

No. 06-0097

**In The
Supreme Court of Texas**

**GILBERT KERLIN, INDIVIDUALLY, GILBERT KERLIN, TRUSTEE,
WINDWARD OIL & GAS CORP., AND PI CORP.,**

Petitioners,

v.

GLORIA SOTO ARIAS, ET AL.,

Respondents.

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi, Texas
No. 13-03-364-CV

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10. Elida Guevara
11. Mario Soto
12. Raquel Ramirez
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16. Daniel Sabedra
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26. Christobal Gonzales
27. Adam Gonzales
28. Oscar Canales
29. Brenda Gonzales
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STATEMENT OF THE CASE

- Nature of the Case:* Respondents are descendants of Jesus Balli, an individual who once owned an undivided fractional interest in Padre Island. In 1847, Jesus Balli's interest was sold by his father to Nicolas Grisante pursuant to a transaction approved by the Mexican courts. In 1928, a Texas court held that Jesus Balli's descendants had no interest in Padre Island and had sold any claims they may have had to such an interest. In 1948, a Texas federal court, in determining who was entitled to compensation for a federal taking of part of the island, ruled that Jesus Balli's descendants possessed no interest in Padre Island.
- More than 50 years later, respondents filed suit in Cameron County against petitioners (owners of certain Padre Island mineral interests), claiming that respondents remain the rightful owners of Jesus Balli's original interest because the 150-year-old conveyance and 75-year-old state court judgment were tainted by fraud.
- Trial Court:* The Honorable Leonel Alejandro, 357th Judicial District Court, Cameron County.
- Trial Court's Disposition:* Summary judgment granted to petitioners on respondents' claims of trespass, trespass to try title, conversion, constructive trust, and fraud.
- Court of Appeals:* The Thirteenth Court of Appeals at Corpus Christi.
- Parties in the Court of Appeals:* Plaintiffs-Appellants: The Arias *et al.* Plaintiffs (listed *supra* at ii-iv).
Defendants-Appellees: Gilbert Kerlin, individually and as trustee; Windward Oil & Gas Corp.; and PI Corp. (*see supra* at i n.2).
- Court of Appeals' Disposition:* In an opinion by Chief Justice Valdez, joined by Justices Rodriguez and Garza, the grant of summary judgment was vacated and the case remanded for trial. *Arias v. Kerlin*, No. 13-03-364-CV, 2006 Tex. App. LEXIS 92 (Tex. App.—Corpus Christi Jan. 5, 2006, pet. filed) (mem. op.) (App., Tab 1).

STATEMENT OF JURISDICTION

This Court has jurisdiction because the decision of the court of appeals conflicts with prior decisions of this Court on questions of law material to the decision of the case. TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 2004). This Court also has jurisdiction because the court of appeals committed errors of law of such importance to the jurisprudence of the State as to require correction by this Court. *Id.* § 22.001(a)(6).

ISSUES PRESENTED

Briefed:

1. Whether a party seeking to invalidate a 150-year-old property conveyance and contemporaneous Mexican court orders, a 75-year-old state court judgment and related assignment of claims, and a 50-year-old federal judgment may survive summary judgment by uncorroborated allegations that the property conveyance was “void” and that both it and the related court determinations were tainted by “fraud.”
2. Whether a Texas court may properly refuse to give preclusive effect to an order of a foreign court approving a land sale between private parties over whom the foreign court had personal jurisdiction on the ground that the foreign sovereign may have lacked *de facto* control over the property at issue.
3. Whether a Texas court may properly refuse to give preclusive effect to a Texas state court judgment between the predecessors-in-interest of the current parties when that judgment has been final for more than 75 years and adjudicated a claim determinative of all presently asserted claims.
4. Whether a Texas court may properly ignore a 75-year-old assignment of claims, which precludes all presently asserted claims, where that assignment is evidenced by a concurrent state court judgment and the party seeking to have the assignment disregarded presents no countervailing evidence.
5. Whether a Texas court may ignore the preclusive effect of a 50-year-old federal court judgment on the basis that
 - a. the judgment relied on an allegedly non-final or incorrect state court judgment;
 - b. the parties to the federal judgment were not “adverse,” even though they asserted conflicting claims of title to the same property; and
 - c. the parties to the federal judgment were not in privity with the current plaintiffs, contrary to those plaintiffs’ admissions and representations of kinship.

