable by any other remedy.[146]

The Advisory Committee for the 1977 Revision of the Florida Rules of Appellate Procedure expressed the opinion that, since the "most urgent interlocutory orders" are appealable under Rule 9.130 of the Florida Rules of Appellate Procedure, there would be very few cases where common law certiorari would provide relief.[147] This prognosis, however, is subject to question.

The decision to grant or deny a writ of certiorari is within the sound discretion of the appellate court.[148] This discretion generally will be exercised in favor of granting review by certiorari under the following standards:

> [The] court will review an interlocutory order . . . only under exceptional circumstances. Where it clearly appears that there is no full, adequate and complete remedy by appeal after final judgment available to the petitioner, this court will consider granting the writ, as where the lower court acts without and in excess of its jurisdiction or the order does not conform to essential requirements of law and may cause material injury throughout subsequent proceedings for which the remedy by appeal will be inadequate.[149]

XIII

BASES OF COMMON LAW CERTIORARI

A. Action in Excess of Jurisdiction

Where a trial court acts in excess of its jurisdiction by, for example, granting a plaintiff's motion to set aside a voluntary dismissal after the court has lost jurisdiction over the case,[150] or erroneously transferring a case which was properly within its jurisdiction to another court which was without jurisdiction over the case,[151] common law certiorari will lie.[152] This rule reflects the high value placed on limiting a court to its proper jurisdiction and has its counterpart in the rule, discussed above, which authorizes the issuance of a writ of prohibition to prevent in advance a wrongful exercise of a court's jurisdiction.[153]

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145. Wright v. Sterling Drugs, Inc., 287 So. 2d 376 (Fla. Dist. Ct. App. 1974).

146. Brooks v. Owens, 97 So. 2d 693, 695 (Fla. 1957).

147. FLA. R. APP. P. 9.130 committee notes (1977 Revision); Malone v. Costin, 410 So. 2d 569, 570 (Fla. Dist. Ct. App. 1982).

148. Combs v. State, 436 So. 2d 93, 96 (Fla. 1983); Kauffman v. King, 89 So. 2d 24, 26 (Fla. 1956); Kilgore v. Bird, 149 Fla. 570, 6 So. 2d 541 (1942). This discretion should be exercised only when there is a violation of a clearly established principle of law resulting in a miscarriage of justice. Combs v. State, 436 So. 2d at 96.

149. Brooks v. Owens, 97 So.2d 693, 695 (Fla. 1957).

150. *See, e.g.,* Tinsley v. McDonald, 378 So. 2d 816 (Fla. Dist. Ct. App. 1980); Sun First Nat'l Bank v. Green Crane & Concrete Servs., Inc., 371 So. 2d 492 (Fla. Dist. Ct. App. 1979); *cf.* Heston v. Vitale, 432 So. 2d 744 (Fla. Dist. Ct. App. 1983) (holding that an order reinstating a cause of action for corporate plaintiffs who had filed a notice of voluntary dismissal was reviewable by prohibition).

151. *See, e.g.,* Norris v. Southern Bell Tel. & Tel. Co., 324 So. 2d 108 (Fla. Dist. Ct. App. 1975); Mendoza v. Farrell, 199 So. 2d 750 (Fla. Dist. Ct. App. 1967).

152. In Stark v. Regency Highland Condominium Ass'n, 418 So. 2d 1058 (Fla. Dist. Ct. App. 1982), a discovery order directed to an out of state witness was quashed partially on the basis that the court had no jurisdiction over that witness under the Uniform Foreign Depositions Act, FLA. STAT. ANN. § 92.251 (West 1979).

153. *See supra* text accompanying notes 127-42.

B. Departure from the Essential Requirements of Law Which Result in Harm Not Remediable by Appeal from Final Judgment

1. *Departure from Essential Requirements of Law.* The Florida cases do not provide a very precise definition of what constitutes a departure from the essential requirements of law, as one court has readily admitted.[154] The process of deciding whether the trial court's order represents such a departure requires the courts to "scrutinize the facts and circumstances of each particular case when making this determination."[155]

Despite the considerable uncertainty in the definition and application of this standard, certain features of the standard have been recognized in theory, if not always in practice. First, to qualify as a departure from the essential requirements of law, the error must be a fundamental one.[156] The concept of fundamental error was defined in *City of Winter Park v. Jones* as follows:

> An error must be so flagrant and of such magnitude that a party has been effectively denied his day in court before our certiorari jurisdiction will be invoked. Even though a nonfundamental error should cause reversal in the circuit court it will not prompt our certiorari jurisdiction.[157]

The above requirements, that the error be glaring and of such a nature that it will, unless corrected, cause harm in the proceedings to the rights of the party against whom it is made, are consistent with the exceptional circumstances test of common law certiorari.[158] A glaring, flagrant, or substantial error is easily identifiable by an appellate court without great effort or expenditure of time. In addition to the requirement that the error be fundamental, an error must also present a *clear* departure from the essential requirments of law in order to qualify for certiorari review.[159] The fact that early appellate court action may prevent manifest injustice provides a justification for intruding into the trial court's conduct of the case.

