

No. 08-_____

IN THE SUPREME COURT OF TEXAS

THE TRAVELERS INSURANCE COMPANY
(THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD CONNECTICUT),
PETITIONER,

v.

BARRY JOACHIM,
RESPONDENT.

**PETITION FOR REVIEW OF NO. 07-06-00322-CV IN THE COURT OF APPEALS FOR THE
STATE OF TEXAS, SEVENTH SUPREME JUDICIAL DISTRICT AT AMARILLO, TEXAS
APPEAL FROM CAUSE NO. 2002-520,246 IN THE DISTRICT COURT OF
LUBBOCK COUNTY, TEXAS, 72ND JUDICIAL DISTRICT,
HONORABLE RUBEN REYES, PRESIDING**

PETITION FOR REVIEW

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Parties

Plaintiff/Appellant/Respondent

Barry Joachim

Defendant/Appellee/Petitioner

The Automobile Insurance Company of
Hartford Connecticut, incorrectly sued as
The Travelers Insurance Company

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STATEMENT OF THE CASE

- Nature of the Case:* This a UIM claim against Travelers arising out of a motor vehicle accident. Summary judgment was granted to Travelers on *res judicata* grounds. (2 CR 623-28).
- Trial Court* Hon. Ruben G. Reyes, 72nd Judicial District, Lubbock County, Texas.
- Course of Proceedings and Disposition:* Barry Joachim nonsuited his first UIM lawsuit, pending in the 237th District Court of Lubbock County, Texas but failed to obtain an order of dismissal. (CR 30, Supp. CR 48). The 237th District Court entered an order dismissing the case for want of prosecution with prejudice on November 26, 2001. (Supp. CR 53).
- Joachim's second UIM lawsuit, filed in the 72nd District Court, was dismissed on summary judgment on grounds of *res judicata* by order dated May 17, 2006. (CR 451).
- Court of Appeals District* Joachim appealed to the Seventh Supreme Judicial District at Amarillo, Texas, which heard oral argument on October 1, 2007. Justice Campbell wrote the opinion reversing the judgment of the trial court and remanding for further proceedings.
- Citation to the Court of Appeals Opinion* *Joachim v. Travelers Ins. Co.*, –S.W.3d–, 2008 Tex. App. LEXIS 7238 (Tex. App.–Amarillo, September 25, 2008).

WHY THIS PETITION SHOULD BE GRANTED

The Seventh Court of Appeals at Amarillo has issued two opinions in the last five years with distinctly opposite conclusions regarding the *res judicata* effect of an order of dismissal for want of prosecution with prejudice. In 2003, the Amarillo court in *Labrie v. Kenney*¹ held that a dismissal for want of prosecution, though erroneously entered *with prejudice*, would sustain a defense of *res judicata* to a subsequently filed lawsuit. However, in this case, the Amarillo court has come down on the opposite side of the spectrum, holding that a dismissal for want of prosecution with prejudice does not bar a second lawsuit. These opinions cannot be reconciled, and they leave the current status of the law in murky waters. Accordingly, this Court must step in to stabilize the status of the law and to provide guidance to practitioners and judges alike regarding the procedural effect of a dismissal for want of prosecution with prejudice. This issue will have a major impact on trial practice in Texas, affecting a plaintiff's right to control his case by way of nonsuit and a trial court's right to maintain its docket.

¹95 S.W.3d 722 (Tex. App.–Amarillo 2003, no pet.).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Section 22.001(a)(2) of the TEXAS GOVERNMENT CODE as the court of appeals' opinion differs from the Supreme Court's prior opinions on questions of law material to this case. In fact, the court of appeals' opinion is inconsistent with its own prior decision in *Labrie v. Kenney*, 95 S.W.3d 722 (Tex. App.–Amarillo 2003, no pet.), a case upon which the court relies here. Furthermore, this Court has jurisdiction under Section 22.001(a)(6) because the court of appeals has committed an error of law of such importance to the jurisprudence of this State that it should be corrected.

ISSUES PRESENTED

Issue No. 1:

The Amarillo court has previously held that a dismissal for want of prosecution *with prejudice*, though improper, can become *res judicata* to a subsequently filed lawsuit. Did the court err in holding the opposite in this case?