Unbriefed:

6. Whether a Texas court may ignore the preclusive effect of a 50-year-old federal court judgment on the basis that an issue was not “fully and fairly litigated,” where the relevant parties’ interests were represented by an appointed attorney and other parties, and the federal court heard evidence and conducted hearings before deciding the issue.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents are descendants of Jesus Balli. In 1829, Jesus Balli inherited an undivided fractional interest in Padre Island. In 1847, that interest was sold by his father. The validity of the sale was confirmed by two orders of a Mexican court with jurisdiction over the parties to the transaction. Over 150 years later, respondents claimed they remain the rightful owners of Jesus Balli's interest because the 1847 sale was fraudulent and void; because contemporaneous Mexican court decrees were invalid; and because subsequent Texas and federal court determinations to the contrary were also tainted by fraud or otherwise invalid. Because no one with personal knowledge of the underlying events remains alive and because respondents produced no documentary evidence supporting their allegations, the trial court granted summary judgment to petitioners.

The Corpus Christi court of appeals vacated and remanded for trial, holding that it could ignore prior court determinations rejecting respondents' claims because, among other reasons, respondents' unsupported fraud allegations sufficed to create "fact issues" as to the validity of the 1847 sale and related court proceedings. In holding that factually unsubstantiated and legally precluded claims may nonetheless go to trial, the court of appeals applied legal principles in conflict with this Court's precedents and incorrectly decided issues of importance to the jurisprudence of this State. Indeed, the court's decision threatens to unsettle statewide land titles, including those to half of Padre Island.

STATEMENT OF FACTS

A. In 1847, Jesus Balli's interest in Padre Island was sold to Nicolas Grisante in a transaction confirmed by two Mexican court orders.

In 1829, the Mexican state of Tamaulipas confirmed the Mexican government's grant of Padre Island to Padre Nicolas Balli and his nephew Juan José Balli. *Sauceda v.*

Kerlin, 164 S.W.3d 892, 903 (Tex. App.—Corpus Christi 2005, pet. filed), *judgm't vacated in part by agr.*, Nos. 05-0653, 06-0189, 2006 Tex. LEXIS 201 (Tex. Mar. 10, 2006). Padre Nicolas Balli died that year and his interest in the island passed to various relatives, including Jesus Balli. *Arias v. Kerlin*, No. 13-03-364-CV, 2006 Tex. App. LEXIS 92, at *1 (Tex. App.—Corpus Christi Jan. 5, 2006, pet. filed) (mem. op.) (App., Tab 1) (“Op.”). In 1830, Juan José Balli sold his interest in the island. *See State v. Balli*, 144 Tex. 195, 215-16 (1944). That sale partitioned the island into a Northern and Southern Division, and Jesus Balli’s interest became restricted to the Southern Division. *Id.*; CR225-27.

In 1846, Jesus Balli’s father presented evidence to a Mexican court that selling Jesus Balli’s interest in Padre Island was in that minor’s best interests because the land was in an area of disputed sovereignty between Mexico and Texas. CR187-88. The court approved the request and ordered a public auction. CR188-90. The first two auctions produced no bidders. *Id.* At the next auction, Nicolas Grisante won the bid, CR194, and the Mexican court thereafter approved the sale of Jesus Balli’s interest to Grisante. CR194-95.

In March 1847, Grisante accepted a deed from Agustin Menchaca (the agent of Jesus’s father). CR184. That deed transferred Jesus Balli’s interest in Padre Island to Grisante. *Id.* The deed facially reflects that it was signed by Grisante, Menchaca, and Jesus Balli, and that its execution was witnessed by three resident citizens and verified by a Mexican notary. *Id.* In December 1847, Grisante obtained certified copies of this deed and the related Mexican court proceedings from the American Consul in Matamoros, Mexico, which he then filed in the deed records of Nueces County where they reside to this day. *Id.*

B. In 1928, a Texas court determined that Jesus Balli’s descendants had no interest in Padre Island and, in any event, had sold any “claim” thereto.