The recent past provides some examples of fundamental errors deemed significant enough to warrant the grant of certiorari. The cases involve trial judges whose errors include: refusing to approve a settlement between parties,[160] granting a protective order which prevented the taking of a defendant's attorney's deposition,[161] denying the right to take the testimony of an alleged material witness[162]

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154. City of Winter Park v. Jones, 392 So. 2d 568, 571 (Fla. Dist. Ct. App. 1980); *see also* Combs v. State, 436 So. 2d (Fla. 1983). An incorrect decision on subject matter jurisdiction is fundamental error. Stel-Den of America, Inc. v. Roof Structures, Inc. 438 So. 2d 882 (Fla. Dist. Ct. App. 1983).

155. Zediker v. State, 218 So. 2d 464, 466 (Fla. Dist. Ct. App. 1969). "Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually." Combs v. State, 436 So. 2d 93, 95-96 (Fla. 1983).

156. Chicken 'N' Things v. Murray, 329 So. 2d 302, 304 (Fla. 1976).

157. 392 So. 2d 568, 571 (Fla. Dist. Ct. App. 1981). *See also* Girten v. Bouvier, 155 So. 2d 745, 749 (Fla. Dist. Ct. App. 1963). "In granting writs of common law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error." Combs v. State, 436 So. 2d at 95.

158. *See* Leithauser v. Harrison, 168 So. 2d 95, 97 (Fla. Dist. Ct. App. 1964).

159. Venezia A., Inc. v. Askew, 314 So. 2d 254, 255 (Fla. Dist. Ct. App. 1975).

160. Bullard v. Sharp, 407 So. 2d 1023 (Fla. Dist. Ct. App. 1982).

161. Young, Stern & Tannenbaum, P.A. v. Smith, 416 So. 2d 4 (Fla. Dist. Ct. App. 1982). Mandamus, however, has been used to require production of materials claimed to be protected by the Florida

and denying a right to arbitration.[163] These cases provide examples of flagrant errors.

Many of the trial court errors corrected by common law certiorari, however, do not appear to have been particularly flagrant or as pervasive in their harmful effect as required by the definition of fundamental error stated in *City of Winter Park*. Yet, such trial court errors may have caused harm of a type that was not subject to adequate remedy by appeal. This dilemma demonstrates that an appellate court must not only determine, in the abstract, whether a trial court error is serious enough to require review by common law certiorari, but it must also measure the impact the legal ruling has in the particular case considered. An examination of the particularized harmful effects of an erroneous trial court ruling is necessary to determine whether the error should qualify for review by common law certiorari.[164]

2. *Material Injury Not Subject to Remedy By Appeal.* As a general rule, the burden and expense of a needless trial that would result from an erroneous interlocutory order is not the kind of injury that will support the granting of a petition for certiorari.[165] The reason given for this general rule is that allowing such harm to be the basis for obtaining interlocutory review of an erroneous order would create the potential for excessive interlocutory review of trial court orders and defeat the purposes of the final order rule.[166]

The type of special injury needed to support a grant of common law certiorari often results from orders requiring discovery of matters beyond the scope of legitimate discovery or shielded by a privilege.[167] Courts granted certiorari in many of the earlier leading cases to prevent such harm on the theory that once the disclosure of the protected information is compelled, the invasion of the privacy right or privilege involved cannot be remedied adequately on appeal.[168] Recent cases continue to apply this principle not only to discovery orders directed to a party,[169] but also to orders directed to nonparties. Nonparties are said to be irreparably harmed for both the reason applying to parties and because, as nonparties, they cannot

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Public Records Act. FLA. STAT. ANN. § 119.011 (West 1982); Edelstein v. Donner, 450 So. 2d 562 (Fla. Dist. Ct. App. 1984).

162. Travelers Indemnity Co. v. Hill, 388 So. 2d 648 (Fla. Dist. Ct. App. 1980).

163. *See* Lapidus v. Arlen Beach Condominium Ass'n, 394 So. 2d 1102 (Fla. Dist. Ct. App. 1981). Effective January 1, 1985, such orders will be reviewable by appeal under Fla. R. App. P. 9.130 (a)(3)(C)(v).

