

**No. 08-0941**  
**IN THE SUPREME COURT OF TEXAS**

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

v.

**BARRY JOACHIM,**  
*RESPONDENT.*

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**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**

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**PETITIONER'S BRIEF ON THE MERITS**

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**ORAL ARGUMENT REQUESTED**

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Barry Joachim

#### ***Defendant/Appellee/Petitioner***

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Hartford Connecticut, incorrectly sued as  
The Travelers Insurance Company

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## STATEMENT OF THE CASE

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<i>Nature of the Case:</i>	This is an underinsured motorist claim against Travelers arising out of a motor vehicle accident that occurred on August 5, 1997. Summary judgment was granted to Travelers on <i>res judicata</i> grounds. (2 CR 623-28).
<i>Trial Court</i>	Hon. Ruben G. Reyes, 72nd Judicial District, Lubbock County, Texas.
<i>Course of Proceedings and Disposition:</i>	<p>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).</p> <p>Joachim's second UIM lawsuit, filed in the 72nd District Court, was dismissed on summary judgment as <i>res judicata</i> by order dated May 17, 2006. (CR 451). Joachim appealed.</p>
<i>Court of Appeals District</i>	Seventh Supreme Judicial District at Amarillo, Texas.
<i>Court of Appeals' Justices</i>	Appeal was heard by Chief Justice Quinn, Retired Chief Justice Boyd (sitting by assignment), and Justice Campbell, who wrote the unanimous opinion of the Court.
<i>Disposition in Court of Appeals</i>	Reversed and remanded.
<i>Citation to the Court of Appeals Opinion</i>	<i>Joachim v. Travelers Ins. Co.</i> , –S.W.3d–, 2008 Tex. App. LEXIS 7238 (Tex. App.–Amarillo, September 25, 2008).

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## STATEMENT OF JURISDICTION

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This Court has jurisdiction pursuant to Section 22.001(a)(2) of the TEXAS GOVERNMENT CODE as the Amarillo Court of Appeals' opinion in this case conflicts with this Court's prior decisions in *El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc.*, 617 S.W.2d 189 (Tex. 1981) and *Mann v. Gonzalez*, 595 S.W.2d 102 (Tex. 1979) on questions of law material to the case. The decision in this case also conflicts with the Amarillo Court's own prior and subsequent decisions in *Labrie v. Kenney*, 95 S.W.3d 722 (Tex. App.–Amarillo 2003, no pet.) and *Rodriguez v. ICON Benefit Administrators, Inc.*, 2008 Tex. App. LEXIS 7870 (Tex. App.–Amarillo Oct. 15, 2008, pet. filed). Furthermore, the court of appeals' opinion conflicts with the Houston court's decision in *Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 568 (Tex. App.–Houston [14th Dist.] 1990, writ denied), a case in which this Supreme Court denied writ. Lastly, 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.

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## ISSUES PRESENTED

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### Issue No. 1:

The Amarillo Court of Appeals has twice 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?

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## STATEMENT OF FACTS

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Travelers is generally in agreement with the court of appeals' rendition of the facts but would like to briefly expound upon those facts. On or about August 5, 1997, Barry Joachim was involved in a motor vehicle accident with a third party in Lubbock, Texas.<sup>1</sup> The third party's automobile insurer, Kemper, tendered its policy limits of \$25,000 to Joachim.<sup>2</sup> On August 4, 1999, Joachim filed suit, in cause number 99-507,018, against his own insurer, Travelers, asserting an entitlement to underinsured motorist benefits.<sup>3</sup>

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.<sup>4</sup> On November 1, 2001, the 237th District Court issued a notice stating that "[i]f a final order is not filed within 10 days of this notice, this case will be **DISMISSED FOR WANT OF PROSECUTION.**"<sup>5</sup> Having received no order, on November 26, 2001, the 237th District Court entered an Order of Dismissal for Want of Prosecution and dismissed the case with prejudice.<sup>6</sup> 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.<sup>7</sup>

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<sup>1</sup>CR 65; Supp. CR 20.

