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Louisiana Practice - Effect of Application for Supervisory Writs on Trial Court Proceedings

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recovery by the named insured had been permitted.[7] In that year, the national standard policy was revised so that the named insured was explicitly barred from bringing such a suit.[8] However, in 1947 the standard policy was again revised,[9] and the clauses which had barred action by the named insured were omitted. There is no indication in the text of the opinion that this history was before the court when it reached its decision.

Although the insurer in this suit may have had no knowledge of this history, he is required by Louisiana law to extend the full coverage of the standard policy.[10] Since these changes indicate a definite intention that the standard policy permit recovery by the named insured, the decision, though based exclusively on the wording of the policy, is manifestly correct.

Robert J. Jones

LOUISIANA PRACTICE—EFFECT OF APPLICATION FOR SUPERVISORY WRITS ON TRIAL COURT PROCEEDINGS

Defendant's exception of *lis pendens* was overruled by the trial court. Defendant then notified the trial judge that she intended to apply to the Supreme Court for a review of the ruling under its supervisory jurisdiction. Subsequently, default judgment was rendered in favor of the plaintiff. Defendant's motion to vacate the judgment was denied and she made appli-

7. Farmer v. United States Fidelity & Guaranty Co., 11 F. Supp. 542 (M.D. Ala. 1935); Howe v. Howe, 87 N.H. 338, 179 Atl. 362 (1935); Archer v. General Casualty Co. of Wisconsin, 219 Wis. 100, 261 N.W. 9 (1935).

8. 1 INSURANCE POLICY ANNOTATIONS, SECTION OF INSURANCE LAW OF AMERICAN BAR ASSOCIATION 29 (Supp. 1945):

"(b) INJURY TO OR DEATH OF . . . . NAMED INSURED

"The insurance with respect to any person or organization other than the named insured does not apply: (a) to injury to or death of any person who is a named insured."

APPLEMAN, AUTOMOBILE LIABILITY INSURANCE 106 (1938):

"DEFINITION OF INSURED

"The unqualified word 'insured' wherever used . . . includes not only the named insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is 'pleasure and business' or 'commercial,' each as defined herein, and provided further that the actual use is with the permission of the named insured. The provisions of this paragraph do not apply:

". . .

"(b) to any person or organization with respect to bodily injury to or death of any person who is a named insured."

9. Note 6 *supra*.

10. LA. R.S. § 22:623 (1950).

cation for supplemental writs of review. *Held*, formal notice of intent to apply for supervisory writs stays proceedings in the trial court for such reasonable time as may be necessary for application to be made. *State* ex rel. *Marston v. Marston*, 223 La. 1046, 67 So.2d 587 (1953).

In holding that mere notice of intent serves to suspend trial court proceedings the court relied upon Rule XIII, Section 2, of the Revised Rules of the Supreme Court[1] and upon the case of *Wilson Sporting Goods Co. v. Alwes*,[2] in which this rule, according to the instant decision, was properly interpreted. The court distinguished the case of *First National Bank Bldg. Co. v. Dickson & Denny*[3] on the ground that the pertinent provision of the Supreme Court Rules was not considered in that case.

In *Wilson Sporting Goods Co. v. Alwes* there was no contention made by either litigant that trial court proceedings had been stayed by notice of intent to apply for supervisory writs. The question was whether the giving of this notice rectified noncompliance with Section 7 of Rule XIII requiring that the petition for writs be mailed or delivered to the trial judge and adverse party. In holding that giving notice does not relieve a party from serving copies of the petition, the court stated that the notice given was effective only to stay proceedings in the trial court. This statement, made incidentally by the court in deciding another question, was relied on in the instant case as a proper interpretation of the rule.

In the *First National Bank Bldg.* case, after dismissal of defendant's reconventional demand, the trial judge was notified that application would be made to the Supreme Court for review of the dismissal decree. The trial judge was requested to suspend proceedings pending action on the application but refused to do so. The Supreme Court upheld the trial court's refusal, stating in definite terms that mere notice to the trial judge of intention to apply for supervisory writs does not serve to stay proceedings. Proceedings are suspended only if the writs are granted together with a stay order which is served on the judge.

