

No. 08-0941
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**

REPLY TO RESPONSE TO PETITION FOR REVIEW

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ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

The issue in this case is whether an erroneous dismissal *with prejudice* can constitute a decision on the merits for purposes of res judicata. The Seventh Court of Appeals at Amarillo has decided three cases within the past five years which go back and forth on this issue. Thus, the status of the law is now up in the air and requires this Court's attention.

Two of the three decisions from Amarillo have held that an order of dismissal with prejudice, even though obviously entered in error, can become a final decision on the merits and res judicata to any subsequently-filed suit if the order is not properly attacked by the plaintiff, either in the trial court or on appeal. Sandwiched in between those two opinions is the Amarillo Court's decision in this case, which stands at the other end of the spectrum. Because of this inconsistency in the law, Travelers requests that this Honorable Supreme Court grant its Petition for Review in this case, reverse the court of appeals' opinion, and affirm the judgment of the trial court. Unless this Court does so, the law will remain unsettled with regard to the res judicata effect of an erroneous dismissal with prejudice.

ARGUMENTS AND AUTHORITIES

The Amarillo Court of Appeals has gone back and forth on the issue of the res judicata effect of an erroneous dismissal with prejudice. With its latest opinion in *Rodriguez v. ICON Benefit Administrators, Inc.*, 2008 Tex. App. LEXIS 7870 (Tex. App.–Amarillo Oct. 15, 2008, pet. filed), which is currently before this Court on petition for review, the Amarillo Court has once again reversed field, going back to its previous decision in *Labrie v. Kenney*.¹ Thus, the Court has now issued three (3) opinions in the last five years on this issue, two of those holding that an order of dismissal, though erroneously entered *with prejudice* and not initially a decision on the merits, can become a final determination on the merits for purposes of res judicata if not properly attacked by the plaintiffs either in the trial court or on appeal. The opinion in this case is inconsistent with the other two because the Court holds just the opposite—that even though the trial court entered a dismissal for want of prosecution with prejudice, and even though the plaintiff failed to challenge that dismissal, there was no final determination on the merits, and res judicata does not apply. This inconsistency has left the status of the law with regard to res judicata unsettled and requires this Court’s attention.

Just twenty (20) days after, and without any reference to, its opinion in this case, the Amarillo Court of Appeals issued its opinion in *Rodriguez*, dealing with the res judicata effect of an erroneous dismissal with prejudice. In *Rodriguez*, the plaintiff initially filed suit

¹*Labrie v. Kenney*, 95 S.W.3d 722 (Tex. App.–Amarillo 2003, no pet.).

against John Leza in 2003 for injuries he received in an automobile collision.² The lawsuit was settled at mediation, but Rodriguez was unable to negotiate the workers' compensation lien held by ICON Benefit Administrators. Thus, Rodriguez refused to execute the settlement documents with Leza, and instead filed an amended petition, without leave of court, adding ICON as a defendant along with Leza. The trial court granted Leza's motion to enforce the mediation agreement and entered a judgment dismissing Rodriguez's claims against both Leza and ICON *with prejudice*. At the time, ICON had no pending claims for affirmative relief.³ Rodriguez appealed the judgment without contesting the "with prejudice" provision, and the Amarillo Court of Appeals affirmed.⁴

In 2006, Rodriguez filed a second lawsuit solely against ICON asserting many of the same claims as alleged in the previous suit.⁵ ICON successfully moved for summary judgment on the defense of res judicata. Rodriguez appealed, and the Amarillo Court affirmed the summary judgment. The Court concluded that although the trial court should not have dismissed the claims against ICON "with prejudice" in the first lawsuit, because Rodriguez failed to challenge that dismissal either with the trial court or on appeal, it became a final determination *on the merits* for purposes of res judicata, relying upon its previous

²*Rodriguez v. ICON Benefit Administrators*, 2008 Tex. App. LEXIS 7870, *3-5 (Tex. App.—Amarillo Oct. 15, 2008, pet. filed) (see dissenting opinion for full recitation of underlying facts).

³*Id.* at *6.

⁴*See Rodriguez v. Leza and ICON Benefit Administrators, Inc.*, No. 07-04-0463-CV, 2006 Tex. App. LEXIS 1364 (Tex. App.—Amarillo Feb. 17, 2007, pet. denied).

⁵*Rodriguez v. ICON Benefit Administrators*, 2008 Tex. App. LEXIS 7870 (Tex. App.—Amarillo Oct. 15, 2008, pet. filed).

decision in *Labrie v. Kenney*.⁶

Under the rationale of *Rodriguez* and *Labrie*, the trial court's erroneous dismissal for want of prosecution with prejudice in this case, though not initially a merits decision, became a final determination on the merits and res judicata to the subsequently-filed lawsuit due to Joachim's failure to properly attack the dismissal either in the trial court or on appeal. Thus, the Amarillo Court should have affirmed the trial court's judgment because the elements of res judicata were met.

The Amarillo Court's decision in this case is inconsistent and in direct conflict with its other two opinions on this issue. This Supreme Court must step in and bring some clarity to these issues. Travelers requests that this Court grant its Petition for Review in order to square this case with the opinions in *Labrie* and *Rodriguez*. The reasoning in the *Labrie* and *Rodriguez* cases is sound—a plaintiff waives any error regarding a non-merits dismissal with prejudice if it fails to give either the trial court or appellate court an opportunity to correct it. That same reasoning should apply equally to this case.

For these reasons, Travelers requests that this Court grants its Petition for Review, reverse the Amarillo Court's opinion, and affirm the trial court's judgment.

⁶*Id.*

RELIEF REQUESTED

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

1. that this 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 March 19, 2009, as follows:

CMRRR # 91 7108 2133 3935 2730 3628

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