<sup>2</sup>CR 13-14, 102-103.

<sup>3</sup>CR 64; Supp. CR 19.

<sup>4</sup>CR 30; Supp. CR 48.

<sup>5</sup>CR 182; Supp. CR 51. (capitalization and bolding in original)

<sup>6</sup>CR 183; Supp. CR 53.

<sup>7</sup>Tex. R. Civ. P. 329b.

A year later, on December 5, 2002, Joachim filed a second lawsuit, in cause number 2002-520,246 (which is the subject of this appeal), in the 72nd District Court of Lubbock County, Texas.<sup>8</sup> It is undisputed that the second lawsuit asserts the same UIM claims against Travelers arising out of the 1997 motor vehicle accident as those asserted in the 237th District Court lawsuit.<sup>9</sup> Travelers pled the doctrine of *res judicata* and moved for summary judgment on those grounds.<sup>10</sup> The 72nd District Court granted the motion on May 18, 2006.<sup>11</sup> Joachim appealed to the Seventh District Court of Appeals at Amarillo, which reversed and remanded the case, finding that Travelers had failed to conclusively prove its *res judicata* affirmative defense because there was no final determination on the merits.<sup>12</sup>

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<sup>8</sup>CR 2-6.

<sup>9</sup>CR 2-6.

<sup>10</sup>CR 50; Supp. CR 4.

<sup>11</sup>CR 451-52.

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

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## STANDARD OF REVIEW

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Summary judgment is a question of law, and an appellate court reviews a trial court's summary judgment decision de novo.<sup>13</sup> In a traditional summary judgment proceeding, the standard of review on appeal is whether the successful movant at the trial level carried the burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law.<sup>14</sup> Thus, the question on appeal is not whether the summary judgment proof raises fact issues as to required elements of the movant's cause or claim, but whether the summary judgment proof establishes, as a matter of law, that there is no genuine issue of material fact as to one or more elements of the movant's cause or claim.<sup>15</sup>

A defendant moving for summary judgment on an affirmative defense must prove each element of its defense as a matter of law, leaving no issues of material fact.<sup>16</sup> Where the summary judgment order does not state the specific grounds on which it was granted, the non-movant on appeal must show that each ground alleged in the motion is insufficient to support the granting of summary judgment, and if any of the grounds stated in the motion is meritorious, the appellate court must affirm the summary judgment.<sup>17</sup>

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<sup>13</sup>*Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

<sup>14</sup>*Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Nixon v. Mr. Property Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985).

<sup>15</sup>*Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

<sup>16</sup>*Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475 n. 10 (Tex. 2005).

<sup>17</sup>*See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

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## SUMMARY OF THE ARGUMENT

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There is no question that the 237th District Court erred in dismissing Joachim's first lawsuit for want of prosecution with prejudice. However, the court had the power and jurisdiction to enter that erroneous order of dismissal, thereby making the order voidable and not void. Because the order was voidable, it was subject only to a direct attack in the trial court or on appeal and was not subject to a collateral attack. Accordingly, Joachim's second lawsuit in the 72nd District Court was barred by the doctrine of *res judicata*.

The infamous order of dismissal, while initially entered collateral to the merits, became a final determination on the merits for purposes of *res judicata* when Joachim failed to directly attack the order and allowed it to become final. The Amarillo Court of Appeals' decision to the contrary in this case is in direct conflict with two of its other decisions, as well as the Supreme Court's decisions, on this very issue. The inconsistency in these opinions has created uncertainty in the law and has resulted in unfairness to Travelers.

The Amarillo Court of Appeals erred in reversing the summary judgment granted by the trial court. Travelers carried its burden of proving all the essential elements of its *res judicata* affirmative defense, including a prior final judgment on the merits, meaning that the subsequently-filed lawsuit in the 72nd District Court was barred. For these reasons, Travelers requests that this Honorable Court grant its Petition for Review, reverse the opinion of the Amarillo Court of Appeals, and affirm the summary judgment of the trial court.