1. "The party or attorney intending to apply to this court for a writ of certiorari or review, or for any remedial writ, shall give to the judge whose ruling is complained of, and to the party made respondent, or parties made respondents, such notice as may be deemed necessary to stay further proceedings pending the application to the Supreme Court; provided, however, that a failure to give such notice shall not be, of itself, sufficient cause for dismissing the application or recalling or rescinding the writ or rule nisi." 219 La. lxxxv (1951) (effective Jan. 1, 1952).

2. 204 La. 637, 16 So.2d 217 (1943).

3. 202 La. 970, 13 So.2d 283 (1943).

Thus, precisely the same question was treated in both the *Marston* and *First National Bank Bldg.* cases with irreconcilable results.[4] It is interesting to note that in the first sentence of the opinion in the *Marston* case Justice Ponder states that when writs were granted for the purpose of reviewing the trial judge's ruling rejecting the plea of *lis pendens* a stay order was also issued. If, as the opinion later holds, notice of intent serves to stay the proceedings, why did the court consider it necessary to issue the stay order?

Although not mentioned in the instant case, support for the position taken in the *First National Bank Bldg.* case is found in *Arthur v. Dupuy*.[5] That controversy arose as a result of a previous suit in which an injunction had been sought to prevent the plaintiff in the *Arthur* case from executing a contract. The trial judge had granted leave to dissolve the injunction on bond and the plaintiff in injunction moved for suspensive appeal from that order. The motion was denied and notice was given that application for remedial writs would be made. Subsequently, the injunction was dissolved. On petition of the plaintiff in injunction a record of the proceedings was ordered to be sent up for review by the Supreme Court. The suit was terminated by a decree rescinding the restraining order and dismissing the application for writs. Thereafter, plaintiff claimed that he had been restrained for a period of time after the date on which the injunction was dissolved by the trial judge. Although not explicitly mentioned in the opinion, this contention was apparently based on the theory that the trial judge's action in accepting and approving the bond dissolving the injunction was invalid because done after notification of intent to apply for supervisory writs. It was held, however, that the dissolution had been effective. No restraining order had been issued by the Supreme Court, and the mere ordering up of a copy of the proceedings could not be construed as a stay order. Thus, the court in the *Arthur* case was of the opinion that no stay of proceedings resulted from the service of notice of intent to apply for remedial writs.

The *Marston* and *First National Bank Bldg.* cases represent two possible answers to the question of whether trial court proceedings should be stayed when a litigant gives notice of his

4. The language of Rule XIII, § 2, of the Revised Rules of the Supreme Court, considered in the *Marston* case, is identical with that of the corresponding provision of the Supreme Court Rules considered in the *First National Bank Bldg.* case.

5. 130 La. 782, 58 So. 570 (1912).

intention to seek review under the supervisory jurisdiction of the Supreme Court. Together with a third alternative, these possible solutions may be stated as follows:

(1) Notification of intent serves to stay proceedings for such time as may be reasonably necessary to allow application to be made.

(2) Notification of intent does not stay proceedings. Only issuance and service of writs or a stay order on the trial judge can have that effect.

(3) After notification the trial judge may proceed; however, he must assume the risk that actions taken after notification will be nullified if the writs are issued.

It is submitted that mere notification of intent should not serve to stay proceedings. Only the service of the writs or a stay order on the trial judge should have that effect. If, in compliance with the third alternative, the trial judge were allowed to proceed at his risk, there would always be as a possible consequence the needless waste of time and effort if proceedings subsequent to notification were nullified. On the other hand, the result of the instant case will be to allow a litigant to stay trial court proceedings merely by giving notice of his intention to apply to the Supreme Court for review of a ruling by the trial judge. Clearly, the trial of a case under such circumstances would become an impossible task if an attorney not averse to the use of dilatory tactics were allowed to suspend proceedings in this manner. Although a literal interpretation of the Supreme Court rule in question supports the position taken in the instant case, it is believed that this interpretation will prove unworkable and that reinstatement of the rule of the *First National Bank Bldg.* case offers the soundest solution of the problem.

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Mineral Rights—Obligations—Potestative Condition—Damages for Failure to Drill

Plaintiffs, lessors, sought damages from defendant, lessee, for an alleged breach of contract to drill. The lease provided: "Lessee agrees to commence the drilling of a well in search of oil, gas or other minerals, on the leased premises, on or before one hundred