

No. 05-0653

**In The
Supreme Court of Texas**

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

Petitioners,

v.

CONCEPCION SAUCEDA, ET AL.,

Respondents.

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi, Texas
No. 13-01-0062-CV

PETITIONERS' BRIEF ON THE MERITS

Andrew L. Frey
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019-5820
(212) 506-2500
(212) 262-1910 (fax)

Claudia Wilson Frost
Jeremy J. Gaston
MAYER, BROWN, ROWE & MAW LLP
700 Louisiana Street, Suite 3400
Houston, Texas 77002-2730
(713) 238-3000
(713) 238-4888

Counsel for Petitioners

IDENTITY OF PARTIES AND COUNSEL¹

Gilbert Kerlin, Individually²
Gilbert Kerlin, Trustee
Windward Oil & Gas Corporation
PI Corporation

Defendants/Appellants/Cross-
Appellees/Petitioners

M. Steve Smith
Bar No. 18645650
M. STEVE SMITH & ASSOCIATES
9801 Westheimer, Suite 802
Houston, Texas 77042
(713) 787-9901
(713) 787-9903 (fax)

Counsel for Petitioners at Trial and in the
Court of Appeals

Horacio L. Barrera
Bar No. 01805800
MARTINEZ & BARRERA, L.L.P.
1201 E. Van Buren Street
Brownsville, Texas 78520
(956) 546-7159
(956) 544-0602 (fax)

Russell H. McMains
Bar No. 13782000
LAW OFFICES OF RUSSELL H. MCMAINS
800 N. Shoreline Blvd., Suite 2600 (78401)
P. O. Box 2846
Corpus Christi, Texas 78403
(361) 887-4455
(361) 887-9521 (fax)

Counsel for Petitioners in the Court of
Appeals

¹ This Identity of Parties and Counsel differs from the one filed with the petition for review in two respects. First, the Saucedo Plaintiffs and the Martinez Plaintiffs are now listed as Former Respondents because they settled their claims against petitioners after the petition for review was filed. Second, the *Pro Se* Plaintiffs are now listed as Plaintiffs/Appellees/Respondents. Previously, they were listed only as Plaintiffs (because they had not appeared in the court of appeals to defend the trial court's judgment). Because they retain an interest in that judgment, however, they also should have been listed as Appellees and thus are listed as such herein.

² Petitioner Kerlin died while this matter was pending on appeal. The case remains captioned in his name pursuant to TEX. R. APP. P. 7.1(a)(1). The executor of Kerlin's estate is C. Jones Perry Jr., SHEARMAN & STERLING LLP, 599 Lexington Avenue, New York, NY 10022, (212) 848-4000, (212) 848-7179 (fax).

Claudia Wilson Frost
Bar No. 21671300
Jeremy J. Gaston
Bar No. 24012685
MAYER, BROWN, ROWE & MAW LLP
700 Louisiana Street, Suite 3400
Houston, Texas 77002-2730
(713) 238-3000
(713) 238-4888 (fax)

Counsel for Petitioners in the Texas
Supreme Court

Andrew L. Frey
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019-5820
(212) 506-2500
(212) 262-1910 (fax)

Of Counsel for Petitioners in the Texas
Supreme Court

Sauceda Plaintiffs:

Plaintiffs/Appellees/Cross-
Appellants/Former Respondents³

1. Elma Alaniz [in judgment as “Elma S. Alanis”]
2. Maria Luisa Balli Allen
3. Frances Alvarez
4. Maria Alvarez [in judgment as “Maria Buena Alvarez”]
5. Dolores Balli Anzaldua
6. Lucinda Vera Armendariz
7. Alfred Balli
8. Conrado Balli
9. Emma M. Balli
10. Eulogio Balli
11. Freddie Balli
12. Guadalupe Balli
13. John Balli
14. Juan Balli
15. Juan Jose Balli
16. Juan Manuel Balli
17. Juan M. Balli
18. Leonor C. Balli
19. Maria Elena Balli
20. Nicolas Balli
21. Pedro Balli

³ The Saucedo *et al.* Plaintiffs are listed as Former Respondents because they settled their claims against petitioners after the petition for review in this matter was filed. *See supra* note 1.

22. Raquel Balli
23. Raymond Balli
24. Esteban Balli, Jr.
25. Federico Balli Jr. [in judgment as
“Frederico Balli Jr.”]
26. Nicolas Balli, Jr.
27. Nicolas Balli Jr. [in judgment as
“Nicolas H. Balli”]
28. Juanita Barrera
29. Ernestina Becerril [in judgment as
“Erenesta Becerril”]
30. Dolores B. Bejaran
31. Manuel G. Benavides
32. Maria Vera Brown [in judgment as
“Maria Olivia Brown”]
33. Raquel S. Caballero
34. Sara Camacho
35. Elvira Rangel Cantu
36. Maria Alicia Cardenas [in judgment
as “Mary Alice Cardenas”]
37. Guadalupe Castillo [in judgment as
“Guadalupe G. de Castillo
Benavides”]
38. Hilda A. Castillo
39. Benilda Cervantes [in judgment as
“Belinda L. Cervantes”]
40. A. J. Champion Jr.
41. Alberto S. Charles
42. Noe Charles
43. Delia L. Chavez
44. Esteban Lozano Cisneros
45. Celia Castillo Colmenero
46. Edna Guadalupe Reyes Corona
47. Ida B. DeLeon Cortez
48. Lucia Garcia Cortez
49. Dennis Crittenden
50. Nicholas Crittenden [in judgment as
“Nicolas Crittenden”]
51. Maria Magdalena Davila
52. Candida G. de Cantu
53. Candida Maria Garcia de Cantu
54. Eloisa de la Rosa
55. Gracie de la Rosa [in judgment as
“Graciela De La Rosa”]
56. Rodolfo de la Rosa
57. Ernesto de la Rosa Jr. [in judgment as

- “Ernesto De La Rosa”]
58. Leonor Ruelas De Garcia
 59. Estella Balli De Torre
 60. Alfonso B. DeLeon Sr.
 61. Elida Balli DeLeon
 62. Joel Balli DeLeon
 63. Jose Luis DeLeon
 64. Noe DeLeon
 65. Ricardo B. DeLeon
 66. San Juana DeLeon
 67. Esther G. Delgado
 68. Rosalinda Lozano de Reyna
 69. Omadee Fairchild
 70. Consuelo B. Ferrer
 71. Blanca Vera Flores [in judgment as
“Blanca E. Flores”]
 72. Raquel Flores
 73. Cynthia A. Galvan
 74. (Jose) Guadalupe Garcia [in judgment
as “Guadalupe ‘Jose’ Garcia”]
 75. Adela Villareal Garcia
 76. Alberto Davila Garcia
 77. Alberto Barron Garcia [in judgment
as “Alberto Garcia Barron”]
 78. Alejandra Beatriz Garcia [in
judgment as “Alejandra Garcia”]
 79. Arturo Rafael Garcia
 80. Beatriz G. Garcia
 81. Celia Garcia [in judgment as “Celea
Yolanda Vera Garcia”]
 82. Diane A. Garcia
 83. Dolores M. Garcia
 84. Efrain Garcia
 85. Elia Garcia
 86. Eliseo L. Garcia Sr.
 87. Elma Reyes Garcia
 88. Elvira R. Garcia
 89. Enrigue Garcia
 90. Esmerlinda Garcia [in judgment as
“Esmirlinda Garcia”]
 91. Estela B. Garcia
 92. Feliciano T. Garcia
 93. Herminia Garcia
 94. Irma E. Garcia
 95. Jesus Garcia
 96. Jose T. Garcia

97. Jose Luis Garcia
98. Juan Jose E. Garcia
99. Juan R. Villareal Garcia
100. Juanita Garcia
101. Justa Garcia
102. Leonor Angelica Garcia [in judgment as “Angelica B. De Garcia”]
103. Leonor Ruelas Garcia
104. Lourdes Garcia [in judgment as “Lourdes Davila Garcia Romero”]
105. Lucinda Garcia
106. Lucinda Garcia
107. Maria Garcia
108. Nora H. Garcia
109. Olivia Garcia
110. Omadee Barton Garcia
111. Oscar Garcia
112. Peter J. Garcia
113. Roberto Garcia
114. Roberto E. Garcia
115. Roman Garcia Jr.
116. Ruben E. Garcia
117. Santos Garcia
118. Sergio Garcia [in judgment as “Sergio Garcia Martinez”]
119. Tomas Garcia
120. Tomas Garcia
121. Ygnacia P. Garcia
122. Alberto Garcia Jr. [in judgment as “Alberto Garcia”]
123. Jose Garcia Jr.
124. Primitivo Garcia Jr. [in judgment as “Primitivo Garcia Barton”]
125. Maria Elena Garza [in judgment as “Elena V. Garza”]
126. Paula Balli Garza
127. Zoila R. Garza
128. Carmen Balli Gonzales
129. Evangelina R. Gonzales
130. Herlinda Longoria Gonzales [in judgment as “Herlinda Longoria Ganzales”]
131. Rosalinda Balli DeLeon Gonzalez
132. Gloria C. Guerra
133. Ana Maria Lozano Guzman
134. Minerva Balli Hall