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## ARGUMENTS

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Texas law is clear that a dismissal for want of prosecution is generally not a decision on the merits and should not be entered with prejudice.<sup>18</sup> This is particularly true where a plaintiff has taken a nonsuit and withdrawn the merits of the case from the trial court's consideration. Thus, ordinarily a dismissal for want of prosecution cannot serve as the basis for a *res judicata* defense. On the other hand, however, a dismissal *with prejudice* does function as a decision on the merits and has full *res judicata* effect, barring subsequent relitigation of the same claims between the same parties.<sup>19</sup> So what happens when a trial court dismisses a case for want of prosecution (a non-merits decision) and erroneously enters that dismissal with prejudice (a merits decision)?

Texas courts have spoken on this issue, including this Supreme Court and the Amarillo Court of Appeals, and have held that a dismissal for want of prosecution, erroneously entered with prejudice, is not initially a decision on the merits but can *become* a decision on the merits for purposes of *res judicata*.<sup>20</sup> As long as the plaintiff properly presents the “with prejudice” error to the trial court or appellate court for correction or

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<sup>18</sup>See *Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980); *Melton v. Rylander*, 727 S.W.2d 299, 303 (Tex. App.–Dallas 1987, writ ref'd n.r.e.); *Willis v. Barron*, 604 S.W.2d 447 (Tex. Civ. App.–Tyler 1980, writ ref'd n.r.e.) (dismissal for want of prosecution with prejudice is improper.).

<sup>19</sup>See *Labrie*, 95 S.W.3d at 729 (citing *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) (emphasis added)); see also *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 630-31 (Tex. 1992).

<sup>20</sup>See *Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 568 (Tex. App.–Houston [14th Dist.] 1990, writ denied); *Labrie v. Kenney*, 95 S.W.3d 722, 725 (Tex. App.–Amarillo 2003, no pet.).

revision, the “with prejudice” dismissal cannot stand and does not act as a determination on the merits. However, if the plaintiff fails to properly attack the dismissal, and the “with prejudice” order becomes final, it becomes a final determination on the merits for purposes of *res judicata*.<sup>21</sup>

To complicate matters somewhat, this case involves a plaintiff’s nonsuit prior to the order of dismissal for want of prosecution with prejudice. Thus, before examining whether the 237th District Court’s dismissal with prejudice bars the subsequent, underlying lawsuit which is the subject of this appeal, we must examine Joachim’s nonsuit and its effect on the 237th District Court’s power to enter the infamous order of dismissal.

**I. 237th District Court Had Power to Enter Order of Dismissal Even After Nonsuit, Making Order Voidable and Not Void**

There is no question that the 237th District Court’s dismissal of Joachim’s first lawsuit for want of prosecution *with prejudice* was error. However, because the court had jurisdiction to enter the order and acted within its plenary power, the order of dismissal was voidable, not void, and was subject only to a direct attack by Joachim. Joachim’s second lawsuit was an impermissible collateral attack upon the order and was barred by the doctrine of *res judicata*. Accordingly, the trial court properly granted summary judgment to Travelers, and the Amarillo Court of Appeals erred in holding otherwise.

A. **Court Retained Jurisdiction to Enter Order of Dismissal**

While a nonsuit is effective and extinguishes the merits of a case when filed with the

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<sup>21</sup>*Labrie*, 95 S.W.3d at 725.

court clerk or requested in open court, Texas law is clear that a trial court retains jurisdiction after the nonsuit is filed, during the time of its plenary power, to consider matters “collateral” to the merits and to perform ministerial acts.<sup>22</sup> Thus, there is no question that a trial court has jurisdiction, pursuant to Rule 165a and its inherent power to control its docket, to dismiss a case for want of prosecution, even after a nonsuit.<sup>23</sup>

After a nonsuit, the lawsuit remains on the court’s docket awaiting an order of dismissal.<sup>24</sup> In this regard, it has been said that:

“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.”<sup>25</sup>

Therefore, Texas law is clear that not only does a trial court have the power and jurisdiction to dismiss a case after a nonsuit, it is required to enter that dismissal. Accordingly, the 237th District Court had jurisdiction to enter the order of dismissal that it entered, even if that order was erroneously entered with prejudice.

