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Supreme Court of Texas.
The Travelers Insurance Company (the Automobile Insurance Company of Hartford Connecticut), Petitioner,
v.
Barry Joachim, Respondent.
No. 08-0941.
February 17, 2010.

Oral Argument

Appearances:Christopher B. Slayton, Jones, Flygare, Brown & Wharton, Lubbock, TX, for petitioner.

Stace Williams, The Stace Williams Law Firm, Lubbock, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0941, Travelers Insurance Company vs. Barry Joachim.

MARSHALL: May it please the Court, Mr. Slayton will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CHRISTOPHER B. SLAYTON ON BEHALF OF THE PETITIONER

ATTORNEY CHRISTOPHER B. SLAYTON: Good morning. May it please the Court, this case arises out of an order of dismissal for want of prosecution that was entered with prejudice after the Plaintiff took a nonsuit. It's our contention that that order of dismissal was initially entered collateral to the merits, and so the court had jurisdiction at the time it entered that order. And only after the order became final with that "with prejudice" language attached to it, did it become a determination on the merits. And at that point, res

judicata kicked in and barred the second lawsuit. Pre-factual background, Your Honors, on the eve of trial the Respondent nonsuited the underlying case, but failed to obtain an order of dismissal. Two months later the trial court issued a notice of intent to dismiss the case for want of prosecution, because it had received no final order. The Respondent failed to provide that order to the court and so the court then dismissed the case for want of prosecution, but erroneously did so with prejudice instead of without.

JUSTICE PAUL W. GREEN: Was that order of dismissal an order that was prepared by Travelers or was this the court's own order?

ATTORNEY CHRISTOPHER B. SLAYTON: This was the court's own order pursuant to its dismissal docket, something generated out of the court and not by either of the parties.

JUSTICE DAVID M. MEDINA: Why does the burden shift to the party that's filed the nonsuit? Why must it do something more than file the nonsuit?

ATTORNEY CHRISTOPHER B. SLAYTON: Well, I think the cases stand for the proposition that an order has to be entered, and I don't think you just get to nonsuit your case and then walk away. I think the cases are clear about that, that you have a further duty to see that the case gets disposed of, and without that order, then nothing has become final just because you filed a nonsuit.

JUSTICE HARRIET O'NEILL: But the order is just a ministerial act.

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct, Your Honor.

JUSTICE HARRIET O'NEILL: And doesn't that distinguish this case from some of the authorities that you cite in your brief?

ATTORNEY CHRISTOPHER B. SLAYTON: I don't believe it does, because even though it's a ministerial act, it still has to be done. And I think if we look at some of these other cases that talk about dismissing a case for want of prosecution with prejudice, the Labrie case, the In re -- I'm sorry -- the Rodriguez case, the El Paso Pipe cases, in those cases, there was not a nonsuit involved, but --

JUSTICE HARRIET O'NEILL: But that's the key point. In those cases --

ATTORNEY CHRISTOPHER B. SLAYTON: Correct.

JUSTICE HARRIET O'NEILL: -- it wasn't merely a ministerial act.

ATTORNEY CHRISTOPHER B. SLAYTON: Correct.

JUSTICE HARRIET O'NEILL: Once a case is moot, then really it's just ministerial, and that's what makes this case unique.

ATTORNEY CHRISTOPHER B. SLAYTON: I would say that even if it is ministerial, that I mean if it's just a ministerial act, the court still has the power to do that. I think that's what we're looking at in this case, does the court have the power to enter that order? Now, if it's merely a ministerial act and it doesn't require any jurisdiction, then even an order of dismissal dismissing the case without prejudice would be void, and we know that's not the case, an order has to be entered. And what we're looking at here is does the court have the power to do that. The Respondent says in this case that once he filed a nonsuit, the merits of the case are withdrawn, that the court can do nothing else but dismiss a case without prejudice.

JUSTICE HARRIET O'NEILL: Well, but the question is -- the court has the power to dismiss it.

ATTORNEY CHRISTOPHER B. SLAYTON: Correct.

JUSTICE HARRIET O'NEILL: The question is whether that power carries with it an adjudication on the merits that has a res judicata effect?

ATTORNEY CHRISTOPHER B. SLAYTON: Correct.

JUSTICE HARRIET O'NEILL: And those are two different questions.

ATTORNEY CHRISTOPHER B. SLAYTON: Yes, and I think the where the merits, res judicata kicks in is once that order becomes final. I don't think at the time the order was entered, the court was clearly just dismissing the case for want of prosecution, not making a merits determination. The merits aren't before the court any more than the merits were before the court in El Paso Pipe, Labrie, Rodriguez. The merits weren't before the court in those cases either, because the court is dismissing either for want of prosecution or for some procedural defect, such as in Rodriguez where they failed to obtain leave of court before adding an amended --

JUSTICE HARRIET O'NEILL: But it's still a merits determination. You've got a cause of action, it has been prosecuted, it's a determination on the merits. Once the case has been withdrawn, it takes away the ability to render a merits determination.