In 1928, over 80 years after the 1847 sale, a Texas district court decided a title

dispute (*Havre v. Dunn*) concerning all but the southernmost 7,500 acres of Padre Island. CR198-205. The court’s judgment awarded all of the land at issue to Sam A. Robertson and W. E. Callahan. CR203-05; *Sauceda*, 164 S.W.3d at 904. In addition, the judgment reflected that certain named defendants were heirs of Jesus Balli and had sold “all and singular, each and every interest, claim, [and] demand” they “have or claim in and to the lands and premises in controversy in this suit” to Robertson and Callahan for \$1,500. CR202-03. Respondents have stipulated that each is a descendant of one of those heirs listed as a party to that judgment and related assignment of claims. CR206-12, 368-69, 375.

C. In 1942, Kerlin obtained title to certain parts of Padre Island.

Ten years later, petitioner Gilbert Kerlin traveled to Texas on behalf of a joint venture formed by his uncle. *Sauceda*, 164 S.W.3d at 904-05. The venture’s original goal was to purchase and attempt to validate certain claims of title to the Northern Division of Padre Island. *Id.*; see also Pet. for Rev. 2-3, *Kerlin v. Sauceda*, No. 05-0653.³ Separately, Kerlin purchased other claims of title to certain Padre Island acreage, largely in the Southern Division. *Sauceda*, 164 S.W.3d at 904-05. Although those claims of title were extinguished by the *Havre v. Dunn* judgment, Kerlin hoped to revive them because a motion for a new trial in that case remained pending. *Id.* at 905.

Kerlin moved for a new trial, which was granted. *Id.* at 906. Two days later, a new judge took office. *Id.* He rescinded the order granting a new trial, *id.*, and dismissed Kerlin’s motion for lack of jurisdiction. *Staples v. Callahan*, 138 S.W.2d 206, 207 (Tex. Civ. App.—San Antonio 1940). The court of appeals reversed that dismissal, *id.* at 211, and this Court affirmed. 161 S.W.2d 489 (Tex. 1942). In affirming, this Court held that the

³ The venture had hoped to validate those claims of title (to which respondents lay no claim) based on the theory that the Northern Division belonged to Juan José Balli’s descendants (from whom Kerlin, as trustee for the venture, obtained deeds). *Sauceda*, 164 S.W.3d at 904-05; see also Pet. for Rev. 2-3, *Kerlin v. Sauceda*, No. 05-0653.

second judge did not err in setting aside the first judge's order but did err in ruling that he lacked jurisdiction to consider the new trial motion. *Id.* at 491-92. The *Havre v. Dunn* judgment thus stood undisturbed but remained subject to a potential reopening on remand.

The trial court set the motion for hearing on remand. *Sauceda*, 164 S.W.3d at 907. Before that hearing, Kerlin settled his claims with those who opposed the new trial motion, and a stipulation of settlement was filed with the court. *Id.* In that settlement, Kerlin obtained title to 20,000 acres in the Southern Division of Padre Island and mineral rights to 1,000 acres in Neuces County. *Id.*; *see also* Pet. for Rev. 4-5, *Sauceda*, No. 05-0653.

D. In 1948, a federal judgment rejected the claim of Jesus Balli's descendants to any interest in Padre Island.

In 1941, the United States decided to build a bombing range on the Southern Division of Padre Island and filed a condemnation proceeding in Texas federal court. CR248-69. The United States cited numerous defendants, including Kerlin and the descendants of Jesus Balli. CR206-12, 215, 253-57. The issue of "just compensation" was complicated because numerous persons asserted conflicting claims of title to the island. CR252. The court therefore assigned a special master to resolve all title issues. CR214, 252. In December 1948, the court adopted the special master's title report (CR214-47) and issued a final title adjudication, holding, *inter alia*, that the heirs of Jesus Balli lacked any title or interest in the Padre Island property at issue. CR253-56, 262.

E. In 2000, Jesus Balli's descendants filed suit against Kerlin, asserting a present interest in Padre Island based on allegations of ancient frauds.