Not only did the 237th District Court retain jurisdiction to enter the requisite order of dismissal, the court acted within its plenary power when it issued the order. A court loses

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<sup>22</sup>See *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997); *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 101 (Tex. 2006).

<sup>23</sup>See TEX. R. CIV. P. 165a; *In re Martinez*, 77 S.W.3d 462, 464-65 (Tex. App.—Corpus Christi 2002, orig. proceeding).

<sup>24</sup>*In re Martinez*, 77 S.W.3d at 464-65.

<sup>25</sup>*Zimmerman v. Ottis*, 941 S.W.2d 259, 263 (Tex. App.—Corpus Christi 1996, no writ).

its jurisdiction and capacity to act as a court upon the expiration of its plenary power.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The trial court retains plenary power to "set appellate deadlines" by the ministerial act of entering an order of dismissal.<sup>29</sup>

In this case, then, the 237th District Court's plenary power did not expire upon the filing of Joachim's notice of nonsuit. Instead, it was the filing of the infamous order of dismissal that began the countdown to the expiration of the court's plenary power, and the court retained such plenary power until December 26, 2001, thirty (30) days after the execution of the order of dismissal.<sup>30</sup> Accordingly, on November 26, 2001, the 237th District Court had the power to enter the order of dismissal with prejudice, even if the order was entered purely for ministerial purposes, thereby making the order voidable and not void.

The Amarillo Court of Appeals held that the 237th District Court had no jurisdiction to enter the order of dismissal because there remained no justiciable controversy before the court once Joachim filed his nonsuit. Thus, the Amarillo Court held that the order of dismissal was void for lack of jurisdiction. This reasoning flies in the face of the *Zimmerman*

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<sup>26</sup>See *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990).

<sup>27</sup>*In re Bennett*, 960 S.W.2d at 38.

<sup>28</sup>*Id.*

<sup>29</sup>*Zimmerman*, 941 S.W.2d at 263.

<sup>30</sup>See TEX. R. CIV. P. 329b.

case and this Court's decision in *In re Bennett*, as well as the trial court's inherent authority to control its docket, because if a trial court loses its jurisdiction at the moment a nonsuit is filed, then even an order of dismissal *without* prejudice, entered simply to start the clock on the court's plenary power, is void and of no force. This would give an inordinate amount of weight to a nonsuit.<sup>31</sup>

B. Order of Dismissal Was Voidable and Subject Only to Direct Attack

The 237th District Court had jurisdiction to enter the order of dismissal with prejudice, making the order voidable and not void. An order is void when a court has no power or jurisdiction to render it.<sup>32</sup> All errors other than jurisdictional deficiencies render the judgment merely voidable, and such errors must be corrected on direct attack.<sup>33</sup> A void order may be collaterally attacked in another court of equal jurisdiction, but a voidable order is not subject to collateral attack and can only be challenged on direct appeal.<sup>34</sup>

In this case, then, because the 237th District Court had the jurisdiction and plenary power to enter the order of dismissal, the order was voidable, and Joachim was required to directly attack the erroneous dismissal for want of prosecution with prejudice either in the 237th District Court or on appeal. To that end, Joachim had thirty (30) days during which to file a motion for new trial, motion to reinstate, or motion to modify.<sup>35</sup> Otherwise, Joachim

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<sup>31</sup>See *In re Bennett*, 960 S.W.2d at 38.

<sup>32</sup>*Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431 (Tex. 1986).

<sup>33</sup>See *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

<sup>34</sup>*Id.*

<sup>35</sup>See TEX. R. CIV. P. 329b; TEX R. CIV. P. 165a.

had thirty (30) days to file an appeal of the order of dismissal with prejudice.<sup>36</sup> However, Joachim failed to take any action to directly attack the order entered by the 237th District Court. Consequently, Joachim waived any error with regard to the order, and it became final, unappealable, unreformable, and not subject to collateral attack by way of a second lawsuit. For purposes of *res judicata*, then, the order was a final determination, but was it on the merits?

