

Case 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 OF AMARILLO, TEXAS
APPEAL FROM CAUSE NO. 2002-520,246 IN THE DISTRICT COURT OF
LUBBOCK COUNTY, TEXAS 72ND JUDICIAL DISTRICT,
HONORABLE RUBEN REYES, PRESIDING

**RESPONDENT, BARRY JOACHIM'S,
RESPONSE TO PETITION FOR REVIEW**

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TABLE OF CONTENTS

Identity of Parties and Counsel	I
Table of Contents	ii
Index of Authorities	iii
Statement of the Case	1
Issue Presented	3
Why the Petition for Review Must be DENIED	3
Statement of Facts	4
Summary of Argument	6
Argument and Authorities	7
Issue No. 1: Once Respondent filed a Notice of Non-Suit with the 237 th District Court and properly served same upon Appellee while no claims for affirmative relief were pending, did the subsequent trial court (72 nd District Court) err in reconsidering and granting Appellee’s Motion for Summary Judgment, thus concluding that the 237 th District Court’s dismissal of the case for Want of Prosecution was proper and merely voidable as opposed to void?	7
Conclusion and Prayer	12
Certificate of Service	13

INDEX OF AUTHORITIES

CASES	PAGE
1) <i>BHP Petroleum Co. v. Millard</i> , 800 S.W.2d 838 (Tex. 1990)	7
2) <i>In Re Bennett</i> , 960 S.W.2d 35, 38 (Tex. 1998)	7, 8, 9
3) <i>Newman Oil Company v. Alkek</i> , 657 S.W.2d 915 (Tex. App.–Corpus Christi 1983, no writ)	8, 9
4) <i>State v. Gary</i> , 359 S.W.2d 456 (1962)	8, 9
5) <i>Ex parte Norton</i> , 118 Tex. 581; 17 S.W.2d 1041 (1929)	8
6) <i>Hoodless v. Winter</i> , 80 Tex. 638; 16 S.W. 427 (1891)	8
7) <i>In Re Martinez</i> , 77 S.W.3d 462 (Tex. App.–Corpus Christi 2002, no pet. h.)	8, 10
8) <i>Greenberg v. Brookshire</i> , 640 S.W.2d 870 (Tex. 1982)	8, 9
9) <i>Zimmerman v. Ottis</i> , 941 S.W.2d 259 (Tex.App.–Corpus Christi 1996, orig. proceeding)	8, 9,10
10) <i>Mapco, Inc. v. Forrest</i> , 795 S.W.2d 700 (Tex. 1990)	10
11) <i>Browning v. Placke</i> , 698 S.W.2d 362, 363 (Tex. 1985)	10, 11
12) <i>Soloman, Lambert, Roth & Associates, Inc. v. Kidd</i> , 904 S.W.2d 896, 900 (Tex. App.–Houston [1 st Dist] 1995, no writ)	11

13)	<i>City of Houston v. Clear Creek Basin Auth.</i> , 589 S.W.2d 671, 678 (Tex. 1979)	11
14)	<i>Collins v. County of El Paso</i> , 954 S.W.2d 137, 145 (Tex. App.–El Paso 1997, pet. denied)	11
15)	<i>Casso v. Brand</i> , 776 S.W.2d 551, 556 (Tex. 1989)	11
16)	<i>Science Spectrum, Inc. v. Martinez</i> , 941 S.W.2d 910, 911 (Tex. 1997)	11
17)	<i>Specialty Retailers, Inc. v. DeMoranville</i> , 933 S.W.2d 490, 491 (Tex. 1996)	11
18)	<i>Nixon v. Mr. Property Mgmt. Co.</i> , 690 S.W.2d 546, 549 (Tex. 1985)	12
19)	<i>Walker v. Harris</i> , 924 S.W.2d 375, 377 (Tex. 1996)	12

TEXAS RULES

1)	<i>Texas Rules of Civil Procedure—Rule 162</i>	2
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STATEMENT OF THE CASE

Respondent/Plaintiff (hereinafter JOACHIM) sued Petitioner/Defendant (hereinafter TRAVELERS) for breach of contract and bad faith damages stemming from a first-party Underinsured Motorist claim for an auto accident that occurred on August 5, 1997.