In 1961, Kerlin sold the surface of the acreage he obtained in the 1942 settlement.⁴ In 2000, respondents filed suit against him raising claims of trespass, trespass to try title,

⁴ Pet. for Rev. 5, *Sauceda*, No. 05-0653. Kerlin indirectly owns certain Padre Island mineral interests through two corporations (petitioners Windward Oil & Gas Corp. and PI Corp.). *Id.* at 5-6.

conversion, constructive trust, and fraud. CR3-18.⁵ Respondents claimed they were the rightful owners of Jesus Balli's original interest in Padre Island because the 1847 deed was void and fraudulent. They specifically alleged that Jesus had not been a minor in 1847 and that his father and Grisante had "fraudulently and illegally passed the title without any legal right to do so." CR7. Respondents further claimed that they discovered this only in 1999. *Id.* They also alleged that when Kerlin obtained his Padre Island acreage in 1942, he had "fraudulently entered into a settlement agreement" to respondents' detriment (CR12), although Kerlin never had any relationship or dealings with Jesus Balli's descendants. Respondents sought a declaration that the 1847 deed was void, an imposition of a constructive trust on the acreage Kerlin obtained in 1942 (or damages), past and future mineral royalties, punitive damages, attorneys' fees, and prejudgment interest. CR13-15.

Kerlin denied respondents' allegations, pleaded not guilty to the trespass to try title action, and asserted various affirmative defenses. CR19-23. After respondents were allowed more than two years for discovery, Kerlin moved for summary judgment. CR160-80. Kerlin's motion asserted that respondents had no evidence to support any of their fraud claims, CR162, and provided five additional and independent bases for the court to grant summary judgment in his favor (CR160-80):

1. If Jesus Balli was not a minor in 1847 as respondents allege, the deed was adequate to transfer his interest because he personally signed it.
2. Even if Jesus Balli had not personally signed the deed, Texas courts must accept the validity of the transfer because a Mexican court with jurisdiction over the relevant private parties, including Jesus Balli, had approved it.
3. Even if Jesus Balli's interest was not transferred in 1847, respondents' ancestors subsequently sold any Padre Island claim that they retained to Robertson and Callahan.

⁵ Despite raising a trespass-to-try-title claim, respondents failed to name any party possessing island surface interests.

4. The state court judgment in *Havre v. Dunn* precluded respondents' claims because it held that their ancestors had no interest in Padre Island.
5. The federal court judgment in *34,884 Acres* precluded respondents' claims because it also held that their ancestors had no interest in Padre Island.

Respondents filed an opposition, supported by an affidavit from one of them. CR380-401; CR403-06. The affidavit asserted that Jesus Balli was not a minor in 1847 and, contrary to the available documents of record, had not signed the 1847 deed. CR403-04. The affidavit also asserted that the 1928 judgment in *Havre v. Dunn* never became final and that Mexican courts lacked authority in 1847 to approve Texas land sales. CR404. Kerlin objected that the affidavit was incompetent summary judgment proof as to events from 1847 because, among other reasons, it was not based on personal knowledge. CR409-10. Kerlin objected that the affidavit was incompetent as to the finality of the judgment in *Havre v. Dunn* and the jurisdiction of Mexican courts because, among other reasons, the affiant was not qualified to render legal opinions. CR410-12. In 2003, the court granted summary judgment against respondents on all claims. CR483. The judgment became final after Kerlin non-suited his counterclaims. CR484; CR487-90 (App., Tab 2). Respondents appealed, CR497, and the court of appeals vacated the summary judgment, holding that

1. Respondents' allegations of fraud created a fact issue as to whether the 1847 deed was valid. Op. at *6.
2. A fact issue also existed as to the validity of the Mexican court orders because it was "unknown" whether Mexican courts had jurisdiction to approve a private property sale by a Mexican citizen in 1847. Op. at *10.
- 3.-4. Kerlin could not rely on the preclusive effect of the assignment of claims or state court judgment in *Havre v. Dunn* because that judgment was not final and involved different parties and claims. Op. at *16-17.
5. Kerlin could not rely on the preclusive effect of the federal court judgment in *34,884 Acres* because it involved non-adverse and different parties and

because it relied on *Havre v. Dunn*. Op. at *20-21.

SUMMARY OF ARGUMENT

This is the second of three pending cases where a branch of the Balli family seeks to recover parts of Padre Island and substantial damages from Kerlin based on claims of ancient frauds. The first, *Sauceda v. Kerlin*, No. 05-0653, is before this Court on petition for review, while the third, *Cortina v. Kerlin*, No. 05-6154-A, is pending in Nueces County District Court in a suit seeking over \$1 billion in damages.