## **II. DWOP Order With Prejudice *Became* Final Determination on Merits**

Texas law is clear that the 237th District Court had the power and jurisdiction to enter the DWOP order even after Joachim nonsuited the case. We must next examine whether the DWOP order was a determination on the merits or collateral to the merits. If it was collateral to the merits, *res judicata* does not bar the second lawsuit. However, if the dismissal functioned as a decision on the merits, *res judicata* bars the subsequently filed lawsuit.<sup>37</sup>

The Supreme Court and at least three other lower appellate courts, including two decisions by Amarillo Court of Appeals, have determined that an order of dismissal, erroneously entered with prejudice, while not initially a decision on the merits can *become* a final decision on the merits and bars a subsequent lawsuit if not properly attacked.<sup>38</sup> The

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<sup>36</sup>See TEX. R. APP. P. 26.1.

<sup>37</sup>See *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). It is undisputed that the second lawsuit involved the same claims and same parties.

<sup>38</sup>*Mann v. Gonzalez*, 595 S.W.2d 102 (Tex. 1979); *El Paso Pipe and Supply Co. v. Mountain States Leasing*, 617 S.W.2d 189 (Tex. 1981); *Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 568 (Tex. App.–Houston [14th Dist.] 1990, writ denied); *Labrie v. Kenney*, 95 S.W.3d 722 (Tex. App.–Amarillo 2003, no pet.); and *Rodriguez v. ICON Benefit Administrators, Inc.*, 2008 Tex. App. LEXIS 7870 (Tex. App.–Amarillo Oct. 15, 2008, pet. filed).

Amarillo Court decided the case at hand in direct contradiction to these other decisions and has even contradicted itself on this issue. Because of this inconsistency between the courts of appeals, and indeed, the inconsistency arising from the same court, this issue must be clarified in order to remove the uncertainty in the law and to resolve the unfairness to litigants such as Travelers.

A. *Mann v. Gonzalez: Erroneous “With Prejudice” Dismissal Became Final and Barred Subsequent Suit*

In 1979, the Texas Supreme Court issued the *Mann v. Gonzalez* opinion, upholding a summary judgment granted essentially on *res judicata* grounds.<sup>39</sup> In *Mann*, the trial court dismissed the plaintiff’s first lawsuit with prejudice, and the “judgment became final upon plaintiff’s failure to perfect an appeal.”<sup>40</sup> The plaintiff filed a second lawsuit against the same defendants and asserted the same claims as before. The trial court granted the defendant’s motion for summary judgment and dismissed the action “as a collateral attack upon the prior judgment of a court of coordinate jurisdiction.”<sup>41</sup> The court of appeals reversed.<sup>42</sup>

In reversing the decision of the court of appeals, the Supreme Court held that even though the trial judge may have erred in dismissing the original lawsuit with prejudice, that

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<sup>39</sup>*Mann v. Gonzalez*, 595 S.W.2d 102 (Tex. 1979).

<sup>40</sup>*Id.* at 102.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

error should have been corrected on appeal.<sup>43</sup> Having failed to do so, the dismissal with prejudice became final and was not subject to collateral attack.<sup>44</sup> The Supreme Court stated that the judgment of the court of appeals conflicts with Rule 329b of the TEXAS RULES OF CIVIL PROCEDURE.<sup>45</sup> Thus, the Supreme Court reversed the court of appeals' decision and affirmed the judgment of the trial court.<sup>46</sup>

B. *El Paso Pipe and Supply Co. v. Mountain States Leasing, Inc.: Failure to Attack DWOP With Prejudice Results in Res Judicata to Second Suit*

Two years after *Mann*, the Texas Supreme Court issued its opinion in *El Paso Pipe and Supply Co. v. Mountain States Leasing, Inc.*<sup>47</sup> In that case, the trial court erroneously dismissed the first lawsuit for want of prosecution with prejudice.<sup>48</sup> The plaintiff failed to directly attack the erroneous dismissal either in the trial court or on appeal, and the order became final.<sup>49</sup> Upon the plaintiff's filing of a second identical action, the trial court granted the defendant's motion for summary judgment "by reason of the prior final judgment" (*res judicata*), but the court of appeals reversed.<sup>50</sup>

The Supreme Court, relying on its decision in *Mann*, held that the court of appeals'

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<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 103.