STATEMENT OF FACTS

On August 4, 1999, Barry Joachim (“Joachim”) filed suit against “The Travelers Insurance Company” asserting an underinsured motorist claim pursuant to a policy of automobile insurance issued to him by The Automobile Insurance Company of Hartford Connecticut (“Travelers”).² The claim arose out of an automobile accident that occurred on August 5, 1997 in Lubbock, Texas.³ The lawsuit, Cause No. 99-507,018, was pending in the 237th District Court of Lubbock County.⁴

On August 28, 2001, on the eve of trial, Joachim filed a notice of nonsuit but never obtained an order of dismissal from the 237th District Court.⁵ On November 1, 2001, the 237th District Court issued a notice indicating its intent to dismiss the case for want of prosecution if no final order was presented.⁶ Having received no order, on November 26, 2001, the 237th District Court entered an order dismissing the case for want of prosecution with prejudice.⁷ Joachim did not directly challenge the order of dismissal in the 237th District Court or on appeal. Thus, the order of dismissal with prejudice became final on December 26, 2001.⁸

²CR 64; Supp. CR 19.

³CR 65; Supp. CR 20.

⁴CR 64; Supp. CR 19.

⁵CR 30; Supp. CR 48.

⁶CR 182; Supp. CR 51.

⁷CR 183; Supp. CR 53.

⁸Tex. R. Civ. P. 329(b).

On December 5, 2002, Joachim filed the lawsuit that is the subject of this appeal, Cause No. 2002-520,246, in the 72nd District Court of Lubbock County, Texas, asserting the same claims against Travelers as those in his previous 237th District Court lawsuit.⁹ Travelers moved for summary judgment, asserting that Joachim's claims were barred by the doctrine of *res judicata*.¹⁰ The 72nd District Court granted the motion on May 18, 2006.¹¹ Joachim appealed to the Seventh District Court of Appeals at Amarillo, which reversed and remanded the case, finding that the trial court erred in granting summary judgment.¹²

SUMMARY OF THE ARGUMENT

This case involves the *res judicata* effect of an order of dismissal for want of prosecution with prejudice. Texas law is clear that an order of dismissal for want of prosecution does not prevent a party from refileing the lawsuit, as such an order is not a decision on the merits. However, Texas law is also clear that an order of dismissal *with prejudice* functions as a determination on the merits. So what happens when a court dismisses a case for want of prosecution and orders the case dismissed with prejudice? Texas law, including the Amarillo Court of Appeals, has determined that such an order, though clearly erroneous, can become a final decision on the merits of the case if the order

⁹CR 2-6.

¹⁰CR 50; Supp. CR 4.

¹¹CR 451-52.

¹²*Joachim v. Travelers Ins. Co.*, –S.W.3d–, 2008 Tex. App. LEXIS 7238 (Tex. App.–Amarillo, September 25, 2008).

is not properly attacked by the plaintiff. The Amarillo court's decision in this case is in absolute conflict with its previous opinion, decided just five years ago.

Texas law allows, and in fact requires, an order of dismissal after a nonsuit. The 237th District Court, therefore, had jurisdiction to enter the order of dismissal for want of prosecution, even though it clearly erred in dismissing the case with prejudice. That error, however, was waived when Joachim failed to attack the order. Because of Joachim's failure to challenge the order of dismissal with prejudice, it became a final order and a final determination *on the merits* of the case. The court of appeals erred in holding that Travelers failed to establish the elements of *res judicata* in this case. Accordingly, the court of appeals' opinion must be reversed and the trial court judgment affirmed.

ARGUMENTS AND AUTHORITIES

I. Seventh District's Prior Contradictory Opinion—*Labrie v. Kenney*

Generally, the rule in Texas is that a dismissal for want of prosecution is not a decision on the merits and does not prevent a party from refileing the suit.¹³ Therefore, a dismissal for want of prosecution with prejudice is improper.¹⁴ However, just five years ago, the Amarillo Court of Appeals in *Labrie v. Kenney* held that an erroneous dismissal for want of prosecution with prejudice can become a final determination on the merits and *res judicata*

¹³See *Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980).