The initial UIM lawsuit was filed in the 364th District Court on August 4, 1999. (CR 64). The case was later transferred to the 237th District Court before Judge Sam Medina. Prior to trial, and while there were no claims for affirmative relief pending for Defendant TRAVELERS, Plaintiff JOACHIM filed a Notice of Non-Suit **without prejudice** on August 28, 2001 with the Court and served same upon all Defendants via certified mail/return receipt requested. (CR 180).

On November 26, 2001, the 237th District Court dismissed the case with prejudice for Want of Prosecution. (CR 183). JOACHIM never received the Court's Notice of Intent to Dismiss—No Final Order dated November 1, 2001 nor the Order of Dismissal for Want of Prosecution itself. (CR 182).

JOACHIM re-filed the instant cause on December 5, 2002 and the case was assigned to the 72nd District Court before Judge Blair Cherry. (CR 2). TRAVELERS filed a Motion for Summary Judgment on August 21, 2003 based on *res judicata* of the previous trial court (237th District Court) entering a dismissal with prejudice after JOACHIM had filed a Notice of Non-Suit. (CR 50).

JOACHIM filed a response to TRAVELERS' Motion for Summary Judgment on November 4, 2003 asserting that the trial court's Order dismissing the case with prejudice was void as a matter of law (since the 237th District Court was without power to do anything following JOACHIM's Non-Suit but enter an Order dismissing the case **without** prejudice). (CR 171).

On November 14, 2003, a hearing on TRAVELERS' Motion for Summary Judgment was held. By letter dated December 10, 2003, the 72nd District Court (Judge Blair Cherry) issued a ruling denying the Motion for Summary Judgment and entered an Order overruling same on December 12, 2003. (CR 213).

On January 21, 2004, TRAVELERS filed a Motion to Reconsider the denial of its Motion for Summary Judgment. (CR 191). A hearing was held on February 5, 2004 and the Court did not change its previous decision, but entered an Order denying TRAVELERS' Motion for Summary Judgment a second time.

On May 3, 2006, TRAVELERS filed yet another Motion to Reconsider its previously denied, reconsidered and denied Motion for Summary Judgment. (CR 295). JOACHIM filed a response to same on May 12, 2006 and a hearing was held that same day before Judge Ruben Reyes. (CR 447). Though the trial of the case was set just ten days away on May 22, 2006, the trial court entered an Order Granting TRAVELERS' Motion for Summary Judgment on May 17, 2006. (CR 451). JOACHIM filed a Motion for New Trial on June 7, 2006 and a Notice of Appeal on July 31, 2006. (CR 453 and 471).

Respondent JOACHIM perfected this appeal to this Honorable Court urging that the trial court erred in granting Petitioner TRAVELERS' Motion for Summary Judgment because: 1) the 237th District Court had no jurisdiction to grant a dismissal with prejudice for Want of Prosecution after Respondent had properly filed a Notice of Non-Suit and such DWOP Order was **void** as a matter of law, and 2) the trial court's granting of Petitioner's Motion for Summary Judgment is a clear abuse of discretion under the present facts.

ISSUE PRESENTED

Issue No. 1: Once Respondent JOACHIM filed a Notice of Non-Suit with the 237th District Court and properly served same upon Petitioner TRAVELERS while no claims for affirmative relief were pending, did the subsequent trial court (72nd District Court) err in reconsidering and granting TRAVELERS' Motion for Summary Judgment, thus concluding that the 237th District Court's dismissal of the case for Want of Prosecution was proper and merely voidable as opposed to void?

WHY THE PETITION FOR REVIEW MUST BE DENIED

After twelve long rounds of heavyweight boxing, the bells rings with both fighters on their feet and still swinging. Since the bell has sounded, JOACHIM's fighting is done and he is returning to his corner to await the judges' decision on the scorecards. The fight is over and he's about to take a seat on his stool in the corner. At that very instant, his opponent TRAVELERS lunges across the ring and clocks him in the back of the head delivering a knockout blow. Though the cheap-shot lands 5 seconds **after** the final bell, the referee, Medina, unbelievably counts out JOACHIM and awards the victory to TRAVELERS via the post-fight knockout. Are the judges/boxing commission really going to allow such a travesty? A knockout punch delivered **after** the final bell sounds? Not a chance.