135. Adela Garcia Hernandez
136. Jose L. Hernandez
137. Maria A. Hernandez
138. Luis Hernandez Jr.
139. Rosita Martinez Herrera
140. Gloria L. Hickox
141. Mary Hinojosa [in judgment as
“Maria Eustolia Vera Hinojosa”]
142. Delia R. Hirtle
143. Norma Linda Horrman
144. Estela Hyde [in judgment as “Stella
Balli Hyde”]
145. Guadalupe Jaeckels [in judgment as
“Lupe B. Jaeckels”]
146. Ada Jimenez
147. Aurora Suarez Juarez
148. Mary Klingler [in judgment as “Mary
L. Klinger”]
149. Rosa Garcia Koite
150. Nicholas Lamas Jr. [in judgment as
“Nicholas G. Lamas”]
151. Esther C. Leal
152. Anna Llosa
153. Benito Lopez
154. Cynthia Ann Martinez Lopez
155. Estela Garcia Lopez
156. Eulalia Balli Lopez [in judgment as
“Eulalia ‘Tia’ Lopez”]
157. Jorge Lopez
158. Joseph Lopez
159. Ruben S. Lopez
160. Silvano Lopez
161. Benito Lopez Jr.
162. Denise Reyes Lovelady
163. Dolores R. Loza
164. Carlos Enrique Lozano [in judgment
as “Enrique Lozano Labanzat”]
165. Eva G. Lozano
166. Rogerio Lozano
167. Guadalupe Madrigal [in judgment as
“Lupe Suarez Madrigal”]
168. Perla Mancillas [in judgment as
“Pearl Mancillas”]
169. Olga A. Marquez
170. Maria Elena Marrero
171. Dolores G. Martinez

172. Gilbert A. Martinez
173. Orencio Martinez
174. Rosalinda Rangel Martinez
175. Rosario Martinez
176. Yolanda Peralez Martinez
177. Librada Balli McKinley
178. Jack Euguene Mitchell
179. James W. Mitchell
180. Tomas Molina
181. Sylvia Molina-Hinkes
182. Yolanda Champion Mora
183. Dionicia Moreno [in judgment as
“Dionicia Moreno Villareal”]
184. Josefina Navejar [in judgment as
“Joesfina Navejan Suarez”]
185. Elizabeth Nuncio
186. Lidia V. Obregon
187. Teresa Irma Ortiz
188. Dalia Puga
189. Antonio Ramirez
190. Eduardo Suarez Ramirez
191. Guadalupe B. Ramirez
192. Jeannie Ramirez [in judgment as
“Jeanne H. Ramirez”]
193. Jose S. Ramirez [in judgment as “Joe
S. Ramirez”]
194. Robert R. Ramirez
195. Rosalinda Ramirez
196. Raymond Ramirez Jr.
197. Diana Vera Ramos
198. Rogelio C. Rangel
199. Tomacita C. Rangel
200. Mauro C. Rangel Jr.
201. Norma Vera Rasco
202. Amy L. Redwantz
203. Alberto B. Reyes
204. Alfredo C. Reyes
205. Conrado Balli Reyes
206. Dora Reyes
207. Jesus C. Reyes
208. Jose “J.C.” Reyes [in judgment as
“J.C. Reyes”]
209. Juan Balli Reyes
210. Juan Jose Balli Reyes
211. Julian Reyes
212. Raul C. Reyes

213. Trinidad Reyes
214. Arturo C. Reyes, Jr.
215. Rosa Linda Riesgo [in judgment as
“Rosalie Vera Riesgo”]
216. Irma Rios
217. Carmen Robinson
218. Angel Rodarte
219. Augustin Rodarte [in judgment as
“Rosalie Vera Riesgo”]
220. Javier Antonio Rodarte
221. Juan A. Rodarte
222. Sarita Rodarte
223. Jose Alvaro Rodarte Jr. [in judgment
as “Jose Alvarado Rodarte Jr.”]
224. Evangelina Rodela [in judgment as
“Evangeline C. Rodela”]
225. Carmen Balli Rodriquez
226. Rosie Suarez Rogers
227. Noah Balli Rosales
228. Sylvestre Rosales
229. Celia Vera Serna
230. Dalia Davila Solis
231. Jacobo Solis
232. Martha Stevens
233. Beniot Suarez
234. David R. Suarez
235. Jose Maria Suarez
236. Jose Maria Suarez Jr.
237. Juan Suarez Sr.
238. Cristobal Suarez Jr.
239. Alma Balli Torres
240. Rosa R. Torres
241. Emma Trevino [in judgment as
“Emma Balli Trevinio”]
242. Olga Trevino [in judgment as “Olga
Trevinio”]
243. Sylvia Trevino [in judgment as
“Sylvia R. Trevinio”]
244. Lydia Vargas [in judgment as
“Lyndia H. Vargas”]
245. Maria Dolores Vargas
246. Olga C. Vasquez
247. Marie Venable [in judgment as
“Maria Conception Venable”]
248. Albino A. Vera
249. Arnoldo Vera

250. Hector A. Vera
251. Irma Vera
252. Jose Santiago “Jimmy” Vera
253. Maria Luisa Vera
254. Olivia Vera
255. Virginia Vera
256. Placido Vera Jr.
257. Richard Vera Jr.
258. Bernardino Villareal
259. Dora Villareal
260. Enrique Villareal
261. Everardo Villareal
262. Hugo C. Villareal
263. Jose Villareal
264. Jose Alfredo Villareal
265. Jose G. Villareal
266. Manual Cirilo Villareal
267. Mario A. Villareal
268. Martha E. Villareal
269. Reynaldo Villareal
270. Roberto Villareal [in judgment as
“Robert Gatica Villareal”]
271. Silvia Villareal [in judgment as
“Silvia Villarel Gutierrez”]
272. Ricardo Villareal Jr. [in judgment as
“Ricardo Enrique Gatica Villareal”]
273. Belia Vera Wallace
274. Anna Maria Ward
275. Josefina R. Zarate

Tom C. McCall
Bar No. 13350300
Robert J. Johnson, III
Bar No. 10786400
MCCALL & RITCHIE, L.L.P.
2700 Via Fortuna, Suite 150
Austin, Texas 78746
(512) 477-4242
(512) 477-2271 (fax)

Britton D. Monts
Bar No. 14303900
MONTS & WARE, L.L.P.
1701 N. Market, Suite 330
Dallas, Texas 75202
(214) 741-9400
(214) 744-5013 (fax)

Counsel for the Saucedo Plaintiffs at
Trial and in the Court of Appeals

Hector H. Cardenas, Jr.
Bar No. 00790422
LAW OFFICES OF HECTOR H. CARDENAS, JR.
2700 Via Fortuna, Suite 150
Austin, Texas 78746
(512) 477-4242
(512) 477-2271 (fax)

Frank Costilla
Bar No. 04856500
LAW OFFICES OF FRANK COSTILLA
5 E. Elizabeth St.
Brownsville, Texas 78520
(956) 541-4982
(956) 544-3152 (fax)

Martinez Plaintiffs:

Plaintiffs/Appellees/Former
Respondents⁴

Daniel Martinez
Gloria Martinez
Juan José Martinez
Olivia Martinez
Petra Martinez
Zulema Martinez

Juan José Martinez
2310 W. Highway 77
San Benito, TX 78586

Counsel for the Martinez Plaintiffs at
Trial

Pro se Plaintiffs:⁵

Plaintiffs/Appellees/Respondents

Rebecca Gomez Sexton
611 Uvalde Ave.
McAllen, TX 78503

Ramon Donato Garcia
Rt. 8, Box 606
Brownsville, TX 78520

⁴ The Martinez Plaintiffs are listed as Former Respondents because they settled their claims against petitioners after the petition for review was filed. *See supra* note 1. As with the *Pro Se* Plaintiffs, the Martinez Plaintiffs inadvertently were listed only as Plaintiffs in the petition. *See id.*

⁵ Petitioners are informed that respondent Rafael Garcia died during the pendency of this appeal, although the caption of this matter would remain the same. *See supra* note 2.

Rafael Garcia
Rt. 8, Box 606
Brownsville, TX 78520

Hortencia Garcia
Rt. 8, Box 606-A
Brownsville, TX 78520

Pedro Garcia
Rt. 8, Box 606-B
Brownsville, TX 78520

Sandra Pappagiorgio
794 Normandy
Houston, TX 77015

Esmeralda Gomez Carroll
209 W. Fern
McAllen, TX 78201

George Butcher
619 Sutton Drive
San Antonio, TX 78228

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL	i
INDEX OF AUTHORITIES.....	xiv
RECORD REFERENCES	xix
STATEMENT OF THE CASE.....	xx
STATEMENT OF JURISDICTION	xxiii
ISSUES PRESENTED	xxiv
STATEMENT OF FACTS.....	2
A. More than 175 years ago, Juan José Balli sold his stake in Padre Island to Santiago Morales.....	2
B. In 1938, Kerlin was instructed by his uncle to purchase the outstanding “Juan José interest” in Padre Island, whatever that amounted to, based on rumors of a documented rescission of the 1830 sale.....	3
C. Between 1938 and 1942, Kerlin tried to revive the Juan José interest along with other claims of island title that he had separately acquired.....	4
D. Between 1940 and 1942, Seabury unsuccessfully sought a favorable settlement for the Juan José interest.....	5
E. In November 1942, Seabury reached a settlement of Kerlin’s other title claims and Kerlin conveyed the Juan José interest back to the Balli heirs.	7
F. Consistent with the reconveyance, the Balli heirs proceeded to assert claims to Padre Island in subsequent litigation during the 1940s and 1970s.....	9
G. More than 50 years after the fact, respondents sued Kerlin based on an alleged conspiracy between him and Seabury in connection with the 1942 settlement.	12
SUMMARY OF ARGUMENT	16
ARGUMENT.....	20
I. Respondents’ claims are time barred.....	20
A. Allowing parties to challenge land titles via 50-year-old claims of fraud defeats the reliability and integrity of judicial proceedings.....	21
B. Respondents are guilty of laches because their 50-year delay in filing suit was unreasonable and resulted in the loss of presumptively relevant evidence.....	25