ATTORNEY CHRISTOPHER B. SLAYTON: Correct, and I agree with you, Your Honor, but I don't believe that at the time the court entered that order -- say if we take a snapshot of the case at that time, the court is not adjudicating the merits, not making a determination on the merits. It's merely performing a ministerial act in dismissing the case.

JUSTICE EVA GUZMAN: When the court makes or issues an order, signs an order that basically says you can no longer prosecute your cause of action, isn't that a merits determination? You're barred from going forward ever.

ATTORNEY CHRISTOPHER B. SLAYTON: Well, I think it -- I don't believe it is, Your Honor, because I think it could have been remedied, and I think that's where this case can be decided. The Respondent had a chance at the time that order was entered with prejudice. “With prejudice” is a merits determination, although I don't believe initially in this case it was, because if we look at what the court is trying to do at that point.

JUSTICE DAVID M. MEDINA: It sounds like the court is just trying to clear its docket. What's the -- I mean you're -- that's an easy way for the court to clear its docket. You file a motion to dismiss, and the court says, “Well, okay, we're going to get you, we'll dismiss with prejudice,” and if you don't do anything, the case is over. There's no equity in that.

ATTORNEY CHRISTOPHER B. SLAYTON: Well, I understand that it's not equitable, it's not fair, and this is a technicality, and we benefit from that, but --

JUSTICE EVA GUZMAN: Well, is there a notice issue, though? I mean when you talk about whether it's fair or not, was there an op -- did they get a notice of DWOP, did they have an opportunity after that notice to file a motion to reconsider, et cetera?

ATTORNEY CHRISTOPHER B. SLAYTON: They did, Your Honor. There's a contention in the briefing from my opponent that says, “We didn't get that notice. We didn't get the order.” But I think the presumption under the rules, under Rule 21(a) is that they got that.

JUSTICE EVA GUZMAN: Getting back to the legal issue, I guess, the jurisdictional question, whether or

not it's fair is one question. They had an opportunity to ask the court to withdraw its order, but do you agree then that this is a merits determination after the case had been nonsuited?

ATTORNEY CHRISTOPHER B. SLAYTON: I don't agree that it's a merits determination initially. I agree that it's a merits determination after it becomes final with --

CHIEF JUSTICE WALLACE B. JEFFERSON: But I think your argument is that it shouldn't be a merits determination, but the trial court if the order says “on the merits,” or “with prejudice,” then it turns out to be an erroneous merits determination.

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct. There is no question what the trial court did here was wrong in dismissing that case with prejudice. You can't dismiss a case for want of prosecution with prejudice. But what this Court said in Mossler vs. Shields is that, and a dismissal with prejudice is a merits determination. And when you let that become final, then at that point res judicata kicks in and that order becomes a determination on the merits though initially it was not.

JUSTICE DAVID M. MEDINA: Why isn't that a void order?

ATTORNEY CHRISTOPHER B. SLAYTON: Well, because the court had jurisdiction in what it was trying to do initially. Initially it says, “I see there's been a nonsuit filed here. There's no order cleaning off my docket, so I want you to present an order to me.” The Respondent failed to do that. At that point, the court issues the order itself, dismisses the case trying to clean off its docket. And so I think if we look at what the court is attempting to do, what it's trying to do there, admittedly wrong in what it ultimately did, but what it's trying to do at that point is clean off its docket, and that's collateral to the merits. That's not a merits determination. Only when it becomes final with the “with prejudice” tag attached to it, then at that point we have a whole different situation.

JUSTICE DALE WAINWRIGHT: Counsel, sometimes we use the term “merits” in a broad, general way. Often we mean “merits” to mean the actual dispute and the facts in the controversy were decided, and sometimes we use “merits” to mean it's a final judgment to which res judicata attaches. It's the latter that we're here about today.

ATTORNEY CHRISTOPHER B. SLAYTON: Correct.

JUSTICE DALE WAINWRIGHT: The statute of limitations, for example, aren't necessarily deciding the actual facts in dispute, but it is a merits determination in the sense that it's final and res judicata attaches to it. Let's back up. Why do you say that the trial court was wrong in dismissing with prejudice? Do you think it can never dismiss with prejudice in this circumstance?