STATEMENT OF FACTS

After the third-party liability carrier (Kemper) tendered its policy limits in settlement of the underlying claim, Respondent/Plaintiff JOACHIM sued Petitioner/Defendant TRAVELERS for breach of contract and bad faith damages stemming from a first-party Underinsured Motorist claim for an auto accident that occurred on August 5, 1997.

The initial UIM lawsuit was filed in the 364th District Court on August 4, 1999. (CR 64). The case was later transferred to the 237th District Court before Judge Sam Medina. Prior to trial, and while there were no claims for affirmative relief pending for Defendant TRAVELERS, Plaintiff JOACHIM filed a Notice of Non-Suit **without prejudice** on August 28, 2001 with the Court and served same upon all Defendants via certified mail/return receipt requested per TRCP 162. (CR 180).

On November 26, 2001, the 237th District Court dismissed the case with prejudice for Want of Prosecution. (CR 183). JOACHIM never received the Court's Notice of Intent to Dismiss—No Final Order dated November 1, 2001 nor the Order of Dismissal for Want of Prosecution itself. (CR 182).

JOACHIM re-filed the instant cause on December 5, 2002 and the case was assigned to the 72nd District Court before Judge Blair Cherry. (CR 2). TRAVELERS filed a Motion for Summary Judgment on August 21, 2003 based on *res judicata* of the previous trial court (237th District Court) entering a dismissal with prejudice after JOACHIM had filed a Notice of Non-Suit. (CR 50).

JOACHIM filed a response to TRAVELERS' Motion for Summary Judgment on November 4, 2003 asserting that the trial court's Order dismissing the case with prejudice was void as a matter of law (since the 237th District Court was without power to do anything following JOACHIM's Non-Suit but enter an Order dismissing the case **without** prejudice). (CR 171).

On November 14, 2003, a hearing on TRAVELERS' Motion for Summary Judgment was held. By letter dated December 10, 2003, the 72nd District Court (Judge Blair Cherry) issued a ruling denying the Motion for Summary Judgment and entered an Order overruling same on December 12, 2003. (CR 213 and Appendix A).

On January 21, 2004, TRAVELERS filed a Motion to Reconsider the denial of its Motion for Summary Judgment. (CR 191). A hearing was held on February 5, 2004 and the Court did not change its previous decision, but entered an Order denying TRAVELERS' Motion for Summary Judgment a second time.

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SUMMARY OF ARGUMENT

Since Respondent JOACHIM timely filed and properly served his Notice of Non-Suit against Petitioner TRAVELERS while no claims for affirmative relief were pending, the 237th District Court was without power or jurisdiction to do anything but enter an Order of Non-Suit Without Prejudice. JOACHIM had an absolute right to file a Notice of Non-Suit and the Order granting a Non-Suit is merely a ministerial act. The 237th District Court's subsequent dismissal of the case with prejudice was **void** as a matter of law, and thus, could be collaterally attacked in another court of equal jurisdiction. The 72nd District Court's (Judge Cherry) multiple denials of TRAVELERS' Motion for Summary Judgment (which was based upon *res judicata*) served, in essence, to rectify the previous trial court's ruling. Judge Reyes' reconsideration of Judge Cherry's previous two rulings and the subsequent granting of TRAVELERS' Motion for Summary Judgment on *res judicata* grounds was in error, since a final judgment on the merits never existed.

Any and all action taken by Judge Medina (other than dismissing the case without prejudice) was void, not merely voidable. As such, Petitioner's reliance on *Labrie* is misplaced, because there could have never been a decision on the merits after the Non-Suit was filed. Judge Medina simply had no jurisdiction whatsoever to attempt to enter a decision on the merits in the facts at bar. After the Non-Suit, there existed no issues in controversy to adjudicate.

ARGUMENT AND AUTHORITIES

Issue No. 1: Once Respondent JOACHIM filed a Notice of Non-Suit with the 237th District Court and properly served same upon Petitioner TRAVELERS while no claims for affirmative relief were pending, did the subsequent trial court (72nd District

Court) err in reconsidering and granting TRAVELERS' Motion for Summary Judgment, thus concluding that the 237th District Court's dismissal of the case for Want of Prosecution was proper and merely voidable as opposed to void?

