

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT**

JULY TERM 2002

AMERISURE INSURANCE COMPANY,

Petitioner,

v.

CASE NO. 5D02-1359

MILLER, MILLER & MAC-FLORIDA, INC., ET. AL,

Respondents.

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Opinion filed October 18, 2002

**Petition for Certiorari Review of Order,
From the Circuit Court for Orange County
Dorothy J. Russell, Judge.**

**Hinda Klein and Marc Gutterman, of
Conroy, Simberg, Ganon, Krevans & Abel, P.A.,
Hollywood, for Petitioner, Amerisure.**

**Steven R. Schooley, of Holland & Knight LLP,
Orlando, for Respondents.**

HARRIS, J.

Although we question whether the count for common law bad faith for failure to defend can survive in this first party action against the insurer, the insurer has not shown irreparable harm and the writ of certiorari is therefore denied. Certainly any appropriate discovery which might be addressed to the common law count would be available in any event under the existing statutory bad faith count. Whether the insured's settlement of the underlying claim in this case provides the necessary "determination of liability" should await the trial of this matter.

WRIT DENIED.

ORFINGER, R.B., J., concurs.
PLEUS, J., concurs in result only.