C.	As the jury correctly found, respondents are not entitled to statutory tolling.....	28
1.	The trial court impermissibly reversed the jury’s findings that respondents were not entitled to statutory tolling.	29
2.	The application of statutory tolling in this case would violate petitioners’ rights under the Federal Constitution.	30
3.	The jury’s finding of fraudulent concealment does not cure respondents’ limitations problem because that finding was not supported by legally sufficient evidence.	32
II.	No evidence supported the jury’s finding that Kerlin conspired with Seabury to compromise any claims of the Balli heirs for 7,500 acres in fee simple.....	34
A.	Respondents presented no evidence that the Balli heirs’ claims had ever been settled, while petitioners proved those claims had not been part of a settlement.	34
B.	Seabury’s settlement proposal was inadmissible to prove the value of the Balli heirs’ claims.	36
C.	Seabury’s settlement proposal was incompetent to prove the value of the Balli heirs’ claims.	39
D.	No rational juror could read Seabury’s letter to propose settling the claims of the Balli heirs for 7,500 acres in fee simple for those heirs.	40
E.	No rational juror could find that a party with a dubious claim to a minor royalty interest in certain acreage could ever receive, in settlement of that claim, 100% of the surface and minerals rights to that substantial acreage.	41
III.	Respondents’ separate royalty claim fails because estoppel by deed does not apply to conveyances or reservations of personal interests.	43
IV.	At minimum, respondents’ recovery cannot exceed the greater of their royalty and fee simple claims based on the doctrine of election of remedies.	49
	CONCLUSION	50
	CERTIFICATE OF SERVICE	52
	UNPUBLISHED CASE	
	<i>Arias v. Kerlin</i> ,	
	No. 13-03-364-CV, 2006 Tex. App. LEXIS 92	
	(Tex. App.—Corpus Christi Jan. 5, 2006, pet. filed).....	
		Tab 1

INDEX OF AUTHORITIES

Cases

<i>Acacia Pipeline Corp. v. Champlin Exploration, Inc.</i> , 769 S.W.2d 719 (Tex. App.—Houston [1st Dist.] 1989, no writ).....	31
<i>Adams v. Duncan</i> , 215 S.W.2d 599 (Tex. 1948).....	47
<i>Allen v. United States</i> , 202 Ct. Cl. 1114 (1973)	12
<i>Allen v. United States</i> , 208 Ct. Cl. 958 (1975)	12
<i>Amparo Pena Cortina et al. v. John Doe et al.</i> , No. 05-6154-A	xxi, 1, 15
<i>Arias v. Kerlin</i> , No. 13-03-364-CV, 2006 Tex. App. LEXIS 92 (Tex. App.—Corpus Christi Jan. 5, 2006, pet. filed) (mem. op.) (not designated for publication)	1, 15, 28, 40, 43
<i>Baker v. Coe</i> , 20 Tex. 429 (1857).....	23
<i>Bendix Autolite Corp. v. Midwesco Enterprises, Inc.</i> , 486 U.S. 888 (1988).....	32
<i>Bogart v. Somer</i> , 762 S.W.2d 577 (Tex. 1988) (per curiam).....	27
<i>Caldwell v. Barnes</i> , 975 S.W.2d 535 (Tex. 1998).....	25
<i>Chandler v. Chandler</i> , 991 S.W.2d 367 (Tex. App.—El Paso 1999, pet. denied).....	29
<i>Chapman v. King Ranch, Inc.</i> , 41 S.W.3d 693 (Tex. App.—Corpus Christi 2001), <i>rev'd</i> , 118 S.W.3d 742 (Tex. 2003).....	20, 22
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005).....	23, 34, 35, 39, 41, 42

<i>De Lourett v. Kerlin</i> , 182 F.2d 750 (5th Cir. 1950) (per curiam).....	11
<i>Duhig v. Peavy-Moore Lumber Co.</i> , 144 S.W.2d 878 (Tex. 1940).....	47
<i>Ford Motor Co. v. Miles</i> , 141 S.W.3d 309 (Tex. App.—Dallas 2004, pet. denied).....	30
<i>Goldman v. Pre-Fab Transit Co.</i> , 520 S.W.2d 597 (Tex. App.—Houston [14th Dist.] 1975, no writ).....	31
<i>Greene v. White</i> , 153 S.W.2d 575 (Tex. 1941).....	47
<i>Hanks v. Gulf, Colo. & Santa Fe Railway</i> , 320 S.W.2d 333 (Tex. 1959).....	39
<i>Hanrick v. Patrick</i> , 119 U.S. 156 (1886).....	47
<i>Havre v. Dunn</i> , No. 6515 (103rd Dist. Ct. Cameron Cty., Tex. June 21, 1928).....	<i>passim</i>
<i>Harrison v. Bass Enterprises Prod. Co.</i> , 888 S.W.2d 532 (Tex. App.—Corpus Christi 1994, no writ).....	28
<i>Howard v. Fiesta Tex. Show Park, Inc.</i> , 980 S.W.2d 716 (Tex. App.—San Antonio 1998, pet. denied).....	29, 31
<i>Hyundai Motor Co. v. Vasquez</i> , 189 S.W.3d 743 (Tex. 2006).....	45
<i>Juarez v. United Parcel Serv. de Mexico S.A. de C.V.</i> , 933 S.W.2d 281 (Tex. App.—Corpus Christi 1996, no writ).....	31, 32
<i>King Ranch, Inc. v. Chapman</i> , 118 S.W.3d 742 (Tex. 2003).....	19, 20, 23, 25, 28, 34, 41, 42
<i>Kindred v. Con/Chem, Inc.</i> , 650 S.W.2d 61 (Tex. 1983).....	34

<i>Kuehne v. Denson</i> , 219 S.W.2d 1006 (Tex. 1949).....	45
<i>Lindsay v. Freeman</i> , 18 S.W. 727 (Tex. 1892).....	46, 47
<i>Medina v. Herrera</i> , 927 S.W.2d 597 (Tex. 1996).....	49, 50
<i>Roberts v. Corbett</i> , 265 S.W.2d 127 (Tex. Civ. App.—Galveston 1954, writ ref'd)	45, 47, 48
<i>Robinson v. Robinson</i> , 961 S.W.2d 292 (Tex. App.—Houston [1st Dist.] 1997, no pet.)	45-46
<i>Robinson v. Weaver</i> , 550 S.W.2d 18 (Tex. 1977).....	29
<i>S.V. v. R.V.</i> , 933 S.W.2d 1 (Tex. 1996).....	21, 29
<i>Sauceda v. Kerlin</i> , 164 S.W.3d 892 (Tex. App.—Corpus Christi 2005, pet. filed)	<i>passim</i>
<i>Scurlock Oil Co. v. Smithwick</i> , 724 S.W.2d 1 (Tex. 1986).....	38
<i>Shah v. Moss</i> , 67 S.W.3d 836 (Tex. 2001).....	33
<i>Staples v. Callahan</i> , 138 S.W.2d 206 (Tex. Civ. App.—San Antonio 1940), <i>aff'd</i> , 161 S.W.2d 489 (Tex. 1942)	8
<i>State v. Addington</i> , 588 S.W.2d 569 (Tex. 1979) (per curiam).....	27
<i>State v. Balli</i> , 190 S.W.2d 71 (Tex. 1944).....	3, 6, 22, 26, 44
<i>Steinberg v. Comm'n for Lawyer Discipline</i> , 180 S.W.3d 352 (Tex. App.—Dallas 2005, no pet.).....	30

<i>Stonum v. Schultz</i> , 138 S.W.2d 825 (Tex. Civ. App.—Galveston 1940, no writ)	45
<i>Sw. Bell Telegraph Co. v. Garza</i> , 164 S.W.3d 607 (Tex. 2004).....	30
<i>Tubelite, a Division of Indal, Inc. v. Risica & Sons, Inc.</i> , 819 S.W.2d 801 (Tex. 1991).....	41
<i>Turner v. KTRK TV, Inc.</i> , 38 S.W.3d 103 (Tex. 2000).....	27
<i>United States v. 22,680 Acres</i> , 438 F.2d 75 (5th Cir. 1971) (per curiam).....	12
<i>United States v. 34,884 Acres</i> , No. C.A. 142 (S.D. Tex. Dec. 1, 1948)	10-11
<i>Velsicol Chemical Corp. v. Winograd</i> , 956 S.W.2d 529 (Tex. 1997) (per curiam).....	33
<i>Waco Bridge Co. v. City of Waco</i> , 20 S.W. 137 (Tex. 1892).....	47
<i>Wyatt v. Lowrance</i> , 900 S.W.2d 360 (Tex. App.—Houston [14th Dist.] 1995, writ denied)	29, 31
Constitutions, Statutes, and Rules	
FED. R. EVID. 408	37
TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1997)	28
TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1997)	28
TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1997)	28
TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (Vernon 1997)	29, 31-32
TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon Supp. 2006)	31
TEX. GOV'T CODE ANN. § 22.001(a) (Vernon 2004)	xxiii

TEX. REV. CIV. STAT. ANN. art. 2031b(4), <i>repealed by Acts 69th Leg., R.S., ch. 959</i>	31
TEX. R. APP. P. 7.1(a)(1).....	i
TEX. R. APP. P. 9.5.....	52
TEX. R. EVID. 408	37
U.S. CONST. art. 1, § 8, cl. 3	31
Other Authorities	
<i>Developments in the Law – Res Judicata</i> , 65 HARV. L. REV. 818, 827-28 (1952)	25

RECORD REFERENCES

Plaintiffs' Trial Exhibit # is cited as PX#.