1. Overview.

Respondent JOACHIM submits that the 237th District Court's dismissal of the case for Want of Prosecution is void as a matter of law, and thus, has no *res judicata* implications. Pivotal to this issue is the fact that JOACHIM had an absolute right to file a Notice of Non-Suit and the signing of an Order granting the Non-Suit is merely a ministerial act. With no claims for affirmative relief pending, the 237th District Court was without power or jurisdiction to do anything but enter an Order dismissing the case without prejudice pursuant to the Non-Suit. Thus, the 237th District Court's Order of Dismissal for Want of Prosecution is void, not merely voidable. As such, the case (former cause number 99-507,018) is still active until the 237th District Court enters an Order of Dismissal without prejudice pursuant to, and as is specifically referenced in, Plaintiff's Notice of Non-Suit of August 28, 2001.

2. Respondent JOACHIM's Right to File a Notice of Non-Suit.

Under Texas Rules of Civil Procedure 162, a plaintiff has the right to take a Non-Suit at any time before he has rested his case. The plaintiff has the absolute right to bring a Non-Suit before introducing all of his evidence minus rebuttal. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990); *In Re Bennett*, 960 S.W.2d 35, 38 (Tex. 1998).

This right is unqualified except such Non-Suit shall not prejudice the right of the adverse party to be heard on any affirmative relief asserted in his pleading on file when the

Non-Suit is taken. *Newman Oil Company v. Alkek*, 657 S.W.2d 915, 919 (Tex. App.–Corpus Christi 1983, no writ); *State v. Gary*, 359 S.W.2d 456 (1962); *Ex parte Norton*, 118 Tex. 581, 17 S.W.2d 1041 (1929); *Hoodless v. Winter*, 80 Tex. 638, 16 S.W. 427 (1891).

A plaintiff's right to dismiss the suit exists from the moment a written motion is filed or an oral motion is made in open court, unless the defendant has, prior to that time, filed pleadings seeking affirmative relief. *In Re Martinez*, 77 S.W.3d 462, 464; *Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex.1982); *Zimmerman v. Ottis*, 941 S.W.2d 259, 261 (Tex.App.–Corpus Christi 1996, orig. proceeding).

Only in cases where claims for affirmative relief are pending (motions for sanctions, counterclaims or cross-claims, pleas at bar, or *sua sponte* sanctions by the court) will any action by the trial court, other than the granting of the Non-Suit, be permitted. TRAVELERS' reliance on *In Re Bennett, supra*, in support of its Motion for Summary Judgment was misplaced. The *Bennett* case involved a pending motion for sanctions. Though said motion for sanctions (for Plaintiff counsel's deliberate attempt to circumvent the random case filing mandates) was *sua sponte* by the trial judge following the filing of the Notice of Non-Suit, the sanctions issue existed and a hearing was allowed on same.

Neither existed in the instant case involving JOACHIM's Non-Suit. There were no claims for affirmative relief nor any pending sanctions. Judge Medina in the 237th District Court certainly did not afford Respondent JOACHIM procedural due process, as guaranteed by the United States Constitution, of a hearing if, by some wild stretch of the imagination,

this Honorable Supreme Court considers what Judge Medina did to be a “sanction” against JOACHIM. *See Bennett, at page 40.*

The records will reflect it is undisputed that, at the time of the filing of JOACHIM’s Notice of Non-Suit, TRAVELERS had not filed any pleadings whatsoever seeking affirmative relief.

3. Court’s Jurisdiction over a Non-Suit.

The Texas Supreme Court held that the granting of a Non-Suit is merely a **ministerial act** in *Greenberg*, at 872 (emphasis added). The Corpus Christi Court of Appeals ruled in *Newman Oil Company v. Alkek*, that [u]nder the circumstances presented in both the prior appeal and this appeal, when the plaintiffs took their nonsuit, the trial court lost jurisdiction of the entire case except jurisdiction to render an order of dismissal of the case without prejudice. It did not have any power or jurisdiction to entertain either the defendants’ first or second motion for summary judgment or to render summary judgment thereon.” *Newman*, at 920. The *Newman* Court held that summary judgment granted after the notice of a Non-Suit would be reversed for “lack of jurisdiction.” *Id.*, at 920; *See also, State v. Gary, supra.*

