

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'S BRIEF ON THE MERITS

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ISSUE PRESENTED

Issue No. 1: Once JOACHIM filed a Notice of Nonsuit 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?

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 Nonsuit **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 Nonsuit. (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 nonsuit 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).

SUMMARY OF ARGUMENT

Since Respondent JOACHIM timely filed and properly served his Notice of Nonsuit 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 Nonsuit Without Prejudice. JOACHIM had an absolute right to file a Notice of Nonsuit and the Order granting a nonsuit 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* and similar cases is misplaced, because there could have never been a decision on the merits after the nonsuit 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 nonsuit, there existed no issues in controversy to adjudicate.

ARGUMENT

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 Nonsuit and the signing of an Order granting the nonsuit is merely a ministerial act. With no claims for affirmative relief nor sanctions 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 nonsuit. Thus, the 237th District Court's Order of Dismissal for Want of Prosecution is void, not merely voidable.

2. Respondent Joachim's Right to File a Notice of Nonsuit.

Under Texas Rules of Civil Procedure 162, a plaintiff has the right to take a nonsuit at any time before he has rested his case. The plaintiff has the absolute right to bring a nonsuit 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. 1997).

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

The nonsuit “extinguishes a case or controversy from the ‘moment the motion is filed.’” *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006), (citing *Shadowbrook Apts. v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990)).

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 nonsuit, 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 Nonsuit, the sanctions issue existed and a hearing was allowed on same.

This Court has made clear that a claim for affirmative relief “must allege a cause of action, independent of the plaintiff’s claim, on which the claimant could recover compensation or relief, even if the plaintiff abandons or is unable to establish his cause of action.” *Blackmon*, at 101. While Rule 162 permits “motions for costs, attorney’s fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit’s effect of rendering the merits of the case moot.” *Id.*

With respect to Joachim’s nonsuit, 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 40. Further, since this was an auto accident and not a medical malpractice action, there exists no statutory sanctions to be imposed if certain requirements are not met.

The record will reflect it is undisputed that, at the time of the filing of Joachim’s Notice of Nonsuit, Travelers had not filed any pleadings whatsoever seeking affirmative relief and Joachim was not subject to any pending or statutory sanctions.

3. Trial Court’s Jurisdiction over a Nonsuit.

The Texas Supreme Court held that the granting of a nonsuit 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 nonsuit would be reversed for “lack of jurisdiction.” *Id.*, at 920; *See also, State v. Gary, supra.*

In *Blackmon*, the plaintiff filed a nonsuit while the matter was pending an interlocutory appeal from defendant’s pre-trial plea to the jurisdiction. This Court held that

plaintiff's nonsuit deprived the court of appeals from jurisdiction to issue an order and opinion on rehearing. *Blackmon*, at 100-101.

When the entire case is nonsuited, no real controversy exists between the parties, and the trial court has no jurisdiction to ignore the nonsuit 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 Nonsuit, 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; *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005); *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 Nonsuit was beyond its jurisdiction and amounted to a void order. *Martinez*, at 464-465.

In referencing this Court's holding in *Mapco*, the Fort Worth Court of Appeals in April 2009 confirmed that "a court **must** have jurisdiction over the parties and the subject matter before it **or else any judgment it renders is void**. *Parker County's Squaw Creek*

Downs v. Watson, 2009 WL 885941 (Tex. App.–Fort Worth) (emphasis added).

A case “becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings.” *In re Kellogg Brown & Root, Inc.* 166 S.W.3d 732, 737 (Tex. 2005) (original proceeding).

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

The Notice of Nonsuit by Joachim on August 28, 2001 terminated any real controversy between the parties. At the very moment the nonsuit 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, not merely voidable, as Petitioner contends.

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 v. Placke*, 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 nonsuit.

5. Erroneous DWOP Orders Can Become Final *Unless* a Nonsuit is Taken.

The body of cases cited in Petitioner's brief regarding erroneous DWOP Orders becoming a final determination on the merits (*Mann, El Paso Pipe, Labrie and Rodriguez*), and thus, resulting in *res judicata* are inapplicable to the case at bar. Not one of those cases dealt with a plaintiff having already filed a nonsuit. In all of those cases, the erroneous dismissal was voidable, as opposed to void. In all of those cases, the court had the power to dismiss the case, but merely granted more relief (via dismissal with prejudice) than initially sought or intended. In Joachim's case, however, an empty shell existed the very moment nonsuit was filed and the only action that could have ever been taken by the trial court was to enter an Order dismissing the case without prejudice.

To Joachim's knowledge, there has **never** been a Texas case where any appellate court has allowed or approved a dismissal with prejudice after a nonsuit when no claims for affirmative relief nor sanctions were pending at the time the nonsuit is filed.

6. The Standard of Review.

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); 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. *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).

When material facts are undisputed, the nonmovant may defeat a motion for summary judgment by establishing that the movant's legal position is unsound. *Hansen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 90 (Tex. App.–Dallas 1996, writ denied).

CONCLUSION AND PRAYER

After twelve long rounds, the bells rings with both fighters still on their feet and still

swinging. The bell has sounded and Joachim's fighting is done for the day. Though there will definitely be a rematch in the future, that fight is for another day...another time. THIS fight, however, is over and Joachim heads to his corner to await the judges' decision on the scorecards. As Joachim is about to take a seat on his stool in the corner, 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 (trial court) unbelievably counts out Joachim and awards the victory to Travelers via the **post**-fight knockout. The judges and boxing commission obviously cannot allow such a travesty—a knockout punch delivered **after** the final bell sounds.

WHEREFORE, PREMISES CONSIDERED, Respondent Joachim prays that the Petition for Review be denied, that the concise and well-reasoned opinion of the Seventh District Court of Appeals of Texas be affirmed, that Respondent have and recover his costs of court and reasonable and necessary attorneys fees and expenses incurred in the defense of this appeal to the full extent permitted by law, and that he have all other and further relief to which he is justly entitled, both at law and in equity.

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I hereby certify that on this the 6th day of August 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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