<sup>47</sup>617 S.W.2d 189 (Tex. 1981).

<sup>48</sup>*Id.* at 190.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

judgment conflicted with Rule 329b.<sup>51</sup> The Court stated that the plaintiff's remedy with regard to the erroneous "with prejudice" dismissal of the first action was by appeal or bill of review.<sup>52</sup> Thus, the Supreme Court reversed the court of appeals' decision and affirmed the trial court's summary judgment dismissal of the subsequent lawsuit.<sup>53</sup>

C. *Andrews v. ABJ Adjusters, Inc.: Failure to Attack Erroneous DWOP With Prejudice Results in Waiver*

In 1990, the Houston Court of Appeals issued its opinion in *Andrews v. ABJ Adjusters, Inc.*<sup>54</sup> In *Andrews*, the trial court dismissed the plaintiff's lawsuit with prejudice for want of prosecution pursuant to its dismissal docket.<sup>55</sup> The appellate court 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.<sup>56</sup> The court stated that complaints on appeal must be preserved at the trial court by a timely request, motion, or objection, and a party cannot raise an issue for the first time on appeal which was not presented to the trial court.<sup>57</sup> Thus, the court affirmed the dismissal for want of prosecution with prejudice.<sup>58</sup> This Supreme Court subsequently denied writ.<sup>59</sup>

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<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567 (Tex. App.–Houston [14th Dist.] 1990, writ denied).

<sup>55</sup>*Id.* at 568.

<sup>56</sup>*Id.* at 568-69.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

In *Andrews*, then, the erroneous dismissal for want of prosecution with prejudice effectively became a final determination on the merits as a result of the plaintiff's failure to properly attack the "with prejudice" language. Any subsequently-filed lawsuit in *Andrews* would have been barred by the "with prejudice" dismissal which was allowed to become final.

D. *Labrie v. Kenney: Amarillo Holds That Erroneous DWOP With Prejudice Becomes Res Judicata if Not Properly Attacked*

Just six years ago, the Amarillo Court of Appeals, relying upon the decision in *Andrews*, held that an erroneous dismissal for want of prosecution with prejudice, which was not properly attacked by the plaintiff, barred a subsequently-filed lawsuit on the grounds of *res judicata*.<sup>60</sup> That decision by the Amarillo Court in *Labrie v. Kenney* is directly contradictory to its opinion here.<sup>61</sup>

In *Labrie*, the trial court dismissed the first lawsuit with prejudice for want of prosecution.<sup>62</sup> 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

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<sup>60</sup>*Labrie v. Kenney*, 95 S.W.3d 722, 725 (Tex. App.—Amarillo 2003, no pet.).

<sup>61</sup>Interestingly, two of the three justices who decided *Labrie* were also on the panel in this case, Chief Justice Quinn and Senior Justice Boyd.

<sup>62</sup>*Labrie*, 95 S.W.3d at 725.

properly attacked by the plaintiff.<sup>63</sup> Relying on this 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.<sup>64</sup> Thus, the Amarillo Court held in *Labrie* that the dismissal for want of prosecution with prejudice, though unquestionably improper, barred the second suit on *res judicata* grounds.<sup>65</sup>

E. *Rodriguez v. ICON Benefits Administrators, Inc.: Amarillo Again Holds That Erroneous Dismissal With Prejudice Becomes Res Judicata if Not Properly Attacked*

Just twenty days after issuing its opinion in this case (*Joachim*), and without any reference to its opinion in *Joachim*, the Amarillo Court of Appeals issued an opinion in *Rodriguez v. ICON Benefit Administrators, Inc.* dealing with this issue of the *res judicata* effect of an erroneous dismissal with prejudice.<sup>66</sup> In *Rodriguez*, the plaintiff initially filed suit against Leza in 2003 for injuries he received in an automobile collision. 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

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<sup>63</sup>*Id.* at 728-29.