In both the present case and *Sauceda*, the Corpus Christi court of appeals breathed new life into stale claims by crediting factually unsupported allegations of fraud dating back decades (*Sauceda*) and over a century and a half (here).⁶ *Cortina* presents the same problem as the present case because it raises identical claims on behalf of another branch of the Balli family. Although crediting unsupported allegations of fraud is always error, it is especially pernicious in cases like these, where the lengthy passage of time ensures a lack of reliable evidence for a jury to consider at trial.

In addition to ruling that unsupported allegations create “fact issues” for a jury, the court of appeals ignored the preclusive effect of two 150-year-old Mexican court orders, a 75-year-old state judgment and related assignment of claims, and a 50-year-old federal court adjudication. This was error because each of these events independently confirms that respondents lack any present interest in Padre Island and because title determinations, on which the public relies, should not be so easily undone.

By ignoring respondents’ lack of proof and the multiple judicial determinations that defeat their claims, the court of appeals turned the state justice system inside out. Rather than enforce the fundamental principle that parties are entitled to one opportunity to prove

⁶ See Pet. for Rev. 1-7, *Sauceda*, No. 05-0653.

their claims on a timely basis, it established a system where parties may repeatedly ask courts to decide issues decades or centuries after the fact, with less proof demanded the older their claims grow. Such Alice-in-Wonderland adjudication degrades the public reputation of judicial proceedings, encourages the multiplicity of baseless claims, and defeats important public policies, including the finality of judgments and settlements, as well as the public's right to rely on record titles. In particular, the decision below unsettles statewide property rights by calling into question any land title where someone is willing to allege that it was fraudulently obtained at some remote point in the past.

Because the court of appeals committed multiple errors on important legal issues in an apparent effort to let a jury hear unsupported fraud allegations 150 years after the fact, this Court should grant the petition for review and reverse the judgment.

ARGUMENT

I. The decision below defeats the purpose of summary judgment by allowing unsupported allegations of ancient frauds to create “fact issues.”

It is undisputed that each of respondents' claims depends, as a threshold matter, on respondents' ability to somehow invalidate an 1847 deed. In moving for summary judgment, Kerlin provided the trial court with evidence that facially demonstrated the validity of that deed. Specifically, Kerlin submitted a copy (certified by the Nueces County District Clerk) of an English translation of a Spanish copy (certified by the American Consul in Matamoros) of the original deed. CR182-97.⁷ That English translation reflects that Jesus Balli's interest in Padre Island was transferred to Grisante in 1847, CR182-84, and that Jesus Balli signed the original deed. CR184 (describing the deed's execution and listing the following signatories: “– Agustin Menchaca. – Nicolas Grisante. – Jesus Balli.”

⁷ Presumably, the original deed – assuming it still exists – remains in Matamoros.

who were before “Joaquin Arguelles, Notary Public”).

Because the 1847 deed was executed before the advent of modern reproduction techniques, it is unsurprising that contemporaneous copies and, in turn, subsequent translations of those copies, lack photostatic images of any original signatures. Even so, because the translation is an ancient document reflecting a public property record, it is competent evidence that Jesus Balli’s interest in Padre Island was transferred to Grisante in 1847 – even if Jesus was not a minor as respondents allege – because it facially purports to have been signed by him. *See* TEX. R. EVID. 803(14) (providing that “[t]he record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office” is not hearsay); TEX. R. EVID. 803(16) (providing that “[s]tatements in a document in existence twenty years or more the authenticity of which is established” are not hearsay).⁸ As such, when Kerlin moved for summary judgment on the basis of this document, the burden shifted to respondents to come forward with some evidence competent to invalidate it.⁹

But all respondents came forward with were conclusory allegations that the original deed was “fraudulent” and “false” and that “a fact issue” existed as to whether Jesus really signed it. CR384-85, 396; *see also* Op. at *5-6 & n.1 (noting that respondents repeatedly “allege[d]” and “assert[ed]” that the deed was fraudulent and false).¹⁰ Although the trial

⁸ Respondents have never claimed, let alone offered evidence, that the English translation is not an authentic or accurate translation of the certified Spanish copy (filed of record in Nueces County in 1847) of the original Mexican deed.