When the entire case is Non-Suited, no real controversy exists between the parties, and the trial court has no jurisdiction to ignore the Non-Suit or continue the lawsuit in such a manner suggesting justiciable claims remain for determination. *Zimmerman*, at 263. The Court in *Zimmerman* further explained that, after the Motion/Notice of Non-Suit, the lawsuit remains on the docket merely as an “empty shell awaiting the final ministerial act of

dismissal.” *Id.*

4. The Dismissal for Want of Prosecution is Void.

The Texas Supreme Court has stated that a judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, **no jurisdiction to enter the particular judgment**, or no capacity to act as a court. *Id. at 262; Mapco, Inc. v. Forrest*, 795 S.W.2d 700,708 (Tex.1990); *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (emphasis added). The *Martinez* Court held that the trial court’s attempt to grant a motion for new trial after notice of Non-Suit was beyond its jurisdiction and amounted to a void order. *Martinez*, at 464-465.

In the present case, the 237th District Court had no jurisdiction at all to ignore JOACHIM’s Notice of Non-Suit or to take any action whatsoever other than Ordering the Non-Suit, which would have resulted in the dismissal of the case without prejudice—just as JOACHIM filing the Non-Suit intended.

The Notice of Non-Suit by JOACHIM on August 28, 2001 terminated any real controversy between the parties. At the very moment the Non-Suit was filed, there existed no case to prosecute, and thus, no case for the trial court to dismiss with prejudice or adjudicate on the merits. The case was just an empty shell. The Dismissal for Want of Prosecution by the 237th District Court is void as a matter of law.

Most importantly, then, if the underlying judgment is void, it **can** be collaterally attacked by another court of equal jurisdiction. *Soloman, Lambert, Roth & Associates, Inc.*

v. Kidd, 904 S.W.2d 896, 900 (Tex. App.–Houston [1st Dist] 1995, no writ); *Browning*, at 363 (emphasis added). Accordingly, Judge Cherry’s denial of TRAVELERS’ Motion for Summary Judgment merely served to rectify Judge Medina’s erroneous Order in dismissing the case with prejudice after JOACHIM had taken his Non-Suit.

5. The Standard of Granting Summary Judgments.

The purpose of a summary judgment under TRCP 166a is to allow a trial court to dispose promptly of cases that involve unmeritorious claims. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). However, the purpose of a summary judgment is not intended to deprive litigants the right to a trial by jury. *Collins v. County of El Paso*, 954 S.W.2d 137, 145 (Tex.App.–El Paso 1997, pet. denied). A non-movant in a summary judgment proceeding is not required to produce summary judgment evidence until after the movant establishes it is entitled to summary judgment as a matter of law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989).

In deciding whether there is a disputed issue of material fact that precludes summary judgment, the court assumes that all evidence favorable to the non-movant is true. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 491 (Tex. 1996). The court is required to view all of the evidence presented in a summary judgment setting in the light most favorable to the non-movant. See *Specialty Retailers* at 491; *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985). The court must indulge every reasonable inference and resolve all doubts

in favor of the non-movant. *Science Spectrum*, 941 S.W.2d at 911; *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

6. Abuse of Discretion.

In indulging him with every reasonable inference and resolving all doubts in favor of the non-movant, JOACHIM would argue that, as discussed above in items #1, 2, 3 and 4, the complained of action, which is tantamount to a sanction (Judge Medina's dismissal with prejudice of the case for Want of Prosecution **after** JOACHIM filed his Non-Suit and Judge Reyes' affirmation of same via his granting of TRAVELERS' Motion for Summary Judgment), rose to the level of an abuse of discretion and was reversible error on the part of the trial court.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent BARRY JOACHIM prays that upon hearing and consideration of the Petition for Review and Response to same, this Texas Supreme Court deny Petitioner's Petition for Review giving full weight to the concise and well-reasoned opinion of the Seventh District Court of Appeals of Texas.

Respectfully submitted,

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I hereby certify that on this the 6th day of March 2009, a true and correct copy of the above and foregoing document was hand delivered to the following counsel pursuant to the Texas Rules of Appellate Procedure:

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