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 MOTION FOR REHEARING

THE STACE WILLIAMS LAW FIRM

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ISSUE PRESENTED

Issue No. 1: The effect of the Texas Supreme Court's decision in the present case represents an overruling of precedent and a change in the law in the State of Texas, so contrary to previous Supreme Court authority and application, that the decision should be reformed to "remanded" as opposed to "reversed and rendered" in the interests of justice.

STATEMENT OF FACTS

JOACHIM sued TRAVELERS for breach of contract/bad faith 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, 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, however, 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 attacked the erroneous order **collaterally** and re-filed the instant cause on December 5, 2002. 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 asserting *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).

Following a hearing in November, and 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). On February 5, 2004, after hearing, the Court 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).

JOACHIM appealed and the Seventh District Court of Appeals in Amarillo reversed and remanded the case. This Supreme Court has now reversed the Seventh Court of Appeals and rendered judgment, effectively denying JOACHIM's 7th Amendment right to a civil trial by jury.

SUMMARY OF ARGUMENT

JOACHIM timely filed and properly served his Notice of Nonsuit Without Prejudice against TRAVELERS in specific accordance with Texas Rules of Civil Procedure–Rule 162. There were no claims for affirmative relief pending, no motions for sanctions pending and no *sua sponte*

sanctions contemplated nor ever at issue. Thus, 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 was 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 pursuant to Texas Supreme Court authority at that time. The 72nd District Court's multiple denials of TRAVELERS' Motion for Summary Judgment (which was based upon *res judicata*) served, in essence, to rectify collaterally the previous trial court's ruling.

Any and all action taken by Judge Sam Medina in the 237th District Court (other than dismissing the case **without** prejudice) was void, not merely voidable, pursuant to well-settled Texas Supreme Court authority and analogous Federal law precedent and application. Judge Medina simply had no jurisdiction whatsoever to attempt to enter a decision on the merits in the facts at bar. After JOACHIM's Notice of Nonsuit Without Prejudice, there existed no issues in controversy to adjudicate.

By reversing and rendering, this Supreme Court is effectively denying JOACHIM's 7th Amendment right to a civil trial by jury vis-a-vis a grossly erroneous trial court ruling, though JOACHIM's strict adherence to the precise language of TRCP 162 and subsequent collateral attack of a void order complied with the then-existing procedural mandates, Texas Supreme Court authority and Federal law precedent and application.

In all fairness to JOACHIM, who merely followed well-settled Texas law at the time, the Texas Supreme Court should either change its ruling or modify same from "render" to "remand" in

the interests of justice.

ARGUMENT

1. Overview.

For the first time in the history of Texas law, and in direct contravention of 30 years of Texas Supreme Court authority on the issue and clear Federal guidance in the matter, this Supreme Court has ruled that a trial court retains jurisdiction to enter an erroneous merits determination judgment following a Notice of Nonsuit **without** prejudice. By reversing and rendering, JOACHIM is effectively deprived of his 7th Amendment right to a civil trial. In the interests of justice, this Supreme Court decision should either be changed or modified and remanded to the 237th District Court, so that the initial trial court can rectify said erroneous

ruling. The case still exists as an empty shell in the initial trial court unless and until the only ministerial act allowable (dismissal without prejudice) is performed.

2. Texas Supreme Court authority relied upon by JOACHIM.

A. A party requesting a nonsuit has an **absolute right** to a nonsuit at the moment **notice** is timely filed. *Greenberg v. Brookshire,* 640 S.W.2d 870, 872 (Tex. 1982); *BHP Petroleum Co. v. Millard,* 800 S.W.2d 838, 840 (Tex. 1990) (emphasis added).

B. 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)).

C. Under Rule 162, a trial court retains power after a nonsuit is filed only to entertain matters "collateral" to the merits (specifically limited to claims for affirmative relief, attorney's fees and sanctions), but is without discretion to deny the nonsuit. *In Re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997); *Estate of Blackmon,* 195 S.W. at 101; *Hooks v. Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991). Entering a dismissal with prejudice following the nonsuit, as opposed to a dismissal without prejudice following the nonsuit as specifically requested by the plaintiff, operates as a determination on the merits and is clearly not "collateral."

D. 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." *Estate of Blackmon,* 195 S.W. at 101 (cited in *Villifani v. Trejo*, 251 S.W.3d 466, 469 (Tex. 2008). 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). Once JOACHIM took his nonsuit pursuant to Rule 162, there were no matters in controversy and the case became moot.

E. An order is void if it is apparent that the court "had no jurisdiction over the parties or property, no jurisdiction of the subject matter, **no jurisdiction to enter the particular judgment**, or no capacity to act." *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).

F. If a court lacks jurisdiction over the parties and the subject matter before it, any judgment it renders is void. *Mapco, Inc.* 795 S.W.2d at 703. 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).

G. Consequently, if the underlying judgment is void, it **can** be collaterally attacked by another court of equal jurisdiction. *Browning v. Placke,* 698 S.W.2d at 363; *Soloman, Lambert, Roth & Associates, Inc. v. Kidd*, 904 S.W.2d 896, 900 (Tex. App.–Houston [1st Dist] 1995, no writ) (emphasis added).

3. Federal guidance relied upon by JOACHIM.

A. Analogous to Texas Rule 162 is Federal Rule 41(a)(1)(A)(i) which provides that an action may be dismissed by the plaintiff without an order of the court by filing a notice

of dismissal before service by the adverse party of an answer or a motion for summary judgment. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987).