ATTORNEY CHRISTOPHER B. SLAYTON: I don't believe it can if it's dismissing for want of prosecution. The cases are clear that a court dismissing a case for want of prosecution with prejudice is clear error. And there's a case that I want to point out, Willis vs. Barron out of the Tyler Court of Appeals. It's cited in our brief. I believe it's from 1980, and what the court held there was there was a dismissal for want of prosecution that was entered with prejudice. The plaintiff in that case did what the plaintiffs should have done in this case, and took that order up on appeal. And when the Tyler court got it, it said, “We understand, the Texas law is clear, that a dismissal with prejudice” -- I'm sorry -- “a dismissal for want of prosecution with prejudice is clearly error.” You can't do that. You have a dismissal collateral to the merits combined with a dismissal on the merits, and you can't do that. And so what the Tyler court did was say, “We understand what the trial court was trying to do, it was trying to clean off its docket, and so we're going to reform that judgment and take out the words ‘with prejudice.”’ And that's an easy fix, and that could have been done in this case, but the point is, the plaintiff has to attack that order directly.

JUSTICE DON R. WILLETT: But he says he never got it, and you say, “Well, the rules presume he did get it.” Why can't the presumption be that the trial court did it the right way and didn't commit clear error, as

you call it?

ATTORNEY CHRISTOPHER B. SLAYTON: I'm not quite sure I follow your question, Justice Willett.

JUSTICE DON R. WILLETT: I mean, isn't a litigant who nonsuits a case entitled to presume that the case is dismissed without prejudice?

ATTORNEY CHRISTOPHER B. SLAYTON: Well, I don't believe so, and that's an issue that I struggled with a little bit in briefing this, but I think there's a clear duty on the plaintiff even though he nonsuits the case. He can't just walk away from the court. As the Court said In re Bennett, that gives an inordinate amount of weight to a nonsuit and allows then a plaintiff to essentially have more power than a trial court, and dismiss that case and walk away from it and never pay any attention again at what the trial court does. I don't think you can do that. I think there remains some duty to make sure that that case gets dismissed properly. And if it doesn't, then you have that duty then to address that erroneous order that was dismissed with prejudice.

JUSTICE DON R. WILLETT: But do you agree, I thought your briefing said around page 17 or so, that a nonsuit in fact withdraws the merits of a case?

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct.

JUSTICE DON R. WILLETT: And if the merits are withdrawn, then how can a trial court ever make a determination on the merits post nonsuit?

ATTORNEY CHRISTOPHER B. SLAYTON: Well, I think the answer is it didn't initially. The plaintiff allowed it to become a determination on the merits when it became final. So I think the problem here is we have a dismissal for want of prosecution that's collateral to the merits, and that's what the trial court was attempting to do. It just so happened that it dismissed it with prejudice instead of without. But the trial court is attempting to dismiss the case to clean off its docket, but that error has to be attacked before it becomes final.

JUSTICE HARRIET O'NEILL: What if the Plaintiff did not get notice, as they claim they didn't, what would be the avenue of attack? Would it be a bill of review?

ATTORNEY CHRISTOPHER B. SLAYTON: I would think that would probably be the avenue to take. And unfortunately at this point, a bill of review is no longer viable. I think you have to bring a bill of review within four years of the erroneous order, and it's been -- this order is now almost ten years old, and so a bill of review I don't think is a viable option. And as well, I think with a bill of review you have to show some kind of fraud or wrongful act on our part as the Petitioners in procuring that order, which was argued I think in the trial court that we did something, that we submitted this order that said “with prejudice,” and the record is clear that we did not. So --

JUSTICE DAVID M. MEDINA: Well, it really wouldn't matter who submitted the order, if your theory is correct, right? Because the order is there, it gets signed by the judge --

ATTORNEY CHRISTOPHER B. SLAYTON: Correct.

JUSTICE DAVID M. MEDINA: -- and according to you, the burden shifts to the other side to do something?

ATTORNEY CHRISTOPHER B. SLAYTON: I agree with that, to the extent that that order has become final. I say that to point out the fraud element of the bill of review. If the plaintiff could prove that we did something, you know, submitted an order without showing it to the other side and it contained the words

“with prejudice” instead of without, then at that point maybe there's some issue about fraud or some kind of wrongful act on our part.

JUSTICE PAUL W. GREEN: Should the rule be different in the case of a DWOP than otherwise? For example, you have a situation where there are two defendants in a case, a plaintiff nonsuits one, and there's a summary judgment hearing and the order erroneously disposes of both defendants and nothing is done to correct that. Is that the same rule? Should it be the same rule?