Defendants' Trial Exhibit # is cited as DX#.

The Clerk's Record at page # is cited as CR#.

Volume *x* of the Reporter's Record at page # is cited as *xRR*#.

The court of appeals' opinion (Pet. App., Tab 1) at page # is cited as Op. at #.

STATEMENT OF THE CASE

- Nature of the Case: Respondents are descendants of Juan José Balli, a man who owned 4/7th of Padre Island in 1829 but sold that interest in 1830. More than 100 years later, respondents' ancestors sold any remaining "claim" they had in the island to petitioner Kerlin, reserving only a minor mineral royalty. Over 60 years after that sale, however, respondents convinced a Cameron County jury that they were somehow the rightful owners of certain parts of Padre Island in fee simple and that they further were owed a royalty interest in other parts of the island based on stale and trumped-up claims of fraud, breach of fiduciary duty, breach of contract, and conspiracy, ultimately resulting in a judgment following appeal with a potential value of as much as \$70 million.
- Trial Court: The Honorable Pat McDowell (Visiting Judge), 107th Judicial District Court, Cameron County.
- Trial Court's Disposition: Respondents' claims were filed more than 50 years after the key events giving rise to them. The jury made findings in respondents' favor on all substantive claims and in petitioners' favor on the issue of statutory tolling. The trial court reversed those findings favoring petitioners, conducted an accounting of past mineral lease rentals and bonuses, and then entered judgment awarding respondents their *pro rata* share of \$1,092,000 in proceeds from a 1961 sale by petitioner Kerlin of certain surface rights; \$401,684.46 in mineral lease rentals; and \$70,946.98 in mineral royalties. The judgment also imposed a constructive trust in respondents' favor on an undivided 37.5% mineral interest under 37,160.57 acres and awarded an on-going 1/64th of 1/8th royalty under 58,983.99 acres and 9 numbered lots. The trial court awarded pre- and post-judgment interest to respondents and \$1,620,000 in attorneys' fees to other plaintiffs. The trial court denied respondents' post-trial request for an equitable accounting and disgorgement of profits relating to the surface sales proceeds, as well as respondents' related request for additional pre-suit interest.
- Court of Appeals: The Thirteenth Court of Appeals at Corpus Christi (opinion by Justice Hinojosa, joined by Justices Yañez and Castillo).
- Parties in the Court of Appeals: Appellants/Cross-Appellees: Gilbert Kerlin, individually and as trustee, Windward Oil & Gas Corp., and PI Corp.

Appellees/Cross-Appellants: The Saucedo Plaintiffs (listed *supra* at pp. ii-ix).

Appellees: The Martinez and *Pro Se* Plaintiffs (listed *supra* at pp. x-xi).

Court of Appeals’
Disposition:

The court of appeals’ opinion is reported at *Sauceda v. Kerlin*, 164 S.W.3d 892 (Tex. App.—Corpus Christi 2005, pet. filed) (Pet. App., Tab 1). The court of appeals reversed the trial court’s denial of an equitable accounting of profits earned since 1961 on \$1,092,000 in sales proceeds and remanded for further proceedings. The court of appeals otherwise affirmed the trial court’s judgment. The court of appeals denied petitioners’ petition for rehearing. *Sauceda v. Kerlin*, No. 13-01-00062-CV, 2005 Tex. App. LEXIS 5569 (Tex. App.—Corpus Christi July 7, 2005).

Related Cases:

1. *Gilbert Kerlin et al. v. Gloria Soto Arias et al.* (“*Arias*”), No. 06-0097, in the Supreme Court of Texas (petition for review filed Apr. 21, 2006).

The plaintiffs in *Arias* allege that they are the descendants of Jesus Balli, who, like Juan José Balli, once owned part of Padre Island. Although Jesus Balli’s interest in the island was sold in 1847 in a transaction confirmed by the Mexican courts, the plaintiffs in *Arias*, like respondents here, claim that they remain the rightful owners of parts of Padre Island (including interests determined in this action to belong to respondents) because, among other allegations, petitioner Gilbert Kerlin supposedly defrauded them in connection with the 1942 settlement of *Havre v. Dunn*. Because *Arias* and the present case involve conflicting but related claims to some of the same Padre Island acreage, petitioners filed a motion on April 26, 2006 for the Court to consolidate these cases or treat them as related.

2. *Amparo Pena Cortina et al. v. John Doe et al.* (“*Cortina*”), No. 05-6154-A, in Nueces County District Court (original petition filed Dec. 19, 2005).

The plaintiffs in *Cortina* claim to be another branch of the Balli family that remain the rightful owners to parts of Padre Island. The *Cortina* plaintiffs seek \$1 billion in damages based

on claims identical to those of the *Arias* plaintiffs, which they have filed against “John Doe” (as personal representative of petitioner Gilbert Kerlin) and petitioner P.I. Corp.

STATEMENT OF JURISDICTION

This Court has jurisdiction because the court of appeals held differently than prior decisions of this Court and another court of appeals 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 construction or validity of a state statute is necessary to the determination of the case. *Id.* § 22.001(a)(3). Finally, this Court 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

1. Whether a 50-year delay in filing suit establishes laches as a matter of law when it results in the loss of presumptively relevant witnesses and documents.
2. Whether a trial court may reverse a jury finding supported by evidence on the ground that it purportedly conflicts with another finding.
3. Whether Texas may constitutionally toll limitations against nonresident defendants otherwise amenable to long-arm service of process during the tolling period.
4. Whether legally sufficient evidence supported the jury's finding that respondents' property claims were compromised during the settlement of *Havre v. Dunn*.
5. Whether a party waives a running objection to inadmissible evidence by testifying about that evidence to explain or rebut it.
6. Whether an unaccepted settlement proposal is competent to prove the value of a claim or the existence and terms of a settlement.
7. Whether a rational juror could find that a party with a claim to only a mineral royalty in certain acreage could obtain, in settlement of the claim, that same acreage in fee simple.
8. Whether estoppel by deed applies to conveyances or reservations of personal interests.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents are descendants of Juan José Balli, a man who once owned 4/7th of Padre Island but sold his interest in 1830. Nevertheless, 170 years later, a Cameron County jury found that respondents remained the rightful owners of parts of the island based on an alleged conspiracy from the 1940s. Respondents' claims are unfounded, self-contradictory, and based on conjecture rather than competent evidence. In addition, respondents' 50-year delay in bringing suit resulted in the loss of critical witnesses and documents, further compromising any possible reliability of the adjudicative process. The trial court's judgment – itself worth in excess of \$7 million – was then inflated exponentially by the Corpus Christi court of appeals, which ordered further accounting of profits petitioners have earned since 1961 on land sales proceeds. The resulting judgment was then potentially worth as much as \$70 million.

Facing the risk of an enormous judgment and having no further appeal as of right, petitioners settled with most respondents after the petition for review in this matter was filed. Although that settlement reduced the magnitude of the court of appeals' current judgment, it did not diminish the need for this Court's review because the court of appeals' affirmance of stale and meritless claims has fueled further litigation against petitioners on related claims by other Balli descendants and has thrown into doubt the ownership of Padre Island.

A petition for review is pending in this Court in one of those other cases, *Arias v. Kerlin*,⁶ No. 13-03-364-CV, 2006 Tex. App. LEXIS 92 (Tex. App.—Corpus Christi Jan. 5, 2006, pet. filed) (mem. op) (not designated for publication) (copy attached at Tab 1), while another case, *Cortina v. Doe*, No. 05-6154-A, is currently pending in Nueces County trial

⁶ No. 06-0097, in the Supreme Court of Texas.

court. The plaintiffs in these cases seek over a billion dollars in damages on claims of fraud dating back as far as 1847. Other Balli descendants with similar but as yet unasserted claims wait in the wings. Because *Arias* and the present case are both pending in this Court and involve related but conflicting claims to some of the same Padre Island acreage, petitioners filed a motion on April 26, 2006 for this Court to consolidate them or treat them as related.

As shown herein, the court of appeals' opinion in the present case affirmed a judgment on stale and meritless claims by applying legal principles that conflict with this Court's precedents and by incorrectly deciding issues of substantial importance to the jurisprudence of this State and to all *bona fide* property owners in it. In addition, the court of appeals' opinions here and in *Arias* unsettle statewide property rights, upend longstanding settlements and judgments, and, contrary to public policy, encourage protracted litigation in pursuit of ancient and baseless claims. For these reasons, this Court should grant the petition, reverse the court of appeals' judgment, render judgment in favor of petitioners, and vacate the court of appeals' opinion before its baleful consequences multiply further.