¹⁴See *Willis v. Barron*, 604 S.W.2d 447 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

to a subsequently filed lawsuit, a decision which is directly contradictory to its opinion here.¹⁵

In *Labrie*, the trial court dismissed the first lawsuit with prejudice for want of prosecution.¹⁶ Five months later, a second lawsuit was filed asserting the same claims which had been subject to the previous dismissal with prejudice. The trial court granted summary judgment to the defendant on *res judicata* grounds. In upholding the trial court's decision, the Amarillo court held that even though a dismissal for want of prosecution *with prejudice* is improper and is not a decision on the merits, such error was waived because it was not properly attacked by the plaintiff.¹⁷ Relying on the Supreme Court's decision in *Mossler v. Shields*, the Amarillo court found that the dismissal with prejudice became a final determination on the merits by virtue of the plaintiffs' failure to challenge the order on appeal.¹⁸ Thus, the Amarillo court held in *Labrie* that the dismissal for want of prosecution with prejudice, though unquestionably improper, would bar the second suit on *res judicata* grounds.¹⁹

In the case at hand, the Amarillo court has reversed field and now holds that an unchallenged dismissal for want of prosecution with prejudice would not bar a second lawsuit. Litigants and trial courts, particularly those in West Texas, are now left in a state of flux regarding the effect of an erroneous dismissal for want of prosecution with prejudice.

¹⁵*Labrie v. Kenney*, 95 S.W.3d 722, 725 (Tex. App.–Amarillo 2003, no pet.). Interestingly, two of the three justices who decided *Labrie* were on the panel in this case, Chief Justice Quinn and Senior Justice Boyd.

¹⁶*Id.* at 725.

¹⁷*Id.* at 728-29.

¹⁸*Id.* at 729 (citing *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991)).

¹⁹*Id.*

Travelers requests this Court to affirm the rationale of the *Labrie* decision and hold that such an order, if left unchallenged, becomes final and becomes *res judicata* to any subsequently filed lawsuit.

II. Second Suit Barred by Res Judicata

In light of its prior *Labrie* rationale, the Amarillo Court of Appeals erred in holding that Travelers failed to meet its summary judgment proof on the defense of *res judicata*. The affirmative defense of *res judicata* requires proof of (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.²⁰ There has never been a dispute in this case regarding the second and third elements. The Amarillo court found the first element lacking because the 237th District Court did not have jurisdiction to enter the order, and the order was not a determination on the merits.

A. Court Retained Jurisdiction to Dismiss After Nonsuit

There is no question that a trial court has the authority, pursuant to Rule 165a and its inherent power to control its docket, to dismiss a case for want of prosecution, even after a nonsuit.²¹ After a nonsuit, the lawsuit remains on the court's docket awaiting an order of dismissal.²² In this regard, it has been said that:

²⁰*Amstadt v. U.S. Brass*, 919 S.W.2d 644, 652 (Tex. 1996).

²¹*See Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999); *see also* TEX. R. CIV. P. 165a.

²²*In re Martinez*, 77 S.W.3d 462, 464-65 (Tex. App.—Corpus Christi 2002, orig. proceeding).

“The trial court, and not one of the litigants before it, officially ends the lawsuit and closes the file. Once begun, a lawsuit is not officially and formally concluded until the trial court pronounces it concluded. Just as the parties are not free during an in-court appearance to conclude their business and walk out of court without the trial court’s dismissal, so they are not free to leave the constructive presence of the court by nonsuit without an order of dismissal.”²³

It is the signing of an order of dismissal, not the filing of a notice of nonsuit, that is the starting point for determining when a trial court’s plenary power expires.²⁴ Appellate timetables do not run from the date a nonsuit is filed, but rather from the date the trial court signs an order of dismissal.²⁵ Thus, Texas law is clear that not only does a trial court have the power and jurisdiction to dismiss a case after a nonsuit, but it is required to enter that dismissal.

The relevant question in this case, which involves *res judicata* concerns, is whether that order of dismissal is a determination on the merits or collateral to the merits. If it is collateral to the merits, *res judicata* does not bar a second lawsuit. However, if the dismissal functions as a decision on the merits, *res judicata* bars a subsequently filed lawsuit.

B. Dismissal for Want of Prosecution With Prejudice Became Final Judgment on Merits

As stated above, generally a dismissal for want of prosecution is not a decision on the merits.²⁶ This is particularly true where a plaintiff has nonsuited the case and withdrawn the merits of the case from the trial court’s consideration. Thus, ordinarily a dismissal for want

²³*Zimmerman v. Ottis*, 941 S.W.2d 259, 263 (Tex. App.–Corpus Christi 1996, no writ).