⁹ Indeed, respondents had to come forward with competent evidence to invalidate the deed as “fraudulent” whether or not Kerlin presented any evidence regarding Jesus Balli’s signature because Kerlin’s summary judgment motion was a “no evidence” motion as to respondent’s fraud claims. *See* CR162; TEX. R. CIV. P. 166a(i).

¹⁰ Respondents did file a “supporting” affidavit, but as explained at page 6 above, that affidavit was incompetent

court properly granted summary judgment in Kerlin’s favor, the court of appeals held that respondents’ allegations and assertions created fact issues because courts must construe a non-movants’ *pleadings* in the most favorable light. Op. at *5-6.

This reflects a fundamental and radical distortion of the summary judgment standard. Apart from pleaded allegations admitted by the adverse party, what must be construed in the light most favorable to the non-movant is evidence, not pleadings. *See Wheeler v. Sec. State Bank, N.A.*, 159 S.W.3d 754, 757 n.3 (Tex. App.—Texarkana 2005, no pet.) (“Even sworn pleadings are not summary judgment evidence.” (citing *Americana Motel, Inc. v. Johnson*, 610 S.W.2d 143, 143 (Tex. 1980) (per curiam))). Since Kerlin denied all of respondents’ allegations in his answer and amended answer, CR19, 423, the court of appeals’ holding conflicts with established precedent by allowing a party to resist summary judgment by simply repeating previously-denied allegations. Because this eviscerates summary judgment as a means of terminating unsupported claims, the petition for review should be granted and the court of appeals’ judgment should be reversed.

II. The court of appeals ignored a foreign court’s 150-year-old approval of a property conveyance between private parties within the court’s jurisdiction.

Respondents had to overcome much more than the 1847 deed. For one, the summary judgment record contained two orders of a Mexican court approving the sale. Thus, even if respondents had any evidence that Jesus Balli had not signed the deed, the court orders approving the sale 150 years ago are entitled to preclusive effect as a matter of *res judicata* or comity.¹¹ The Corpus Christi court of appeals rejected this argument because it believed there was a fact issue as to whether Texas or Mexico had actual or “*de*

summary judgment evidence because it was not based on personal knowledge; in addition, the court of appeals did not purport to rely on that affidavit in holding that respondents’ allegations sufficed to create fact issues.

¹¹ *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992) (*res judicata*); *Forum Ins. Co. v. Bristol-Myers Squibb Co.*, 929 S.W.2d 114, 118 (Tex. App.—Beaumont 1996, writ denied) (comity).

facto” control over Padre Island in 1847. Op. at *9.

If the court of appeals were correct that Mexican court orders between 1836 and 1848 that approved property sales in what is now Texas are invalid whenever Mexico lacked *de facto* control over the land in question, it would gravely cloud all Texas titles deriving from such judicial actions. The court of appeals’ ruling is incorrect, however, and conflicts with settled law. Specifically, if a court has jurisdiction over the parties before it, it may decide any issues that affect them personally, even if those issues affect their interests in land outside the jurisdiction:

[W]hen jurisdiction of the persons is present, no one disputes the jurisdiction and authority of [a foreign] court to decree that A convey to B certain Texas lands, nor the further proposition that such deed, when executed in accordance with the Texas laws relating to conveyancing, operates to legally convey lands in Texas.¹²

McElreath v. McElreath, 345 S.W.2d 722, 727 (Tex. 1961). The Mexican court thus had the authority to approve a transfer of Jesus Balli’s property interest. Indeed, any other view borders on the bizarre: If a *Mexican* court could not decide whether one Mexican citizen (Agustin Mechacha) as the agent for another Mexican citizen (Jesus Balli’s father) could transfer a property interest held by another Mexican citizen (Jesus Balli), what court could?

Respondents contest the “accuracy” of the Mexican court’s approval on the ground that Jesus Balli was not really a minor, but that is precisely the kind of collateral attack precluded by basic concepts of finality.¹³ See *Schein v. American Restaurant Group, Inc.*, 852 S.W.2d 496, 497 (Tex. 1993) (per curiam) (“[T]he fact that a judgment may have been wrong . . . does not affect the application of *res judicata*.” (internal quotation marks

¹² See also *Hall v. Jones*, 54 S.W.2d 835, 836 (Tex. Civ. App.—San Antonio 1932, no writ) (“[T]he courts of one state may exercise jurisdiction, when affirmatively invoked or acquiesced in, to determine the validity or effect of a deed of conveyance of real property situated in another state so as to bind the parties to such decree, which, operating directly upon them personally, prohibits them from disputing it in another state.”).