STATEMENT OF FACTS

A. More than 175 years ago, Juan José Balli sold his stake in Padre Island to Santiago Morales.

On March 21, 1829, the Mexican State of Tamaulipas confirmed the grant of Padre Island to Juan José Balli and his uncle Padre Nicolas Balli. *Op.* at 903. Padre Nicolas Balli died later that year, and his undivided one-half interest in the island passed to his seven nieces and nephews, one of whom was Juan José. *Id.* Juan José then held a four-sevenths interest in the island.

On January 19, 1830, the heirs of Padre Nicolas Balli, including Juan José,

partitioned the island into two unequal divisions: (1) the northern fourth-sevenths (“Northern Division”) owned by Juan José and (2) the southern three-sevenths (“Southern Division”) owned by the other heirs. Op. at 903; DX66; DX31 at 12-14. That same day, Juan José sold his interest in the island to Santiago Morales. *Id.*

Soon thereafter, Morales claimed that the original government grant to Juan José and his uncle had been defective. Op. at 903. Morales asked Juan José to return the purchase money until title was cleared. *Id.* Juan José temporarily returned the purchase money. *Id.* During the 1840s, however, Morales treated the Northern Division as his own by mortgaging and selling parts of it; as a result, when the issue came before it in 1944, this Court concluded that Juan José ultimately had cleared his title to Morales’s satisfaction. *State v. Balli*, 190 S.W.2d 71, 87 (Tex. 1944). No other court has ever ruled to the contrary.

B. In 1938, Kerlin was instructed by his uncle to purchase the outstanding “Juan José interest” in Padre Island, whatever that amounted to, based on rumors of a documented rescission of the 1830 sale.

In 1937, a group of individuals (E.R. Fry, J.Q. Henry, A.W. Phillips, and Herman Nami) claimed they had discovered in the archives at Matamoros evidence of a rescission of the 1830 sale. Op. at 904. Word of this claim reached New York attorney Frederic Gilbert, who agreed to enter a joint venture with two of the individuals (Fry and Henry). *Id.* The goal of that venture was to use the evidence from Fry and Henry “to establish and assert the title of the heirs-at-law of Juan Jose Balli in Padre Island.” PX4 at 1; *see also* Op. at 904. To that end, Frederic Gilbert enlisted his 27-year-old nephew, petitioner Gilbert Kerlin, to go to Texas, purchase the Juan José claims from the living heirs as trustee for the venture, and then attempt to validate the rescission. 9RR128-32; 13RR224. Kerlin, a recent law school graduate, went to Brownsville as instructed by his uncle and

began working with real estate attorney F.W. Seabury. 9RR126-29; 17RR121. From the start, Seabury doubted the evidence of the claimed rescission:

I saw today [August 11, 1938] for the first time the alleged cancellation of March, 1830, between Santiago Morales and Juan Jose Balli. You will remember that we were informed this instrument was attached to the deed from Juan Jose Balli to Morales, made two months earlier, both being stitched together and both taken from the same archive. That information was false. The cancellation instrument is not numbered or pages [*sic*] as the other is, it has never been stitched to anything, it is on different paper with an Italian water mark, it is written in different ink (and, I think, an ink unknown at that time), and it is not signed by anyone. (DX116A.)

In addition, whether or not an ancient rescission could be proven, Seabury independently believed the Juan José interest to be worthless because Juan José's heirs had never registered any property interest with the Bourland-Miller land commission (following the Mexican-American war) and because the land had been adversely possessed by others for decades. DX115. Nevertheless, based on Gilbert's orders, Seabury and Kerlin pressed forward in locating Balli heirs and preparing deeds between them and Kerlin, as trustee for his uncle's venture. 10RR25-29, 33; 13RR125-30, 139; 16RR78; PX4, 7.

Ultimately, eleven deeds were signed by the heirs of Juan José Balli. These deeds conveyed the heirs' undivided interests, if any, in Padre Island in exchange for monetary consideration. The deeds also reserved the heirs' *pro rata* interests, if any, in a 1/64th of 1/8th mineral royalty. PX28 (Pet. App., Tab 2) (representative deed); 9RR132-36; 10RR39; 12RR80-81, 141-42; 13RR169-71; PX26-36.

C. Between 1938 and 1942, Kerlin tried to revive the Juan José interest along with other claims of island title that he had separately acquired.

By 1938, Kerlin held for his uncle's venture all of the Juan José interest (less the minor reserved royalty interest), giving him a "claim" of title – colorable or not – to the Northern Division of the island. In addition to the problems identified by Seabury,

however, Kerlin faced a 1928 judgment in a state court case, *Havre v. Dunn*,⁷ which had settled title to all but the southernmost tip of the island, thereby extinguishing all competing title claims, including those based on the Juan José interest. PX41.

Upon further research, Kerlin learned that two parties to the *Havre v. Dunn* judgment had moved to reopen it and that their motion remained pending. 23RR91-92; PX42. To gain standing to pursue that pending but dormant motion, Kerlin bought a mineral lease from the widow of one of the movants. 10RR64-66; 13RR234-35; PX40. Kerlin's attorney Seabury then moved for a new trial and filed an answer and cross-action on behalf of Kerlin and those whose claims of title he was asserting. 10RR67, 70-72, 76-77, 79, 84, 87-89; 24RR138; PX43.

Having successfully intervened in *Havre v. Dunn*, Kerlin started accumulating additional claims of title to various acreage in the Southern Division of the island (known as the Warren, Moore, Cook, and Agnew claims), along with a claim to 2,214 acres in Nueces County (known as the Kate Gilbert claim). 10RR112-14; 11RR5-8; 13RR225; 15RR115-22; DX369. These claims of title were independent of the Juan José interest, but like that interest, they also had been extinguished by the 1928 judgment in *Havre v. Dunn*. *Id.*; 10RR128-30; 11RR42; 16RR123, 125-26.

D. Between 1940 and 1942, Seabury unsuccessfully sought a favorable settlement for the Juan José interest.

As Kerlin accumulated more and more claims, Seabury sought a favorable settlement for them from those opposing the new trial motion in *Havre v. Dunn*. To that end, Seabury offered to settle with the opposing parties in February 1940 for 40% of the entire island. 10RR132-36; 13RR133-34; 16RR119-20. The opposing parties viewed Seabury's demand as outrageous and rejected it out of hand. PX55; 10RR136-37;

⁷ No. 6515 (103rd Dist. Ct. Cameron Cty., Tex. June 21, 1928).

24RR29-30. As one opposing party sarcastically described it,

[h]aving survived the shock of this pronouncement [Seabury's demand], we, the owners of the Island and their attorneys, were graciously permitted to retire. We are still retiring; and insofar as we are concerned, all settlement negotiations with Mr. Seabury or his clients are at an end. (PX55.)

That same month, another hurdle arose. The State of Texas filed suit against Kerlin, Juan José's heirs, and numerous others in an attempt to quiet title to Padre Island in favor of the State. 9RR153-54; 10RR44-45; 15RR14. Although the State ultimately lost that suit, *see State v. Balli*, 190 S.W.2d 71 (Tex. 1944), the trial proceedings in the spring of 1942, which revealed additional evidence of forgery surrounding the alleged rescission, further convinced Seabury that the Juan José interest was worthless. PX90. As Seabury privately admitted to Kerlin's uncle in the fall of 1942,

[r]eferring to the purchases you have made of the claims of the living descendants of Juan Jose Balli to the Northerly division of Padre Island, I beg to advise you that your claims are worthless, and that the money you have spent in acquiring them is a total loss. (PX95.)

Nevertheless, in an attempt to salvage some value from the Juan José interest, Seabury devised a theory suggesting that, even if no rescission had occurred, Juan José might not have sold all of the Northern Division in 1830. Seabury's theory was based on the idea that Juan José had only sold "one-half league" of the land inherited from his uncle, which technically would have been slightly less than what he had inherited. 23RR74. Specifically, although Juan José had inherited one-seventh of the south half of the island, he arguably conveyed only one-half league of that interest to Morales. Based on that discrepancy, Seabury theorized that Juan José had retained 7,444 acres, the approximate difference between one-seventh of the south half (9,658 acres) and one-half

league (2,214 acres).⁸ See PX58 at 3; 11RR93.

Although ingenious, Seabury's theory was dubious on the merits: in addition to years of adverse possession by others and the failure of Juan José's heirs to register any interest with the state land commission, an 1856 tax sale would have extinguished any remaining interest Juan José had retained. 23RR70-87; DX371H at 653-64.

Even so, Seabury pushed forward, tendering a new settlement proposal on June 9, 1942. 10RR157-58; 24RR60. Part of that proposal demanded a tract of 7,444 acres in the Northern Division, which Seabury said represented "the acreage that never was divested out of Juan José Balli on any theory of the case." Seabury added that "Gilbert Kerlin and Associates want this to comply with their commitments to the heirs of Juan José Balli." PX58; 10RR161-65. As explained above, however, those "commitments" were necessarily limited to a 1/64th of 1/8th royalty interest based on the reservations in the eleven deeds from the Balli heirs. As before, Seabury's proposal was not accepted, and subsequent settlement proposals made no further references to exchanging land or money for the "Juan José interest." DX209b; PX85.

E. In November 1942, Seabury reached a settlement of Kerlin's other title claims and Kerlin conveyed the Juan José interest back to the Balli heirs.