ATTORNEY CHRISTOPHER B. SLAYTON: I think it's the same rule, and I think the scenario that you're talking about the Amarillo Court of Appeals addressed in Rodriguez vs. ICON, because that's essentially what happened there is that -- and my firm was actually involved in that case, and what happened was the plaintiff, after the case was settled, refilled or filed an amended petition adding a new party, a new defendant. And the court, in dismissing and granting summary judgment to one defendant, also dismissed the other defendant, ICON. And what the court held there is, “I'm sorry, you have to attack that order. And once it becomes final, even though it was not making a determination on the merits of the case, not trying to bar this plaintiff from having its day in court, that order becomes final and is res judicata, the second lawsuit is barred.” And so I think it is the same rule. I don't believe just because this order contained the words “with prejudice” that it initially -- that that makes it void. There are plenty of cases out there, as I've talked about, El Paso, Labrie and Rodriguez, that essentially hold the same thing, that dismissal for want of prosecution with prejudice, even though it contains that language, it's not initially a determination on the merits. And that only when that order is allowed to become final, does it then become a determination on the merits and res judicata kicks in.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Slayton. The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Williams will present argument for the Respondent.

ORAL ARGUMENT OF STACE WILLIAMS ON BEHALF OF THE RESPONDENT

ATTORNEY STACE WILLIAMS: May it please the Court, Counsel. Your Honors, the issues in this case involve the simple concepts of nonsuit, of void, and of the timing. In this case, Mr. Joachim -- I thought it was Joaquin for about a half a year myself, but his name, he pronounces it the West Texas way of Joachim. He did file a nonsuit. And Justice Guzman bring up a good point. Is there a notice issue as to whether the plaintiff received notice from the court, that we intend to DWOP your case, and then did we receive an order of dismissal? There's definitely an issue in the case as to whether that was ever received, Joachim, and my law firm contends that it was not. We do understand there's a presumption, however, that it was received. Nonetheless, we will get to the issues of the effect of nonsuit and also whether something is void or voidable and how it may be attacked. The purpose, in and of itself, of the filing of a lawsuit is for a plaintiff to invoke the Court's jurisdiction to hear a matter in controversy. That's all we're doing, we want to invoke jurisdiction. Now, once we invoke jurisdiction with our lawsuit, then we can proceed to trial on the merits. And if I can be given just a moment of latitude, when my brother and I were growing up, my dad always had us have kicking and punting contests. He was older, I wanted to wear his shoes that were too big for me, and so when I would try to punt, the ball would slip off to the right side. And my dad would say, “No, go get on your shoes that fit you. Go get your house in order and we'll let you do it over,” because when my dad laid down the law, it was unqualified and it was absolute. Now, we have something else in Texas that is unqualified and absolute, pursuant to Rule 162, and this Supreme Court's holding in BHP Petroleum and In re Bennett in 1998, “It is a plaintiff's nonsuit that is absolute and is unqualified.” And what that means is a plaintiff is, in essence, given an opportunity to get its house in order and to be given a do over, if you will.

JUSTICE EVA GUZMAN: What would happen if when you submitted the order of nonsuit, the person responsible for typing the order accidentally put “with prejudice” in there, the Court signed it, and you never challenged it?

ATTORNEY STACE WILLIAMS: Well, if the court signed that, if I presented an order of nonsuit, and the clerk typed in “with prejudice,” then that would be just as void as what Judge Medina had his clerk enter.

JUSTICE EVA GUZMAN: It wouldn't be final if you didn't challenge that for appellate purposes?

ATTORNEY STACE WILLIAMS: Now, it would become final --

JUSTICE EVA GUZMAN: For the appellate process?

ATTORNEY STACE WILLIAMS: Yes, Your Honor. It would become final, and that's the problem with this case, is that once that nonsuit was entered with prejudice, it was a determination on the merits. And that's a point that I'd like to bring out. In Petitioner's Petition for Review and in the briefing at page 14, the Petitioner asserts to this Court that 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, but that's not what the Labrie decision out of Amarillo said at all.

JUSTICE HARRIET O'NEILL: But it can be.

ATTORNEY STACE WILLIAMS: It can be once it becomes final.

JUSTICE HARRIET O'NEILL: No, but there's another situation where it can be, and that is plaintiff settles with defendant and as a condition of the settlement, plaintiff says, “We're going to nonsuit and we'll do it with prejudice.”

ATTORNEY STACE WILLIAMS: That's correct, that's correct.

JUSTICE HARRIET O'NEILL: So a nonsuit, I mean a dismissal order with prejudice in that situation, by agreement would be appropriate.

ATTORNEY STACE WILLIAMS: Right. And in that case, it would become final by agreement. And the critical element, Your Honor --

JUSTICE HARRIET O'NEILL: And it would be an adjudication on the merits, by agreement.

ATTORNEY STACE WILLIAMS: That's right.

JUSTICE HARRIET O'NEILL: And it would have preclusive effect.

ATTORNEY STACE WILLIAMS: And that's because the court still has jurisdiction to enter that agreement.