²⁴*In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997).

²⁵*Id.*

²⁶*See Rizk*, 603 S.W.2d at 775.

of prosecution cannot serve as the basis for a *res judicata* defense. On the other hand, however, a dismissal *with prejudice* functions as a decision on the merits.²⁷ In this case, we have both a dismissal for want of prosecution (which is not a decision on the merits) and an order of dismissal with prejudice (which is a decision on the merits).

In these specific types of situations, Texas courts, including the Amarillo Court of Appeals as discussed above, have held that the dismissal for want of prosecution *with prejudice*, even though erroneous, becomes a final determination on the merits unless directly attacked by the plaintiff.²⁸ Accordingly, unless properly attacked, an order of dismissal for want of prosecution with prejudice can serve as *res judicata* to a subsequently filed lawsuit.²⁹

In *Andrews v. ABJ Adjusters, Inc.*, the trial court dismissed the first lawsuit with prejudice for want of prosecution pursuant to its dismissal docket.³⁰ The Dallas Court of Appeals found that the trial court erred in dismissing the lawsuit *with prejudice*, but held that such error was waived when the plaintiff failed to properly present the error to the trial court.³¹ Thus, the appellate court affirmed the dismissal for want of prosecution with prejudice.³²

In the case at hand, although the dismissal for want of prosecution entered by the

²⁷See *Labrie*, 95 S.W.3d at 729 (citing *Mossler*, 818 S.W.2d at 754) (emphasis added).

²⁸*Labrie*, 95 S.W.3d at 728-29; *Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 568 (Tex. App.–Houston [14th Dist.] 1990, writ denied); see also *Bird v. Kornman*, 152 S.W.3d 154, 161 (Tex. App.–Dallas 2004, pet. denied).

²⁹See *Labrie*, 95 S.W.3d at 729.

³⁰*Andrews*, 800 S.W.2d at 568.

³¹*Id.* at 568-69.

³²*Id.*

237th District Court was initially intended to be collateral to merits (i.e., to clean the case off of the court's docket), it became a final determination on the merits when the court erroneously dismissed the case "with prejudice" and Joachim failed to bring such error to the court's attention for correction.³³ If a case has been dismissed with prejudice for want of prosecution, the order of the trial court dismissing the suit must be reformed to eliminate the words "with prejudice."³⁴ Error in dismissing case for want of prosecution with prejudice cannot be raised for the first time on appeal and must be presented to the trial court.³⁵ Joachim having failed to raise the issue with the 237th District Court, the order of dismissal with prejudice became final, and became a final judgment on the merits for purposes of *res judicata*. Accordingly, the order was not subject to a collateral attack in the 72nd District Court, and Joachim's second lawsuit was barred. For these reasons, the trial court properly granted summary judgment to Travelers, and Amarillo Court of Appeals erred in holding that Travelers failed to prove the elements of its affirmative defense of *res judicata*.

³³*Id.* at 568.

³⁴*See Willis*, 604 S.W.2d at 450; *Melton v. Ryander*, 727 S.W.2d 299, 303 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

³⁵*See Bird*, 152 S.W.3d at 160 (citing *El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc.*, 617 S.W.2d 189, 190 (Tex. 1981) and *Andrews*, 800 S.W.2d at 568-69).

RELIEF REQUESTED

The Travelers Insurance Company (The Automobile Insurance Company of Hartford Connecticut) respectfully requests:

1. that this Petition for Review be set for determination on the Court's calendar at the Court's earliest convenience;
2. that the Petition be granted, briefs on the merits be requested and the case be set for oral submission;
3. that upon submission, the Court of Appeals' judgment below be reversed and the trial court judgment be affirmed;
4. that it have and recover its costs of court and reasonable and necessary attorney fees and expenses incurred in prosecution of this appeal to the extent permitted by law;
5. that it have all other and further relief to which it is justly entitled, both at law and in equity.

Respectfully submitted,

/s/ Christopher B. Slayton

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and forgoing document was served on all parties by and through their counsel of record in accordance with the Texas Rules of Appellate Procedure by United States Mail, Certified Delivery, Return Receipt Requested, with proper postage affixed, on November 6, 2008, as follows:

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APPENDIX

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Trial Court Judgment A

Opinion of Court of Appeals B