<sup>64</sup>*Id.* at 729 (citing *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) (“If no appeal is taken from a dismissal with prejudice, it functions as a final determination.)).

<sup>65</sup>*Id.*

<sup>66</sup>*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).

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.<sup>67</sup> Rodriguez appealed the judgment without contesting the “with prejudice” provision, and the Amarillo Court of Appeals affirmed.<sup>68</sup>

In 2006, Rodriguez filed a second lawsuit solely against ICON asserting many of the same claims as alleged in the previous suit.<sup>69</sup> 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 decision in *Labrie v. Kenney*.<sup>70</sup>

F. Joachim Opinion: Amarillo Reverses Field

In this case, the Amarillo Court of Appeals held that Joachim’s nonsuit withdrew the merits of the case from the 237th District Court, and thus, the court had no jurisdiction to enter a judgment adjudicating the merits. Thus, the court held, because there was no final determination on the merits, Travelers failed to meet its summary judgment burden of

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<sup>67</sup>*Id.* at \*6.

<sup>68</sup>*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).

<sup>69</sup>*Rodriguez v. ICON Benefit Administrators*, 2008 Tex. App. LEXIS 7870, \*6 (Tex. App.–Amarillo Oct. 15, 2008, pet. filed).

<sup>70</sup>*Id.*

proving the elements of its affirmative defense of *res judicata*.

Under the rationale of *Mann*, *El Paso Pipe*, *Andrews*, *Labrie*, and *Rodriguez*, however, even though the nonsuit withdrew the merits of the case, and even though the 237th District Court's erroneous dismissal for want of prosecution with prejudice was not initially a decision on the merits, because Joachim failed to properly attack the "with prejudice" dismissal either in the trial court or on appeal, that dismissal *became* a final determination on the merits and *res judicata* to the subsequently-filed 72nd District Court lawsuit. As stated by this Court, the Amarillo Court's decision in this case to the contrary conflicts with Rule 329b of the TEXAS RULES OF CIVIL PROCEDURE.

It is undisputed that the 237th District Court's entry of the order of dismissal was initially collateral to the merits of the case as the court was simply cleaning the case of its docket. After all, the merits of the case had been withdrawn by Joachim's nonsuit. However, when Joachim failed to directly attack the erroneous order of dismissal by motion in the trial court or on appeal, the order *became* a final determination on the merits. Thus, the elements of *res judicata* were met, and the Amarillo Court should have affirmed the trial court's summary judgment.

The trial courts in *El Paso Pipe*, *Labrie* and *Rodriguez* had no more power to adjudicate the *merits* of the plaintiff's claims than the 237th District Court did in this case. In both *El Paso Pipe* and *Labrie*, the trial court dismissed for want of prosecution, a non-

merits dismissal.<sup>71</sup> In *Rodriguez*, the dismissal was for failure to comply with a procedural rule, also a non-merits dismissal.<sup>72</sup> In its opinions in *Labrie* and *Rodriguez*, the Amarillo Court of Appeals recognized that the trial court erred in dismissing the plaintiffs' claims *with prejudice*, a determination *on the merits*. However, despite neither trial court having authority to adjudicate the merits and dismiss with prejudice, the Amarillo Court of Appeals, in both cases, found that such dismissals *became* merits decisions when the plaintiffs allowed the dismissal orders to become final without direct attack. The same rationale should apply in this case regardless of whether the trial court lacked authority to adjudicate the merits because of a nonsuit, procedural hiccup, or otherwise.