B. A judgment on the merits rendered after the plaintiff files a dismissal notice pursuant to Federal Rule 41(a)(1) is void. *Marques v. Federal Reserve Bank of Chicago*, 286 F.3d 1014, 1018 (7th Cir. 2002).

C. Directly on point was the 5th Circuit's holding in *Williams v. Ezell*, 531 F.2d 1261, 1264 (5th Cir. 1976) where, following the filing of a notice of dismissal, the district court's attempt to deny relief on the merits and dismiss with prejudice was void.

4. This Supreme Court's recent decision herein has resulted in a change in law.

A. The body of cases relied upon by TRAVELERS 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 present case. Not one of those cases dealt with a plaintiff having already filed a nonsuit without prejudice and the overt implications of same.

B. In all of those cases, the erroneous dismissal was voidable, as opposed to void. In all of those cases, the trial court had the power to dismiss the case, but merely granted more relief (via dismissal with prejudice) than initially sought or intended.

C. In JOACHIM's case, however, an empty shell existed the very moment nonsuit without prejudice was filed and the only action that could have ever been taken by the trial court, prior to this Supreme Court's recent ruling herein, was to enter an order dismissing the

case without prejudice.

5. This case should be remanded to the trial court in the interests of justice.

A. Texas Rule of Appellate Procedure 60.3 provides: "When reversing the court of appeals' judgment, the Supreme Court may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate." TEX. R. APP. P. 60.3.

B. Legitimate scenarios exist that mandate remanding rather than rendering.

i. "The most compelling case for [a remand in the interest of justice] is where we overrule existing precedents on which the losing party relied at trial." *Westgate, Ltd. v. State,* 843 S.W.2d 448, 455 (Tex. 1992).

ii. The Supreme Court has remanded in the interest of justice when precedent has been overruled or the applicable law has otherwise changed between the time of trial and the disposition of the appeal. *Twyman v. Twyman,* 855 S.W.2d 619, 626 (Tex. 1993) (remand in interest of justice because case was tried on legal theory overruled by Court); *Caller-Times Publishing Co., Inc. v. Triad Communications, Inc.,* 826 S.W.2d 576, 588 (Tex. 1992) (remand in interest of justice because Court announced new liability standard); *Amarillo Oil Co. v. Energy-Agri Products, Inc.,* 794 S.W.2d 20 (Tex. 1990) (remand in the interest of justice after concluding that the injunction sought by the plaintiff was not an available remedy).

C. JOACHIM’s case fits the criteria for remand.

i. This Supreme Court's present decision has overruled 30 years of existing and cited Texas and Federal precedent. In its Opinion herein, this Court states near the end of Section II, "the [trial] court must retain certain limited authority to dispose of the case following a nonsuit, and today we hold that this includes the necessary authority to enter a dismissal with prejudice." What this Court fails to qualify at the end of that sentence is "--even if the plaintiff has taken that nonsuit **without** prejudice." That critical distinction is specifically where this Court has changed the law for all Texas cases and set entirely new precedent.

ii. To date, there has **never** been a single Texas case where any appellate court has allowed or approved a dismissal with prejudice after a nonsuit is taken without prejudice when no claims for affirmative relief were pending, no sanctions were pending and there were no *sua sponte* sanctions at issue–not one in the history of Texas law!

iii. The effect of this Supreme Court's decision serves to substantially broaden, and almost re-write, the well-settled plenary power limitations specified within TRCP Rule 162. Now, the law will be that a nonsuit is effective from the very moment it is taken, unless there are claims for affirmative relief pending, sanctions pending, *sua sponte* sanctions considered or if the trial court enters a grossly erroneous order dismissing the case with prejudice after the nonsuit without prejudice

is taken.

iv. Never before has a trial court been conferred jurisdiction to render a merits determination order following a nonsuit without prejudice when no matters in controversy exist. To do so, deprives JOACHIM of his absolute right to be returned to the same position he was in before the suit was filed and the court's jurisdiction invoked. Never before has TRCP 162 been applied in this fashion to deny the party taking a nonsuit without prejudice his day in court.

v. Since an equitable bill of review is no longer a viable option, no other available remedies exist for JOACHIM to be afforded his 7th Amendment right to a civil trial.

vi. If pursuant to previous application and Texas precedent, the trial court's erroneous dismissal with prejudice order was void, then there is still no final judgment and the plenary power timetables have not yet begun to run. Since the initial lawsuit still exists merely as an empty shell awaiting the final ministerial act (and only allowable act) of dismissal without prejudice, this case should be remanded back to the 237th District Court, so that the erroneous order may be rectified.

CONCLUSION AND PRAYER

JOACHIM relied upon Supreme Court authority and precedent, as well as Federal case law guidance and application, in collaterally attacking what would have previously been considered to

be a void order. Not one other case in Texas history has allowed TRCP 162 to be applied in this fashion to deprive the litigant taking a nonsuit **without** prejudice his day in court. Since this Supreme Court's decision has effectively changed the law and overruled previous and well-settled precedent, this case should be remanded, and not rendered, in the interests of justice.

WHEREFORE, PREMISES CONSIDERED, JOACHIM prays that this Honorable Court either change its ruling in light of the aforementioned arguments and authority or, in the alternative, modify the decision from "render" to "remand" in the interests of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of July 2010, 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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