¹³ In addition, respondents came forward with no competent evidence regarding Jesus Balli’s status as an adult in 1847.

omitted)). The Mexican court decrees are thus entitled to preclusive effect because that court had jurisdiction to authorize the transfer.

The court of appeals cited *Martin v. Weyman*, 26 Tex. 460, 465 (1863), to support its contrary conclusion, but it misunderstood the rule in that case, which derives from this Court's decision in *Trevino v. Fernandez*, 13 Tex. 630, 666 (1855). There, this Court held that Texas courts would recognize the validity of a Mexican court decision regarding private rights to land over which Mexico had *de facto* control, even if Mexico lacked *de jure* sovereignty over the land and even if the Mexican court lacked personal jurisdiction over all parties affected by its ruling.¹⁴ But to say that *de facto* control is a *sufficient* condition to sustain the jurisdiction of a Mexican court is a far cry from the holding below, which treats *de facto* control as a *necessary* condition and thus rejects personal jurisdiction over all affected parties as adequate to sustain the validity of the action of the Mexican court.¹⁵ Because the decision below calls into question all private property transfers that are ordered or approved by out-of-state courts – and does so on a basis that conflicts with established precedent – review should be granted and the judgment should be reversed.

III. The court of appeals ignored the preclusive effect of a final 75-year-old Texas court judgment involving persons in privity with the current parties.

In 1928, the Texas court in *Havre v. Dunn* rejected the title claims of respondents' ancestors and issued a judgment granting title to all but the southernmost tip of Padre Island to Robertson and Callahan. The court of appeals gave three unsound reasons for

¹⁴ *Trevino* did not expressly discuss the personal jurisdiction issue, but its holding that a foreign decree could not be attacked on any jurisdictional basis necessarily rejected the appellants' argument that the decree was invalid because "it was rendered by a foreign court having no jurisdiction over the person of the defendant, or over the land, the subject of the litigation." 1855 Tex. LEXIS 72, at *21-22.

¹⁵ This view is not inconsistent with Texas having exercised any control over Padre Island before 1848. Even if Texas had complete control, it would not be inconsistent for a Mexican court – or, for that matter, a French or Brazilian court – to determine that the sale from Jesus Balli to Nicolas Grisante was valid. Of course, whether *Texas* had a superior interest would be a separate matter not controlled by the Mexican judgment.

ignoring the preclusive effect of this judgment.

First, it characterized the 1928 judgment as non-final, claiming this Court had “affirmed a decision mandating a new trial in the . . . case.” Op. at *17. This is incorrect. Although the trial court in *Havre v. Dunn* granted Kerlin a new trial, a second judge set that order aside and dismissed Kerlin’s motion. That dismissal was reversed on appeal, but when this Court affirmed the reversal of that dismissal, it expressly held that the second judge *did* possess the power to set aside the order granting Kerlin’s new trial motion and only erred in dismissing Kerlin’s new trial motion rather than hearing evidence on it. *Callahan v. Staples*, 161 S.W.2d 489, 491-92 (Tex. 1942). The effect of that decision was to revert to the circumstances in which Kerlin’s new trial motion was pending but unresolved. Thus, although Kerlin’s motion had to be heard on remand, unless and until it was heard, there was no live order setting aside the 1928 judgment. Because Kerlin settled with those opposing a new trial before any hearing, the judgment remained final.

Second, the court of appeals claimed that Kerlin had not been involved in *Havre v. Dunn* case when the 1928 judgment issued. Op. at *16. But *res judicata* does not require identity of parties when current parties are in privity with prior parties, see *Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984), and Kerlin was in privity with those who obtained the 1928 judgment by virtue of the 1942 settlement. CR238-40 (tracing title to particular Padre Island acreage from Robertson and Callahan to Kerlin).¹⁶

¹⁶ The court of appeals found it “offensive” for Kerlin to cite the 1928 judgment in *Havre v. Dunn* against respondents because he supposedly sought to overturn it on behalf of “the Balli family.” Op. at *17. If the court meant to invoke some form of estoppel based on inconsistent positions, it erred because, among other reasons, it conflated two branches of the Balli family: the heirs of Juan José Balli (who once had a claim to the Northern Division of Padre Island) and the heirs of Jesus Balli (who once had a claim to the Southern Division). Although both claims were extinguished by *Havre v. Dunn*, there would be nothing inconsistent in seeking to overturn that judgment as to one claim and not the other because the claims are distinct. Moreover, only the heirs of Juan José Balli claim that Kerlin ever acted on their behalf. Respondents have not made such allegations, nor could they: Kerlin had no relationship with their ancestors and never sought to overturn the *Havre v. Dunn* judgment based on their claims.