JUSTICE HARRIET O'NEILL: Why, if you've taken a -- if the agreement and settlement is we've settled the case, I'll take a nonsuit with prejudice.

ATTORNEY STACE WILLIAMS: Uh-huh. And I believe that's the defendant's case, or the petitioner's case, in the Rodriguez vs. ICON Benefit Administrators, that there was a settlement and they had not yet worked out the workers' comp. lien. And so the plaintiff in that case said, “Well, we agreed, and we have this mediation agreement.” The court enforced the mediation agreement, and dismissed as to both the defendant and then also the intervener, which was ICON Administrators. But the reason that was okay in that situation is because what the court did, they had jurisdiction at that time. And in my case, the court did not have jurisdiction once we filed a motion for nonsuit or a notice of nonsuit.

JUSTICE HARRIET O'NEILL: But talk with me the example of a settlement --

ATTORNEY STACE WILLIAMS: Yes, ma'am.

JUSTICE HARRIET O'NEILL: -- with an agreed nonsuit and dismissal order with prejudice.

ATTORNEY STACE WILLIAMS: Okay.

JUSTICE HARRIET O'NEILL: Would that have a res judicata effect down the road or would that be a void order?

ATTORNEY STACE WILLIAMS: If the plaintiffs agree to nonsuit with prejudice, then that is a done deal.

JUSTICE HARRIET O'NEILL: Well, but under your argument it would be a void order, because after a nonsuit you can't have a dismissal with prejudice. So what you would have to do is then say that order was void, but if the suit was later filed, there would be some estoppel argument rather than res judicata.

ATTORNEY STACE WILLIAMS: Well, in this case, the nonsuit was taken specifically without prejudice. The notice of nonsuit was, we nonsuit the case without prejudice. And what the 237th District Court did was they entered an order of nonsuit with prejudice. So,...

JUSTICE HARRIET O'NEILL: No, I understand. But I'm just saying that if we adopt the notion that in every nonsuit if an order follows with prejudice, then it's going to be void. That's going to sweep in the situation where it's an agreed with prejudice.

ATTORNEY STACE WILLIAMS: No, Your Honor, that wouldn't be the case, because under that situation, a judge -- that's what the parties intend. If the parties intend, if the plaintiff intends to nonsuit his case with prejudice because he settled the case, then that is a decision on the merits and the judge is entering that order, that requested order.

JUSTICE EVA GUZMAN: Let's say that you nonsuit, and then after you nonsuit you all have this settlement conference and then you agree that, “Actually, I wanted to nonsuit with prejudice not just nonsuit.” Can the court enter an order after you've simply made an oral motion to nonsuit, to nonsuit with prejudice?

ATTORNEY STACE WILLIAMS: Once the nonsuit is taken without prejudice, the court is without authority to enter the nonsuit with prejudice. I believe it would be incumbent upon the plaintiff to submit a different nonsuit saying, “We are nonsuiting without prejudice.”

JUSTICE EVA GUZMAN: So you're saying once you announce a nonsuit in open court, you can't have subsequent negotiations, agree to a nonsuit with prejudice, and the court enter that order?

ATTORNEY STACE WILLIAMS: That is exactly what I'm saying, Your Honor. And the reason I know that I can say that with clarity is that the right exists from the moment the nonsuit is filed. And I direct the Court's attention to the Corpus Christi decision in 2002 in In re Martinez. That's the school district case where the school district said, “Hey, we nonsuit. We want to back up, get our house in order.” And then after it nonsuited, it filed its own motion for a new trial, and the court heard it. But the Court of Appeals in Corpus Christi said, “No. The court should not have heard the motion for new trial, because once you nonsuit it, the court couldn't hear anything.” That at the moment, at the second, at the instant that you declare a nonsuit, either in open court or to the district clerk, then it removes all possibility of the court doing anything other than dismissing the case without prejudice.

JUSTICE HARRIET O'NEILL: The court of appeals seemed to rely on federal rules in support of its reasoning. Do the federal rules support your approach?

ATTORNEY STACE WILLIAMS: The federal rules, according to the Amarillo Court of Appeals' opinion, does support the fact that once you declare a nonsuit, there's nothing justiciable for the court to hear, that the case merely exists as an empty shell.

JUSTICE HARRIET O'NEILL: But under the federal rules, is it then a void judgment?

ATTORNEY STACE WILLIAMS: It is a void judgment, Your Honor. And that's the point that Mr. Joachim is making in this case. That at the moment the nonsuit was taken, in accordance with Greenberg and Zimmerman, and actually in accordance with this Supreme Court's holding in 2006 in the Blackmon case, at the moment the nonsuit was taken, then there is nothing for the court to decide. There are no matters in controversy.