Unlike Kerlin's title claim based on the Juan José interest, Kerlin's other title claims had substantial merit. Indeed, according to the opposing parties' own attorney (Harbert Davenport), the opposing parties had no defenses to the Cook, Agnew, and Moore claims that Kerlin possessed, and defeating his claims derived from the Warren and Kate Gilbert titles was expected to be difficult. DX205; see also DX31 at 26 (describing

⁸ In 1830, the difference between one-seventh of the south half of Padre Island and one-half league would have been much different because at that time, the island was believed to comprise only 49,913 acres. Op. at 903. Although one-half league still would have been 2,214 acres, one-seventh of the south half of the island would have been only 3,565 acres, thus making any discrepancy 1,350 acres rather than 7,444 acres.

scope of Warren title).

Of course, the opposing parties hoped that Kerlin's new trial motion would not be granted, but that was a gamble. One trial judge had initially granted the motion, and while a second judge had set that order aside and dismissed the motion, the court of appeals had held that the second judge erred in dismissing the motion without hearing evidence. *See Staples v. Callahan*, 138 S.W.2d 206, 207, 211 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 161 S.W.2d 489, 491-92 (Tex. 1942). As a result, the *Havre v. Dunn* judgment remained subject to a potential reopening on remand, and a hearing on Kerlin's new trial motion was set for November 9, 1942. Op. at 907.

These uncertainties induced the opposing parties to reach a settlement with Kerlin right before the scheduled hearing. 11RR22-23, 90-92. Under that settlement, Kerlin was to receive 20,000 acres in fee simple in the Southern Division of the island and mineral rights to 1,000 acres in Nueces County. 10RR176-77; 11RR55-57; 16RR86, 170-71; PX96, 96a (Pet. App., Tab 3). The settlement thus represented full value (20,000 acres in the Southern Division) for Kerlin's Cook and Agnew claims, DX271 (Pet. App., Tab 4), 15RR120-27; partial value (1,000 mineral acres in the Northern Division) for Kerlin's Kate Gilbert claim to 2,214 acres in Nueces County; and nothing additional for Kerlin's Warren and Moore claims (which overlapped the Cook and Agnew claims, DX205; DX31 at 26).

Seabury and Davenport informed the court that a settlement had been reached and asked the court to continue the new trial hearing to give the parties time to finalize the documentation required by the settlement. PX88, 96, 96a (Pet. App., Tab 3). In particular, Kerlin had to clear the opposing parties' titles by quitclaiming the Cook, Agnew, Warren, Moore, and Kate Gilbert titles in favor of the opposing parties. *Id.*; PX109. In return, the opposing parties had to issue conveyances sufficient to vest title in Kerlin to the acreage

he was to receive in the settlement. PX96, 96a (Pet. App., Tab 3). Notably, the settlement did not mention the Juan José interest, let alone require any quitclaim of that interest in favor of the opposing parties, either by Kerlin or the Balli heirs. *Id.*

To complete his part of the settlement, Kerlin obtained a three-day leave from the armed forces and came to Texas on November 7, 1942, where he executed the necessary documents. 11RR23, 33, 103; 16RR84-85. Having obtained nothing of value based on the Juan José interest, Kerlin also quitclaimed that interest back to the Balli heirs through a reconveyance deed. 11RR64, 105-06; 16RR161-63. Because Kerlin had to return to the armed forces (where he remained through August 1945, DX292), Seabury agreed to deliver that deed to the Balli heirs. *See* 11RR104-12; 12RR55-56; 16RR85-86, 162.

By the following spring, all necessary quitclaims, conveyances, and other documents had issued, and on March 27, 1943, the parties' attorneys informed the trial court that the pending new trial motion could finally be dismissed, and the court did so. PX99 at 3. In addition, Seabury dismissed the cross-claims he had filed. 11RR83-84.

F. Consistent with the reconveyance, the Balli heirs proceeded to assert claims to Padre Island in subsequent litigation during the 1940s and 1970s.

After the *Havre v. Dunn* settlement, Seabury's health began to fail. He had a stroke in 1945 and died in 1946. 10RR140; 15RR138, 142-43, 150, 156. As a result, he was unavailable at trial 54 years later to testify whether he had in fact, as requested by Kerlin, delivered the reconveyance to the Balli heirs. Likewise, he was unavailable to testify whether he had informed any of the Balli heirs that the case had settled and that nothing had been obtained in exchange for their potential claim to a 1/64th of 1/8th royalty.⁹

⁹ Kerlin knew that at least some of the Balli heirs had been informed that he had received no title under the Balli deeds, for in 1953, one of Juan José's heirs (Primitivo Balli) wrote Kerlin asking for documentation of his interest in the island. 12RR49-50. Kerlin replied that he (Kerlin) had acquired no title under the Balli deeds. 12RR52-53. In 1954, Kerlin again wrote Primitivo, stating that he had been unable to establish that Juan José retained any interest in Padre Island after 1830 and that the heirs' claims were

Kerlin believed that the Balli heirs had received the reconveyance, however, and this belief had substantial foundation because many of those same heirs reasserted claims to Padre Island in subsequent litigation, including claims to a fee interest that they would have had no basis to claim if they believed Kerlin still held their titles. 11RR109-12; 12RR52-58; 15RR171-80.

In particular, during the 1940s, 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 in 1941. DX368 at 1-2; 13RR63. The government's complaint listed numerous defendants, including Kerlin and the descendants of Juan José Balli. DX31 at 2-7; DX431. Juan José's descendants were served personally or by publication or waived service. DX31 at 2-7. Some appeared in person or through an attorney and filed answers, including Primitivo Balli, known as the "patriarch of the Balli family." Op. at 904; *see* DX31 at 7-10; DX431. All others were represented by a court-appointed *ad litem*. DX368 at 6-11, 9. Because the various defendants, including the Ballis, were asserting conflicting claims to the island, the district court assigned a special master to resolve all title issues. 12RR55; DX31 at 1, 14; DX312; DX368 at 5.

In December 1948, the district court adopted the special master's title report (DX31) and issued a final title adjudication (DX368), which held, among other things, that the heirs of Juan José Balli lacked any title or interest in the Padre Island property at issue. DX368 at 9-11; *see United States v. 34,884 Acres*, No. C.A. 142 (S.D. Tex. Dec. 1, 1948). The district court recognized Kerlin's title, however, which Kerlin had proven through an abstract of title that did not rely on the deeds from the Balli heirs. DX282, DX368 at 18-

worthless. 20RR208-09. Kerlin had no further communications with Primitivo. 12RR66; 15RR169. Similarly, in 1985, a descendant of the Balli heirs contacted Kerlin regarding the deeds. As with Primitivo, Kerlin informed her that the deeds had been worthless. Op. at 908.

19; DX369 at DEF-06746; DX388 at 2 (letter dated February 1945 from Seabury to United States attorney for 34,884 Acres case stating that Kerlin previously had “relinquished all rights under the said heirs of Juan Jose Balli”).

One branch of the Balli family (the heirs of Juan José’s brother Francisco Balli) appealed the district court’s title adjudication and challenged both it and the judgment in *Havre v. Dunn*. On appeal, they argued that “[t]he State of Texas does not have the impression of sovereignty of said lands and as such is not legally able to decide the questions of titles and adjudication thereof” and that those judgments “were without force or effect.” *De Lourett v. Kerlin*, 182 F.2d 750, 751 (5th Cir. 1950) (per curiam). The Fifth Circuit rejected these claims:

We find no basis, whatever, in the record, and no authority cited to support, these claims. The case, on the contrary, is simply one in which the respective rights of appellees and appellants were heard and determined in favor of the appellees, and nothing is made to appear either in the briefs or the records to in any manner impeach or overthrow the judgment of the court below, or the earlier judgments, in which the rights of appellees and those under whom they claim were settled and determined. Looked at from any standpoint, therefore, the claims of appellants are untenable, whether regarded as unwarranted collateral attacks on earlier judgments or as efforts to set aside a judgment based upon findings on controverted issues. (*Id.*)

A similar result occurred years later. During the 1960s, the United States condemned part of Padre Island to form a national seashore park. The record owners of the affected land obtained a substantial compensation judgment against the United States. The heirs of Juan José Balli then sought to intervene to receive part of that judgment, claiming they “were the owners of the lands taken by condemnation in this cause at the time of the declaration of taking.” DX358 at 2. The district court denied leave to intervene. The Fifth Circuit affirmed, holding that the denial was proper because the Juan José heirs had known of the proceedings all along but intentionally waited to intervene

until a favorable judgment was rendered in favor of the true land owners. *See United States v. 22,680 Acres*, 438 F.2d 75 (5th Cir. 1971) (per curiam); *see also* 15RR179, 171-80 (discussing the participation of the Juan José heirs in the “extended proceedings” of *22,680 Acres*).

The heirs of Juan José Balli then sought compensation directly from the federal government in a proceeding brought in the federal Court of Claims. That court first held that many of the heirs claims were facially barred by limitations, then remanded the rest to the trial division for a determination of several issues that appeared dispositive of the claims on the merits (including the *res judicata* effect of the *Havre v. Dunn* judgment and the adverse possession of the land by others during the intervening years). *See Allen v. United States*, 202 Ct. Cl. 1114 (1973). Subsequently, the Court of Claims dismissed all remaining claims of the heirs of Juan José for failure to prosecute or comply with court rules and orders controlling the pleadings and discovery in that case. *See Allen v. United States*, 208 Ct. Cl. 958 (1975).

G. More than 50 years after the fact, respondents sued Kerlin based on an alleged conspiracy between him and Seabury in connection with the 1942 settlement.