164. *See* Girten v. Bouvier, 155 So. 2d 745 (Fla. Dist. Ct. App. 1963).

165. *See* Santini Bros. v. Grover, 338 So. 2d 79, 80 (Fla. Dist. Ct. App. 1976); Wright v. Sterling Drugs, Inc., 287 So. 2d 376 (Fla. Dist. Ct. App. 1974).

166. *See* Siegel v. Abramowitz, 309 So. 2d 234 (Fla. Dist. Ct. App. 1975); Girten v. Bouvier, 155 So. 2d 745 (Fla. Dist. Ct. App. 1963).

167. *See, e.g.,* Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech, Inc., 423 So. 2d 545 (Fla. Dist. Ct. App. 1982) (protection of trade secrets); City of Williston v. Roadlander, 425 So. 2d 1175 (Fla. Dist. Ct. App. 1983) (work product); Gadsden County Times, Inc. v. Horne, 426 So. 2d 1234 (Fla. Dist. Ct. App. 1983) (disclosure of confidential sources).

168. *See, e.g.,* Brooks v. Owens, 97 So. 2d 693 (Fla. 1957); Kilgore v. Bird, 149 Fla. 570, 6 So. 2d 541 (1942). *But see* Sanders v. Impellitier, 291 So. 2d 68 (Fla. Dist. Ct. App. 1974).

169. *See, e.g.,* Powell v. Wingard, 402 So. 2d 532 (Fla. Dist. Ct. App. 1981).

appeal from the final judgment entered in the case.[170]

Although discovery orders comprise perhaps the largest category of orders in which certiorari has been granted,[171] there exist other cases which involve a special harm of such significance that a reviewing court will grant certiorari. Examples of these cases include instances where a court's order: (1) had a harmful effect on the alienability of a party's real property because of the wrongful denial of a petition to discharge a notice of lis pendens;[172] (2) unduly burdened a party by forcing him to serve a notice of a pleading on 390 defendants;[173] and (3) harmed a foreign corporation by improperly requiring it to comply with an inapplicable registration statute and, in the interim, by staying the corporation's mortgage foreclosure action.[174] These cases support the proposition that a special harm must be shown by a petitioner.

The special type of harm evident in the foregoing cases, however, is not always a precondition to granting review by common law certiorari. In *Kauffman v. King*,[175] the Florida Supreme Court expressly departed from the general rule requiring special harm, holding that because petitioner's remedy by appeal from an adverse venue ruling was inadequate, common law certiorari was proper.[176] The court in *Kauffman* decided it would be "palpably unjust" to require the petitioner/defendant to incur the expense and inconvenience of defending a suit in both Dade and Palm Beach Counties.[177] Although a ruling of this sort on venue is now subject to interlocutory appeal under Rule 9.130(a)(3)(A) of the Florida Rules of Appellate Procedure and therefore no longer reviewable by common law certiorari, the holding in *Kauffman* is still significant since it evidences an express recognition by the Florida Supreme Court that an appeal in some circumstances does not provide an adequate remedy for the damage caused by a needless trial which results from trial court error.

Common law certiorari also has been granted in a criminal case upon considerations of cost and expense to the public, in general, as well as to the litigants. In *State* ex rel. *Christian v. Rudd*,[178] the court commented:

> Should we now refuse to act, deferring consideration until an appeal following trial should there be a conviction, the only practical result would be the great expense of time and money incurred by the Relator as well as the public. We are ever mindful of the great tax burden placed upon those who support our government and prefer to relieve them of undue expenses whenever feasible. Too, the achieving of justice is the primary responsibility of the courts. We exercise our discretion and grant common law certiorari.[179]

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170. *See, e.g.*, Palmer v. Servis, 393 So. 2d 653 (Fla. Dist. Ct. App. 1981); Fritz v. Norflor Constr. Co., 386 So. 2d 899 (Fla. Dist. Ct. App. 1980).

171. *See* Haddad, *supra* note 143, at 227.

172. Cooper Village, Inc. v. Moretti, 383 So. 2d 705 (Fla. Dist. Ct. App. 1980); Hallmark Mfg., Inc. v. Lujack Constr. Co., 372 So. 2d 520 (Fla. Dist. Ct. App. 1979).