JUSTICE EVA GUZMAN: So in order to clean --

JUSTICE PAUL W. GREEN: There is some authority though, I believe that once a nonsuit is taken, for whatever reason, for the plenary power of jurisdiction at the time of the court, that the other side can come in and move for sanctions or attorney's fees or some other matter. So to that extent, the court still has power to act, and including even, I might add, sanctions to require a nonsuit with prejudice.

ATTORNEY STACE WILLIAMS: That is correct, Your Honor. And in the Texas Supreme Court's opinion in In re Bennett, that was the case out of Nueces County in the Corpus Christi area. And that's where there was a couple of what maybe I would term slick lawyers that were circumventing the court's random filing process. They had 700 Peruvian clients, and they filed and filed and filed, and the 17th plaintiff actually landed in the 105th District Court, and at that point they got the 105th District Court judge that they wanted, and then they joined in 600 other plaintiffs. And the Supreme Court said, “No, we're going to allow a sua sponte sanction. Even though a nonsuit was taken as to your first 16 plaintiffs and you got all this in the court that you wanted, we see what you did.” And I think critical in this Supreme Court's determination in 1998 in the In re Bennett case, at page 40, is that that was a sanction. And this Court was very clear in noting on page 40 that the attorneys in that case, number one, were given notice of the court's intention to sanction, and also they were given an opportunity to respond.

JUSTICE PAUL W. GREEN: So,...

ATTORNEY STACE WILLIAMS: They were given due process.

JUSTICE PAUL W. GREEN: But that would mean then that the proceedings were not void, that the court had jurisdiction to act.

ATTORNEY STACE WILLIAMS: That's right. The only thing the court can do, once a nonsuit is taken without prejudice, just as in the Joachim case, here is all that the court can do: you can enter the nonsuit without prejudice, or if there are claims for affirmative relief, then there are still some merits to be determined. But the second thing that it can do is enter sanctions, and that's what the Supreme Court's holding in In re Bennett stands for, that there are a few things while the court still has plenary power that it can do. It can hear claims for affirmative relief and it can hear sanctions, even if those sanctions are sua sponte.

JUSTICE EVA GUZMAN: Let me ask you a practical question though. When I was on the trial court, I would have a docket with 5,000 cases a year and I needed to dispose of 5,000 cases a year. You nonsuit, you never bring my court back and an order for me to sign, what can the court do to move its docket if you nonsuit and take no further action? What does it have jurisdiction to do, from a practical standpoint?

ATTORNEY STACE WILLIAMS: From a practical standpoint what the court could have done, it certainly was able to enter the order dismissing the case with prejudice. What it could have done is enter an order dismissing the case without prejudice, and, in fact, that's all it could have done. So if it was within the clerk and the court's power --

JUSTICE EVA GUZMAN: But we made a --

ATTORNEY STACE WILLIAMS: to enter this order with --

JUSTICE EVA GUZMAN: So the Court makes a mistake and signs an order with prejudice. It meant to sign an order without prejudice. Is there no burden on the litigant to challenge those orders?

ATTORNEY STACE WILLIAMS: Yes, Your Honor, I do understand your question. The burden would be, I can either attack it directly or collaterally. And so Mr. Joachim was given an opportunity, could have filed a motion for new trial, could have perfected and affected my appeal, filed a bill of review and have Mr. Joachim incur those costs. However, if what the court did was void, which all the case law in the State of Texas, dating back to the Norton decision in 1927, once the nonsuit is taken, anything that happens after that if it's not a sanction and there are no claims for affirmative relief, it's void. And so I did have an opportunity to attack it directly by way of appeal, motion for a new trail, bill of review, or had an opportunity to attack it collaterally, by refiling my case in another court of competent and equal jurisdiction, which we did.

CHIEF JUSTICE WALLACE B. JEFFERSON: If we agree with you, you could go into courthouses across the state and find a lot, I bet, of orders in which the trial court dismissed with prejudice after a nonsuit. So all those cases are alive, they're just dormant? I mean you can, they can be re-urged at this point 10, 20 years later?

ATTORNEY STACE WILLIAMS: What the case law says in Texas is that those cases exist merely as an empty shell, nothing can be done with those cases except that ministerial act of going ahead and entering that order. The ministerial act is referenced in the Greenberg decision and also in Newman Oil, that the order of nonsuit -- all that is, it's just a paper rendition of what has to take place. That's why it's a ministerial act. So in answer to your question, yes, all of those cases exist as an empty shell. There is nothing to decide, there are no matters in controversy, just as in the Joachim case. There were no matters in controversy at the moment --

CHIEF JUSTICE WALLACE B. JEFFERSON: But as Justice Green pointed out, then there would be plenary power to issue sanctions potentially, right, in those cases?