In 1993, respondents sued Kerlin and his two wholly-owned companies (petitioners P.I. Corp. and Windward Oil & Gas Corp., which own Kerlin’s mineral interests). Op. at 908; 12RR110-15. Respondents claimed breach of contract, breach of fiduciary duty, fraud, and conspiracy. Op. at 908-09. In addition to denying respondents’ allegations, petitioners asserted several affirmative defenses, including *res judicata*, estoppel, limitations, laches, the statute of frauds, and respondents’ lack of title. CR2515-26.

After a two-month trial in 2000 – in which Kerlin (then nearly 91) was the principal witness – the jury found that 58 years earlier, Kerlin had conspired with Seabury to commit fraud and breach of fiduciary duty in connection with the settlement of *Havre v.*

Dunn. 13RR78; CR4773, 4775 (Pet. App., Tab 5). In particular, the jury found that Kerlin had acquired in that settlement 7,500 acres in fee simple that rightfully belonged to Juan José's heirs. CR4777 (Pet. App., Tab 5). For that alleged breach of fiduciary duty, the jury awarded \$1,092,000, which represented the heirs' imputed portion (32%) of the sales proceeds Kerlin received in 1961 when he sold the surface rights to the Padre Island acreage he had obtained in *Havre v. Dunn* as well as other island acreage he had obtained afterwards. 12RR82-84; CR4779 (Pet. App., Tab 5).

Separately, the jury found that Kerlin was estopped from denying the royalty reservations in the deeds from the Balli heirs, regardless of whether the Balli heirs ever had good title to any part of the island. CR4758-60 (Pet. App., Tab 5). For this estoppel claim, the trial court awarded respondents \$70,946.98 in past mineral royalties along with an on-going 1/64th of 1/8th royalty in *all* of Kerlin's Padre Island mineral interests, which included the remaining mineral interests Kerlin obtained in *Havre v. Dunn* as well as additional mineral interests he obtained after that case, which together totaled approximately 60,000 mineral acres. CR4966-67, 4982-84 (Pet. App., Tab 6); DX369.

After the jury returned its verdict, respondents moved for additional equitable relief, seeking appointment of an auditor, an equitable accounting, a constructive trust, and a disgorgement of profits, including profits Kerlin had earned since 1961 on the \$1,092,000 in sales proceeds that the jury found belonged to respondents. CR4929-45. The trial court conducted a partial accounting, awarding respondents \$401,684.46 in mineral lease rentals for the 7,500 acres and imposing a constructive trust in respondents' favor on an undivided 37.5% mineral interest under 37,160.57 acres. CR4965-69, 4985 (Pet. App., Tab 6). The trial court otherwise denied respondents' requests, CR4965 (Pet. App., Tab 6), granted a partial award of pre-judgment interest, and awarded \$1,620,000 in attorney's fees to those

plaintiffs who had retained counsel. CR4966-69 (Pet. App., Tab 6).

Kerlin's motions for new trial and to modify the final judgment were overruled by operation of law, and both Kerlin and most plaintiffs (but not the current respondents) appealed. Op. at 909. On appeal, Kerlin argued that:

- Respondents' claims were barred by laches because they had waited 50 years to file suit and relevant sources of evidence had been lost during the delay.
- Respondents' claims were barred by limitations because the trial court had improperly reversed the jury's findings that respondents were not entitled to statutory tolling.
- Respondents' claim to a fee interest, based on an alleged conspiracy to settle the Balli heirs' claims for 7,500 acres in fee simple, failed because no evidence supported the jury's finding in favor of it.
- Respondents' royalty claim, based on estoppel by deed, failed because that doctrine did not apply to the royalty reservations in the deeds from the Balli heirs.
- At a minimum, election of remedies precluded respondents from recovering under both their royalty and fee claims.

Kerlin Appellants' Br. at 26-34, 40-46.

Over four years later, the Corpus Christi court of appeals rejected petitioners' arguments and affirmed the judgment against petitioners in its entirety.¹⁰ As relevant here, the court of appeals held:

- Respondents' claims were not time-barred because Kerlin had not shown any harm from the delay and because the trial court was entitled to reverse the jury's findings that respondents were not entitled to statutory tolling.
- Legally sufficient evidence supported the jury's finding that Kerlin had obtained 7,500 acres for the Balli heirs because Seabury's unaccepted settlement proposal mentioning that acreage was open to "conflicting interpretations" and Kerlin's running objection to its admissibility had been waived by Kerlin's submission of evidence to rebut and explain the wrongly admitted evidence.
- Estoppel by deed applies to reservations in any kind of property deed.
- Election of remedies did not bar either of respondents' recoveries because

¹⁰ Kerlin died in April 2004 at age 94 while the appeal was pending. *See supra* note 2.

respondents' claims were based on different causes of action.
Op. at 914-16, 920, 924-26.

In addition, some plaintiffs had filed a cross-appeal, seeking reversal of the trial court's denial of their request for an equitable accounting and additional pre-judgment interest. *See supra* at ii-ix, listing cross-appellants (the Saucedo Plaintiffs). The court of appeals upheld the trial court's denial of additional pre-judgment interest but ruled that the cross-appellants were entitled to an equitable accounting and disgorgement of profits. The court of appeals thus ordered the trial court to conduct an equitable accounting and remanded for such proceedings. Op. at 927. Based on the court of appeals' remand order, the Saucedo Plaintiffs claimed that the ensuing judgment against Kerlin and his companies would be worth over \$70 million.

After the petition for review was filed with this Court, petitioners settled the claims of the Saucedo Plaintiffs as well as those of the Martinez Plaintiffs. The settling parties then moved this Court to sever and vacate the equitable accounting portion of the court of appeals' judgment, which this Court granted.

Like removing one head of a hydra, however, the settlement did not end the litigation against petitioners. Indeed, news of the settlement encouraged another branch of the Balli family to file suit against petitioner P.I. Corp. and the personal representative of Kerlin's estate, raising claims of fraud dating back even further than the present case. *See Amparo Pena Cortina et al. v. John Doe et al.*, No. 05-6154-A, in Nueces County District Court (original petition filed Dec. 19, 2005). The Corpus Christi court of appeals then remanded for trial related fraud claims of yet another branch of the Balli family, claims the trial court previously had dismissed on summary judgment. *See Arias v. Kerlin, supra* (Tab 1).

As it currently stands, the claims of the non-settling respondents in the present case remain pending. Those claims implicate all of the legal issues raised in the petition for review (except those concerning the propriety of an equitable accounting). As explained herein, to prevent further protracted litigation of stale and meritless claims, this Court should grant the petition, reverse the court of appeals' judgment, render judgment in favor of petitioners, and vacate the court of appeals' opinion.

SUMMARY OF ARGUMENT

In 1829, respondents' ancestor Juan José Balli owned just over half of Padre Island. The next year, he sold his interest. Over a hundred years later, Juan José's descendants sold to Kerlin any remaining "claim" they had to the Northern Division, such as it was, reserving only a tiny royalty interest. More than 60 years after that, a Cameron County jury found that respondents had somehow become owners of 7,500 acres in the Southern Division as well as a royalty interest in the rest of Kerlin's acreage (nearly all of which was in the Southern Division as well). This finding was based on an alleged conspiracy dating back to the 1940s. The court of appeals then parlayed that jackpot into a potentially far greater sum by giving those plaintiffs who cross-appealed the right to an "equitable accounting" of profits that Kerlin had earned since 1961 on \$1,092,000 in sales proceeds.

In reaching this result, the court of appeals made numerous legal errors. Most notably, the court of appeals upheld respondents' claims of estoppel by deed and conspiracy on grounds that conflict with the precedents of this Court and that of another court of appeals. The court of appeals also rejected petitioners' defenses of laches, limitations, and election of remedies on similarly erroneous bases. On each point, the court of appeals' errors require correction by this Court to prevent plaintiffs from raising stale and unsupported claims of ancient frauds as a means of obtaining undeserved judgments

and extorted settlements. The following summarizes the court of appeals' errors:

1a.-b. Respondents were guilty of laches because they delayed over 50 years in filing suit and their unreasonable delay resulted in the loss of relevant witnesses and documents. The court of appeals ruled against Kerlin on this issue because he could not show what the missing witnesses and documents would have proven. This was error because any uncertainty as to the substance of that lost evidence must be held against respondents whose delay caused the loss and undermined the reliability of any adjudicative proceedings.

1c. Although the jury determined that respondents were not entitled to statutory tolling, the trial court reversed the jury's findings, viewing them as inconsistent with other findings. The court of appeals' affirmance was erroneous because the findings that respondents were not entitled to tolling were supported by the evidence, and a jury finding supported by the evidence cannot be reversed by a court, even if it is inconsistent with other findings. Separately, by upholding the application of statutory tolling against Kerlin, the court of appeals violated the federal Commerce Clause by requiring Kerlin to consent to general jurisdiction in Texas courts from 1942 to 1993 in order to keep his limitations defenses as to prior claims against him. Finally, respondents' claim of fraudulent concealment does not cure their limitations problem. By waiting to file suit until 1993, respondents failed to exercise reasonable diligence as a matter of law given that the settlement of *Havre v. Dunn* was a matter of public record since 1943.