173. Clark v. Inman, 379 So. 2d 172 (Fla. Dist. Ct. App. 1980).

174. Batavia, Ltd. v. United States, 393 So. 2d 1207 (Fla. Dist. Ct. App. 1980); *see also* Greyhound Lines, Inc. v. Jackson, 445 So. 2d 1107 (Fla. Dist. Ct. App. 1984) (burden and expense of answering numerous interrogatories).

175. 89 So. 2d 24 (Fla. 1956).

176. *Id.*

177. *Id.*

178. 302 So. 2d 821 (Fla. Dist. Ct. App. 1974).

179. *Id.* at 824.

In addition to these express statements that common law certiorari will lie, in certain circumstances, to prevent the burden and expense of a needless trial, there are numerous other cases implicitly recognizing this principle. Whether these cases are simply violations of the general rule that the damage of a needless trial is insufficient to support common law certiorari, or are proper exceptions to the rule, depends upon a determination of how broadly defined should be the scope of discretionary review under certiorari, especially in light of the policies supporting exceptions to the final order rule. Cases permitting common law certiorari, without requiring special harm of the type discussed above, appear to fall into several categories. One group of cases involves the review of interlocutory orders affecting questions of great public importance and which require an immediate and definitive answer.[180] A second group of cases involve orders having an impact on important rights[181] such as the right to arbitration,[182] the right of a criminal defendant to be heard in person or by counsel,[183] and the right of the media to gain access to public records and proceedings.[184] These cases do not require the showing of special harm.

One other fundamental right held to justify the granting of common law certiorari without the requirement of special injury is the right to trial by jury.[185] In this regard, the court in *Spring v. Ronel Refining, Inc.*[186] said:

> In the present case, the denial of the right to jury trial is more than the denial of a constitutional right; it is the denial of a fundamental right recognized prior to the adoption of a written constitution. The right to select the peers to which one's cause will be submitted is unique and indispensible to the adversary system. For this reason, we deem certiorari to be the appropriate remedy in this instance. If we are accused of granting special dispensation by the review of this type order, then our critics can take solace in the fact that there will be few instances where litigants will present to us similar problems of such great consequence.[187]

Other decisions constituting exceptions to the general rule requiring special injury to support a grant of certiorari are more difficult to classify. One court has

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180. *See* Rich v. Harper Neon Co., 124 So. 2d 750 (Fla. Dist. Ct. App. 1960) (procedure used in eminent domain proceedings throughout the state); Travelers Ins. Co. v. Ballinger, 312 So. 2d 249 (Fla. Dist. Ct. App. 1975) (issue of importance under the comparative negligence doctrine); Desert Ranches of Florida, Inc. v. St. Johns River Water Management Dist., 406 So. 2d 1132 (Fla. Dist. Ct. App. 1981) (constitutionality of a state statute authorizing the levying of state ad valorem taxes).

181. In Bloomhuff v. Miami Jockey Club, Inc., 150 Fla. 411, 413, 7 So. 2d 447, 448 (1942), the court stated that certiorari "affords relief in those extraordinary cases where the remedy afforded by Sec. 4, Declaration of Rights, Constitution of Florida, for injury done a person in his lands, person or reputation is insufficiently afforded by the more common form of procedure."

182. Lapidus v. Arlen Beach Condominium Ass'n, 394 So. 2d 1102 (Fla. Dist. Ct. App. 1982) (court recognizes strong public policy favoring arbitration but denies certiorari based on facts).

183. Hall v. Oakley, 409 So. 2d 93 (Fla. Dist. Ct. App. 1982). Review by certiorari also has been used to review orders relating to the disqualification of counsel. Fitzpatrick v. Smith, 432 So. 2d 89 (Fla. Dist. Ct. App. 1983); Endress v. Coe, 433 So. 2d 1280 (Fla. Dist. Ct. App. 1983); Beth S. v. Grant Assoc., Inc., 426 So. 2d 1008 (Fla. Dist. Ct. App. 1983).

184. News-Press Publishing Co. v. Gadd, 388 So. 2d 276 (Fla. Dist. Ct. App. 1980).

185. Magram v. Raffel, 443 So. 2d 396 (Fla. Dist. Ct. App. 1984); Spring v. Ronel Refining, Inc., 421 So. 2d 46 (Fla. Dist. Ct. App. 1982); Freedman v. Rosin, 394 So. 2d 241 (Fla. Dist. Ct. App. 1981); Sarasota-Manatee Airport Auth. v. Alderman, 238 So. 2d 678 (Fla. Dist. Ct. App. 1970). *Contra* Lindsey v. Sherman, 402 So. 2d 1349 (Fla. Dist. Ct. App. 1981).

186. 421 So. 2d 46 (Fla. Dist. Ct. App. 1982).