ATTORNEY STACE WILLIAMS: There could be plenary power to issue sanctions, but the plenary power timetable, I believe, would start -- well, that's a good point because the plenary power time table starts once there is an act of improper dismissal. So that's correct, but --

JUSTICE HARRIET O'NEILL: But the statute of limitations would continue to run, so there wouldn't be a reviving of dormant judgments over a certain period of time.

ATTORNEY STACE WILLIAMS: That's exactly right, and that is why Mr. Joachim was able, he was within his four-year statute of limitations on this breach of contract and underinsured motorist claim filed, I believe, back in '02 when 2155 and 2121 had the teeth that it had back then, and he was well within the statute. But the nonsuit was taken so he could get his house in order. What we learned from the case is that at the time his underinsured motorist claim was pending against his own carrier, he had to have, I think, a three level fusion, and so to get his house in order, we take the nonsuit, which is our absolute and our unqualified right to do, and once we do that, gets his house in order, has his surgery. Of course there's a whole lot more medical expenses, we refile our case in an equal court or a court of competent jurisdiction.

And so we had that right to do that, we attacked the 237th's decision in a collateral manner, as opposed to a direct manner. We get to the issue of void versus voidable. It's important to note that the four cases brought forth in the Defendant's Petition for Review and Brief on the Merits indicate that those cases have nothing to do with nonsuits. Not a single one of those cases dealt with a nonsuit. What those cases dealt with and stood for the proposition is, a court makes a mistake when it DWOPs a case with prejudice, or if it just dismisses the case with prejudice, assuming you don't have a DWOP situation. But in the case at bar, clearly all the court could do was enter the nonsuit without prejudice. And in doing anything other than that, since there were no claims for affirmative relief pending, what it did was void. It had no effect whatsoever, and the case law in Texas says that I had that absolute right to take the nonsuit, and then if I want to attack that I can do it in either manner, do it directly or do it collaterally. And since we understood that sanctions were a possibility, if by some stretch of the imagination an appellate court or a second trial court or a new judge hearing the case thought that what Judge Medina intended to do back when he dismissed it with prejudice, was in essence ordering a sanction against Mr. Joachim or against my law firm and not providing that order of dismissal without prejudice for them, that simple piece of paper that's the ministerial act. If by some chance that a new court or a further court thought that that would be a sanction, what the plaintiff would have to be afforded is due process, be given notice that it was a sanction and be given an opportunity to respond. And that's exactly why the In re Bennett decision of this Court back in 1998 set that forth at page 40. That the attorneys, if it is a sanction, you're going to be afforded due process. In our case what we know is that it wasn't a sanction. It was merely an act that was void. It had no effect whatsoever. In my brief, and also in my response to the petition, I had presented a scenario for the Court to consider that we feel is applicable. If we have a heavy-weight fight, back in the day it was 15 rounds, now it's 12 rounds. You fight to an even draw pretty much and after the bell sounds someone is walking back to their corner, and as he's walking back to the corner after the bell sounds, he's clocked and he's knocked out. There is no referee in the world that will say the person is knocked out. After the bell sounds, it's moot and void what happens after the bell. That is exactly the situation that we have in the Joachim case. There is nothing that Judge Medina could have done in this case after we declare our notice of nonsuit, other than dismiss it without prejudice. When he dismissed it with prejudice, it was void. And that was a mistake. Now certainly courts have jurisdiction, and while they have jurisdiction trial courts commit mistakes all the time. They do things that are improper all the time, and they have the power to do that. If they didn't make mistakes all the time, I believe the nine of you would be out of a job. But there are mistakes made. What is critical to the Joachim case, and I can't stress it strongly enough, is that the mistake that was made was void because the 237th District Court was without power, was without jurisdiction to do anything other than dismiss the case without prejudice.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you.

ATTORNEY STACE WILLIAMS: Thank you, sir.

REBUTTAL ARGUMENT OF CHRISTOPHER B. SLAYTON ON BEHALF OF PETITIONER

JUSTICE HARRIET O'NEILL: Would the trial court's judgment have been a void judgment under the federal rules?