Travelers would also point out that the Amarillo Court's opinion that the 237th District Court lacked jurisdiction to enter the order of dismissal rests largely on the fact that Travelers had no claim for affirmative relief pending at the time. However, none of the defendants in *Mann*, *El Paso Pipe*, *Andrews*, *Labrie*, or *Rodriguez* had claims for affirmative relief pending either. Yet, the appellate courts, including this Honorable Court, upheld the validity of the "with prejudice" dismissal orders and had no problem finding that those orders became final decisions on the merits, barring any subsequent lawsuit. For these reasons, the Amarillo Court's decision in this case is inconsistent and in direct conflict with this Supreme

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<sup>71</sup>See *El Paso Pipe*, 617 S.W.2d at 190; see also *Labrie*, 95 S.W.3d at 725; see also *Rizk*, 603 S.W.2d at 775 (dismissal for want of prosecution is not a decision on the merits and does not prevent a party from refileing the suit).

<sup>72</sup>See *Rodriguez*, 2008 Tex. App. LEXIS 7870 at \*5, 10-11 (Pirtle dissenting) (citing *Thomas v. Knight*, 52 S.W.3d 292, 295 (Tex. App.—Corpus Christi 2001, pet. denied) (dismissal for failure to comply with procedural rule, such as misjoinder, is not a dismissal on the merits)).

Court's decisions as well as its own opinions on this issue. The court's decision has therefore brought uncertainty in the law, requiring this Supreme Court to step in and bring clarity to these issues.

In that regard, the reasoning of the above-cited 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. The plaintiff whose case has been erroneously dismissed with prejudice has an opportunity to remedy the error. In fact, 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.”<sup>73</sup> However, the plaintiff's opportunity to remedy the error comes at a time when the trial court issuing the erroneous dismissal or a reviewing appellate court can do something about it. Error in dismissing a case for want of prosecution with prejudice cannot be raised for the first time on appeal and must be presented to the trial court.<sup>74</sup> In sum, a plaintiff cannot be allowed to simply ignore a “with prejudice” dismissal and then file a new lawsuit upon the same claims which have been previously dismissed. At some point, a defendant should be entitled to rely upon the dismissal with prejudice. Placing the burden on the plaintiff to reform a “with prejudice” dismissal is not only proper but necessary.

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<sup>73</sup>*See Willis*, 604 S.W.2d at 450; *see also Melton*, 727 S.W.2d at 303.

<sup>74</sup>*El Paso Pipe*, 617 S.W.2d at 190; *Andrews*, 800 S.W.2d at 568-69).

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## CONCLUSION

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While the 237th District Court did not have power or jurisdiction to adjudicate the *merits* of the case after nonsuit, the court did retain jurisdiction to enter the order of dismissal that it entered. In fact, the court was required to enter the order of dismissal in order to officially and formally conclude the case. Thus, the order of dismissal for want of prosecution with prejudice was voidable and not void, making it subject only to a direct attack by Joachim and not a collateral attack.

The order of dismissal with prejudice was not initially a determination on the merits but rather was collateral to the merits. In fact, the merits had been withdrawn from the court by Joachim's nonsuit. However, according to the rationale of the *Mann, El Paso Pipe, Andrews, Labrie, and Rodriguez* cases, the order *became* a final determination on the merits and barred the subsequent suit when Joachim failed to properly challenge the order and give the 237th District Court or the appellate court an opportunity to correct the erroneous "with prejudice" dismissal. For these reasons, Travelers carried its burden of proving the elements of its *res judicata* affirmative defense, and the trial court properly granted summary judgment on those grounds. The Amarillo Court of Appeals erred in reversing the summary judgment and in the process muddied the waters with an opinion inconsistent with its two other opinions on this same matter. Travelers requests that this Honorable Court grant its Petition for Review in order to clear those waters and square this case with the opinions in *Mann, El*

**RELIEF REQUESTED**

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

1. that its Petition for Review be granted and the case be set for oral submission;
2. that upon submission, the Court of Appeals' judgment below be reversed and rendered that Respondent take nothing, and the trial court judgment be affirmed;
3. 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;
4. 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 May 8, 2009, as follows:

**CMRRR # 91 7108 2133 3935 2730 2126**

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/s/ Christopher B. Slayton \_\_\_\_\_  
**CHRISTOPHER B. SLAYTON**