187. *Id.* at 47-48.

held, for example, that an order refusing to approve a settlement is reviewable by common law certiorari.[188] The importance of encouraging settlements of cases is perhaps an important policy consideration involved in this decision.

Cases have also held that an order denying a motion to join certain defendants,[189] an order refusing to dismiss a third party complaint,[190] and an order denying a motion for leave to amend an answer to include a compulsory counterclaim[191] are reviewable by certiorari. These cases, however, seem clearly inconsistent with the policies which underlie Rule 9.130 of the Florida Rules of Appellate Procedure, and more recent cases have held to the contrary.[192]

Moreover, in at least two cases, courts have held that an order preventing the taking of the deposition of a material witness was subject to review by common law certiorari[193] even though the facts in these cases disclosed that the only apparent injury involved was the burden and expense of a needless trial. In one of these cases, the need to develop the law of discovery on an important issue, one that might not be presented on appeal from the final judgment, seemed to be an important consideration in the decision to grant common law certiorari.[194]

The cases discussed above suggest a broader rule for common law certiorari as a method of discretionary interlocutory review. While the generally stated rule is that, except where the court acts in excess of its jurisdiction, common law certiorari will lie only where a trial court order (1) departs from the essential requirements of law, and (2) causes injury not subject to adequate remedy by appeal after final judgment, courts actually use common law certiorari more frequently than the rule suggests.

XIV

RELATIONSHIP BETWEEN COMMON LAW CERTIORARI AND RULE 9.130 OF THE FLORIDA RULES OF APPELLATE PROCEDURE

The courts of Florida allow interlocutory appeal as of right of those nonfinal orders specified in Rule 9.130.[195] Discretionary interlocutory review of nonfinal orders not included in Rule 9.130 may be available in exceptional circumstances under the writ of common law certiorari.

There is a potential conflict between the apparent open texture of common law certiorari and the policy of restricting interlocutory appeals reflected in Rule 9.130. Any expansion of common law certiorari should therefore be made cautiously, keeping the policy of Rule 9.130 in mind.

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188. Bullard v. Sharp, 407 So. 2d 1023 (Fla. Dist. Ct. App. 1981).

189. *See, e.g.*, Surette v. Galiardo, 309 So. 2d 253 (Fla. Dist. Ct. App. 1975).

190. Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. Dist. Ct. App. 1974).

191. *See, e.g.*, Romish v. Albo, 291 So. 2d 24 (Fla. Dist. Ct. App. 1974).

192. Hawaiian Inn of Daytona Beach, Inc. v. Snead Constr. Corp., 393 So. 2d 1201 (Fla. Dist. Ct. App. 1981); *see* Malone v. Costin, 410 So. 2d 569 (Fla. Dist. Ct. App. 1982).

193. Travelers Indemnity Co. v. Hill, 388 So. 2d 648 (Fla. Dist. Ct. App. 1980); Young, Stern & Tannenbaum, P.A. v. Smith, 416 So. 2d 4 (Fla. Dist. Ct. App. 1982).

194. Young, Stern & Tennanbaum, P.A. v. Smith, 416 So. 2d 4 (Fla. Dist. Ct. App. 1982).

195. *See supra* text accompanying notes 100-08.

XV

CONCLUSION

Florida's appellate law in civil cases provides for appellate review of all final judgments or orders, but limits interlocutory review of nonfinal orders to those specified in the interlocutory appeals rules or those meeting the stringent requirements for review by extraordinary writ.

For the most part, this law properly balances the policies and interests which support the final judgment rule and the competing policies and interests which justify the allowance of interlocutory appellate review. The appellate decisions reflect a genuine dedication by Florida appellate judges to preserving this proper balance.

Florida's appellate law could be improved, nevertheless, by the adoption of special rules governing appellate review of orders permitting or denying class actions, since class actions often serve a vital public interest and create unique problems of appellate review. Another improvement would be to adopt a rule comparable to Rule 54(b) of the Federal Rules of Civil Procedure governing appellate review of orders dismissing fewer than all of the claims or parties in a case. Such a rule, by allowing a better weighing of the advantages and disadvantages of delaying the appeal of such dismissals until the entry of final judgment would be an improvement over what is currently available under Florida appellate law.

These suggested improvements are not exhaustive; there is need for further development in this dynamic area of law. An extremely important example is the need for clarification of the principles governing the law of common law certiorari. The complexity of the variables involved in determining whether an order in a civil case should be subject to immediate appellate review or whether appellate review of the order should be postponed until a final disposition of the case, presents a continuing challenge of great significance to the Florida courts.