ATTORNEY CHRISTOPHER B. SLAYTON: I don't believe that -- well, under the federal rules, yes. The answer is yes, but I don't believe the federal rules are anything like what the Texas rules are. Rule 41 of the federal rules specifically provides that no order is needed, that once the plaintiff files a voluntary dismissal, that ends the case. That's clear. That's not what we have in Texas. You still are required to have that order dismissing the case to remove it from the court's docket. Under the federal rules, once the plaintiff files that voluntary dismissal, the case is over. And the reason for that is because Rule 41 provides that that dismissal is entered at a time when the defendant has not appeared yet, has not filed an answer, and so there is nobody there to hurt. And so I don't feel like the federal rules are applicable at all, and these cases cited by Amarillo regarding that from Oklahoma, from Illinois, I don't think we need to go there when Texas law provides a clear answer in my opinion. So, no, I don't believe the federal rules would apply for that reason. I think going back to what Justice Jefferson mentioned, is that if we lay down a rule that says that all of these orders dismissing cases with prejudice after a nonsuit are void, then I think we opened up Pandora's

box there. We have a lot of orders sitting out there that could potentially be revived again, you know, but those cases are not sitting out there still alive. Those are over, and any second lawsuit that is filed on those cases is barred by res judicata. And you can't come back in now and revive those cases by saying, “Well, that order dismissing that case after a nonsuit with prejudice was void.”

JUSTICE PHIL JOHNSON: If part of the settlement agreement is a dismissal with prejudice, and no motion to dismiss is filed, but simply an order is submitted to the judge, an agreed order dismissing with prejudice, now what would be your position on that?

ATTORNEY CHRISTOPHER B. SLAYTON: Well, I think that happens all the time.

JUSTICE PHIL JOHNSON: And is it void or voidable, or is it final?

ATTORNEY CHRISTOPHER B. SLAYTON: I think it's final.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY CHRISTOPHER B. SLAYTON: I think it's an agreement made by the parties that --

JUSTICE PHIL JOHNSON: There's no motion to dismiss in that case, it's simply a dismissal order with prejudice?

ATTORNEY CHRISTOPHER B. SLAYTON: Correct.

JUSTICE PHIL JOHNSON: All right. Now then, what if in fact a motion to dismiss is filed, a settlement agreement, a motion to dismiss is filed, and then a dismissal with prejudice. Now, in that case that would be the situation Justice O'Neill was talking about. In that case, if the case is refilled, then you have a settlement agreement behind the dismissal, correct?

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct. You have --

JUSTICE PHIL JOHNSON: Whether it's a dismissal with prejudice or without prejudice, you still have the case settled and you have limitations and you have all those things?

ATTORNEY CHRISTOPHER B. SLAYTON: Right. That's correct. And I think in that situation if what the trial court did was dismiss it other than what the parties had desired, then you have a duty to go and attack that order within the 30 days that the court retains jurisdiction over that case.

JUSTICE PHIL JOHNSON: But the defendant is still going to be protected if you have a settlement agreement signed by everyone even with a minor.

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct.

JUSTICE PHIL JOHNSON: You have the trial court approving the settlement on behalf of the minor, so even if the dismissal is erroneously entered, as opposing counsel says, it's erroneously entered with prejudice after a motion, and then the suit is refilled even on behalf of the minor, five or six years later, you come in and you plead your settlement agreement, and --

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct.

JUSTICE PHIL JOHNSON: -- file a motion for summary judgment.

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct. And you've got a release with the plaintiff signing that saying, “I dismiss all of my claims, release any and all claims that I may have, they are done and over with,” and you've got that to back up the order of dismissal.

JUSTICE HARRIET O'NEILL: But that's based on an estoppel theory and not res judicata?

ATTORNEY CHRISTOPHER B. SLAYTON: Correct, correct. Your Honors, in closing, I see I'm running out of time here, but a couple weekends ago I was watching the Super Bowl, and I had this case running around in my head, which is kind of sick I guess. I'm supposed to be relaxing having fun, but I'm focusing on this case. And it comes to me that this case is a lot like the NFL system of instant replay. In an instant replay in the NFL, the coach has a red challenge flag, and he has an obligation to throw that red flag if he wants to review the previous play, but he has to review that within the timeframe allotted.

JUSTICE DAVID M. MEDINA: So you're Coach Peyton?

ATTORNEY CHRISTOPHER B. SLAYTON: Yes, correct, correct.

JUSTICE HARRIET O'NEILL: But you have do it within the game clock, and if you do it after the game clock, or if something happens, if the touchdown is made after the clock has run, it doesn't matter, which is opposing counsel's argument. So that analogy kind of works both ways.

ATTORNEY CHRISTOPHER B. SLAYTON: Well, if you don't challenge that before the snap in the next play, which is the timeframe allotted, the play is final. It's over with and you can't come back after the game is over and challenge that play. And that's what the Respondent is doing here, is coming back after the game is over.

JUSTICE DALE WAINWRIGHT: So you and opposing counsel at least both agree on one thing, this case is like a football game.

ATTORNEY CHRISTOPHER B. SLAYTON: That's correct, there's a sports analogy in here somewhere. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

The Travelers Insurance Company (the Automobile Insurance Company of Hartford Connecticut), Petitioner, v. Barry Joachim, Respondent.
2010 WL 709996 (Tex.) (Oral Argument)

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