Third, the court of appeals claimed that *Havre v. Dunn* did not involve the same causes of action as the present case. Op. at *17. But *res judicata* bars the litigation of all causes of action that “arise[] out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit.” *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992). Here, the scope of such preclusion would, at a minimum, include respondents’ threshold contention that the 1847 deed was void. Because that claim is determinative of respondents’ other causes of action, the judgment in *Havre v. Dunn* precludes respondents’ entire action. Because the 1928 judgment precludes respondents’ claim of ownership to an undivided fractional interest in half of Padre Island, review should be granted and the judgment below should be reversed.

IV. The court of appeals ignored a 75-year-old assignment where respondents’ predecessors sold any claim they may have had to any interest in Padre Island.

The *Havre v. Dunn* judgment stated that respondents’ ancestors had sold any claims they might have had to any interest in Padre Island to Robertson and Callahan for \$1,500, CR202-03, but the court of appeals ignored the preclusive effect of this assignment, apparently because it viewed the related judgment as non-final and involving different parties and claims. But even if that were so, the judgment was still evidence of the fact that respondents’ ancestors had sold any claims they may have had. In other words, wholly apart from the judgment’s preclusive effect as a judgment, it prevents respondents from maintaining any current claim to Padre Island because of the assignment it evidences (unless that assignment were invalid, which respondents have neither claimed nor proven).

V. The court of appeals erroneously ignored the preclusive effect of a 50-year-old federal judgment.

In 1948, the federal court in *34,884 Acres* determined that various heirs of Jesus Balli lacked any interest in the island acreage at issue. Because that acreage was in the

Southern Division where respondents claim an undivided fractional interest, the federal judgment precludes their claims. The court of appeals ignored the *res judicata* effect of this judgment on the ground that there was no evidence that the parties to it included respondents' ancestors and because it relied on *Havre v. Dunn*. Op. at *20.

But as respondents acknowledge, “[t]he special master found that the heirs of Jesus Balli were served by publication,” Appellants’ Br. at 18-19, and the interests of those heirs were represented by a court-appointed attorney. CR256. In addition, other parties who appeared through their own attorneys represented a class comprising all descendants of Jesus Balli’s father. CR262. Thus, if respondents are descendants of Jesus Balli as they claim, they are bound by the *34,884 Acres* judgment through privity.

As for the federal court’s reliance upon *Havre v. Dunn*, the *res judicata* effect of a federal judgment cannot be defeated by claims that the judgment (or one it relies on) is “wrong”: “The rule has been settled for this court that where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as *res judicata*, although the first judgment be subsequently reversed.” *Reed v. Allen*, 286 U.S. 191 (1932); *see Schein*, 852 S.W.2d at 497. Because the court of appeals rewrote such basic finality principles, review should be granted and the judgment reversed.¹⁷

CONCLUSION

For these reasons, this Court should grant the petition for review, reverse the court of appeals’ judgment, and render judgment in favor of petitioners. Petitioners also request such other and further relief to which they may be entitled.

¹⁷ The court of appeals also rewrote finality principles by refusing to give collateral estoppel effect to *34,884 Acres* on the basis that Kerlin and the heirs of Jesus Balli were not “adverse.” Op. at *21. This was error because the preclusive effect of a federal court judgment is determined by federal law, which, like Texas law, recognizes non-mutual collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-32 (1979); *Tex. Dep’t of Pub. Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001). In any event, Kerlin and Jesus Balli’s heirs were adverse in *34,844 Acres* because both lay claim to the same land in the Southern Division.

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APRIL 21, 2006

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2006 a copy of the foregoing **PETITION FOR REVIEW** was forwarded to the following counsel, including counsel of record for respondents, in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by Certified Mail, Return Receipt Requested:

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