

SUPREME COURT OF LOUISIANA

No. 99-C-1423

FREDERICK COLLINS

Versus

THE PRUDENTIAL INSURANCE COMPANY ET AL.

LEMMON, J., Subscribing to the Opinion and Assigning Additional Reasons

I agree that a judgment of the trial court compelling arbitration is interlocutory and therefore not appealable unless the asserted error is one that causes irreparable injury, meaning that the asserted error is one that, as a practical matter, cannot be corrected on appeal. The more difficult question is whether the reviewing court should have determined the merits of the arbitrability issue under its supervisory jurisdiction. I agree with the majority opinion on this procedural issue, with the following additional observations.

The test generally applied to determine whether or not a reviewing court should exercise supervisory jurisdiction is whether the asserted error causes irreparable injury which cannot, as a practical matter, be corrected on appeal.¹ However, I disagree to some extent with the intermediate appellate cases cited by the majority insofar as they stand for the proposition (not adopted by the majority) that a party's being required to go to trial (or to arbitration) is never irreparable injury.

When a party unsuccessfully raises an issue pre-trial by supervisory writs and is ultimately successful on the issue on appeal after trial on the merits, the party is

¹Most of the confusion in this area arises because this is substantially the same test applied to determine whether an interlocutory judgment is appealable under La. Code Civ. Proc. art. 2083.

literally injured irreparably because the party can never recover the time and expense of the litigation that could have been avoided if the reviewing court would have exercised supervisory jurisdiction and corrected the error prior to trial. However, a party's saving the time and expense of litigation generally is a risk of litigation that must yield to the normal orderly process of trial and appeal.

Nevertheless, there are some cases in which the reviewing court should recognize extraordinary circumstances and exercise supervisory jurisdiction to rule on an alleged error prior to trial in order to avoid unnecessary litigation. This court has instructed the intermediate appellate courts to consider and rule upon the merits of a supervisory writ, even if the alleged error can be corrected on appeal, when (1) an appellate reversal will terminate the litigation, (2) there is no dispute of fact to be resolved, and (3) the trial court decision appears to be incorrect. Herlitz Constr. Co. v. Hotel Investors of New Iberia, Inc., 396 So. 2d 878 (La. 1981). See also Southern California Edison Co. v. Peabody W. Coal Co., 977 P.2d 769 (Ariz. 1999), which involved the arbitrability of a very complex case involving a \$30 million dispute. The Arizona Supreme Court (in addition to rejecting the independent versus the embodied proceedings distinction used in the federal courts) ruled as follows:

An order compelling arbitration is not a final judgment and is therefore not appealable under [Arizona procedural law.] A party may, however, request that the trial judge enter a final order or judgment under Rule 54(b). . . . If the trial judge makes such an order, it is appealable. If the trial judge refuses to make an order appealable, the aggrieved party may challenge that decision by special action. If the appellate court determines that the trial judge abused his or her discretion in refusing to include language of finality, the court should accept jurisdiction and consider the merits of the arbitrability issue.

977 P.2d at 776 (emphasis added).

In the present case, the party seeking to appeal could have sought a designation of the judgment as immediately appealable under La. Code Civ. Proc. art. 1915B (the

Louisiana equivalent of Fed.R.Civ.P. 54(b)).² If the trial judge issues such an order, the judgment is appealable, as noted by the Arizona Supreme Court (although the appellate court also has the right to reverse such an order). However, if the judge refuses to issue such an order, the aggrieved party can challenge the ruling by application for supervisory writs (referred to as “special action” in Arizona), and if the reviewing court determines that the trial court abused its discretion in refusing to designate the judgment as immediately appealable, the reviewing court can exercise supervisory jurisdiction and order an appeal or otherwise consider the merits of the arbitrability issue.

In the present case, I believe that we should follow the general rule that the reviewing court may decline to exercise supervisory jurisdiction in an ordinary case when the judgment can be corrected on appeal, although the aggrieved party may be subjected to some loss of time and expense of unnecessary litigation if successful on appeal after trial.

²Of course, the party could also have sought review through an application for supervisory writs.