2a.-b. Respondents' only proof that Kerlin secretly received 7,500 acres for Juan José's heirs in *Havre v. Dunn* was an unaccepted settlement offer that conflicted with the terms of the actual settlement (which did not relinquish the heirs' claims, let alone settle them for 7,500 acres). Kerlin had a running objection to the unaccepted settlement offer,

but the court of appeals held that objection waived because Kerlin later testified about the objected-to evidence. This conflicts with the principle that a party may defend itself against inadmissible evidence by explaining or rebutting it without waiving its objection.

2c. In addition, whether admissible or not, an unaccepted settlement proposal is incompetent to prove the value of a claim, let alone the existence and terms of a settlement whose written documentation otherwise makes no mention of the claim. As a result, no legally sufficient evidence supports the jury's finding that the *Havre* settlement awarded Juan José's heirs 7,500 acres in fee simple.

2d.-e. Finally, it was undisputed that respondents' ancestors sold to Kerlin in 1938 any interest they might have had in Padre Island, apart from a minor royalty interest. As such, any rational juror would have understood that Seabury's offer to accept 7,500 acres for the Juan José interest could have referred only to the interest then held by Kerlin, not to the minuscule contingent royalty interest retained by the Balli heirs. Similarly, no rational juror could have believed that the opposing parties in that settlement would ever have agreed to give up 7,500 acres in fee simple for the minuscule royalty interest that the Balli heirs theoretically retained.

3. At trial, the jury found that Kerlin owed past and future mineral royalties to respondents based on estoppel by deed. By upholding this finding, the trial court and court of appeals extended that limited doctrine to deeds that, like quitclaim deeds, convey or reserve purely personal interests in property rather than the property itself. This extension of estoppel by deed conflicts with binding precedent and is unsound as a matter of legal principle because it applies estoppel to a situation that does not involve inconsistent positions. In addition, the lower courts' rulings unsettle statewide property rights by broadening the scope of a traditionally narrow doctrine.

4. Respondents' royalty and fee claims were internally inconsistent. If respondents' property claims actually had been settled in 1942 for some consideration, respondents might have had a claim to *that* consideration, but by accepting that consideration then or now, any claim they might have had to a royalty interest beyond that consideration would necessarily have been extinguished. Conversely, respondents could be entitled in the year 2000 to a royalty interest under the 1938 deeds only if their property claims had not been settled in *Havre v. Dunn* in 1942. Because the jury awarded remedial relief to respondents on two inconsistent claims, respondents had to choose one remedy or the other under the election-of-remedies doctrine. Thus, at a bare minimum, the lesser of respondents' two remedies must be vacated.

By committing the above errors, the decision below undermines the finality of settlements, disturbs longstanding property rights, and enables plaintiffs to recover substantial damages for ancient claims based on allegations that are unsupported, irrational, and inconsistent. Indeed, the court of appeals' decision has already been applied by the same court of appeals to justify further baseless litigation against petitioners and separately has encouraged the filing of additional specious claims by other plaintiffs seeking a billion dollars in damages. Unless corrected by this Court, the court of appeals' errors will also threaten the settled rights of all other *bona fide* property owners in the State, as well as the settled rights of everyone who conducts his business in reliance on the finality of court judgments and settlements, especially those from decades past.

The need for this Court's review is also reflected by the similarity between the present case and *Arias*, on the one hand, and the recent King Ranch case, on the other hand. See *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003). In the latter case, a group of plaintiffs claiming to be the heirs of Major William Warren Chapman and his

wife Helen sued the present owners of the King Ranch seeking title to a one-half interest in nearly 15,500 acres of land in South Texas. The plaintiffs claimed that their ancestors' lawyer had conspired with the founder of the King Ranch in the settlement of a case from 1883, thereby depriving plaintiffs of their rightful title to the property.

In the trial court, the King Ranch filed a motion for summary judgment, arguing that the plaintiffs lacked evidence of fraud to support their claims. The trial court granted the King Ranch's motion, but the Corpus Christi court of appeals reversed. In an opinion by Justice Hinojosa (joined by Justice Chavez with Justice Dorsey dissenting), the court held that fact issues precluded summary judgment. *See Chapman v. King Ranch, Inc.*, 41 S.W.3d 693 (Tex. App.—Corpus Christi 2001). This Court reversed the court of appeals and rendered judgment that the plaintiffs take nothing, finding that plaintiffs' evidence, consisting largely of "historical tidbits," "folklore," and the "absence of evidence" likely due to the passage of time, could not validly sustain any claim of fraud at this late date. 118 S.W.3d at 755. Because the Corpus Christi court of appeals has again committed similarly egregious errors here and in *Arias*, this Court should grant the petition for review, reverse the court of appeals' judgment, render judgment in petitioners' favor, and vacate the court of appeals' opinion.

ARGUMENT

I. Respondents' claims are time barred.

In Parts II and III, petitioners explain why respondents' claims fail on the merits. As a threshold matter, however, this Court should address the propriety of allowing 50-year-old claims to proceed through years of discovery, trial, and appeal in the first place. For as next shown, respondents' extraordinary and inexcusable delay in raising their current claims irrevocably compromises the reliability of the adjudicative process, which

in turn degrades the public reputation of judicial proceedings as an accurate means of dispute resolution.

A. Allowing parties to challenge land titles via 50-year-old claims of fraud defeats the reliability and integrity of judicial proceedings.

A fundamental principle of the justice system is that parties forfeit their legal claims if they do not assert them in a timely fashion. This principle is supported by important policy concerns. For one, the passage of time invariably results in a loss of relevant evidence, thereby undermining the reliability of subsequent adjudicative proceedings:

[Statutes of limitations] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise.

S.V. v. R.V., 933 S.W.2d 1, 3 (Tex. 1996) (internal quotation marks omitted). The passage of time also gives rise to settled expectations that are unfairly disturbed when challenged many years after the fact. This is especially true in the case of property rights, where subsequent investments and transactions in reliance on those expectations have transpired and cannot be undone.

The present case starkly illustrates every one of these concerns. It was not until more than 50 years after the underlying events that respondents sued Kerlin and claimed that he had conspired to defraud them of their share of a property settlement from 1942. Unsurprisingly, by the time respondents filed suit, virtually all individuals with personal knowledge of the events in question were deceased, including Kerlin's attorney Seabury (whom respondents claim functioned as their ancestors' attorney as well); Kerlin's uncle who formed the original venture (Frederic Gilbert); Harbert Davenport, a primary attorney for the opposing parties; and nearly all other involved parties. 10RR99-100, 103, 140;

12RR71, 114; 15RR138, 142-43, 150, 172-74. Indeed, of the sixty-plus Balli heirs and spouses who had interests in the 1938 deeds, most had died by the time of trial and only one testified live. 18RR22-23 (Q: “[O]f the 63 or so grantors who signed the 11 deeds, there are only a handful of you left living today?” A: “Four left.”); *see also* 1RR31-33; DX431. In addition, significant documentary evidence was lost or unavailable, such as portions of the court file in *Havre v. Dunn*, *State v. Balli*, and *Kerlin v. King Ranch* (another title dispute from the 1940s). 2RR60; 25RR194, 198-99; Kerlin Appellants’ Br. at 45.

Under such circumstances, the prejudice to a defendant like Kerlin is overwhelming. For one, those claiming “conspiracy” can easily find gaps in the record evidence and use them as ostensible support for claims of wrongdoing and deception. Here, for example, respondents claimed their ancestors were not told about the *Havre v. Dunn* settlement or that they had received nothing in the settlement or that they had never received the reconveyance deed. Such claims are easy to make and hard to disprove, however, when virtually everyone who might have known the truth is deceased and much contemporaneous documentary evidence has not survived. Here, respondents made use of this by highlighting the fact that the available documents and witnesses could not *disprove* their claims. *See, e.g.*, 11RR26; 24RR127 (neither Kerlin nor Kerlin’s expert could point to documents reflecting communications between Seabury and the Balli heirs regarding the Balli heirs’ claims in *Havre v. Dunn*); 11RR111 (Kerlin lacked actual knowledge of what Seabury did with the reconveyance deed); 11RR40 (Kerlin could not say what Seabury may have told anyone about the settlement in *Havre v. Dunn* because Kerlin was in military service outside the country during the relevant time). In such circumstances, the concepts this Court applied in *King Ranch* should have equal force here:

The Chapman heirs’ extrinsic fraud claims are supported, in large part, by

the absence of evidence – the dearth of complete records one hundred twelve years after judgment was entered, and the unavailability of any living witness to testify to the events at issue. The heirs urge us to second guess, with benefit of hindsight, the wisdom of settling ancient litigation. We decline to do so. As we recognized in 1857, we must apply a presumption in favor of ancient judgments, particularly those involving land titles, lest the passage of time destroy them.

King Ranch, 118 S.W.3d at 755 (citing *Baker v. Coe*, 20 Tex. 429, 437 (1857)).

In addition, the passage of time also likely results in the limited evidence that *is* available being distorted and used out of context, especially as much of that context is missing, unavailable, or otherwise unknown. Without that context, plaintiffs have a far greater opportunity to “prove” fraud and deception through reliance upon unsubstantiated speculation. Here, for example, respondents used Seabury’s demand for 7,444 acres along with his reference to Kerlin’s “commitments” to the Balli heirs to create a legal theory that equated those commitments with those acres rather than the Balli heirs’ potential (and minor) royalty interest in those acres. As explained below, *see infra* Part II, respondents’ theory is too unreasonable to be sustained under this Court’s legal sufficiency standards. More fundamental, however, is the principle that plaintiffs should not be allowed to bring such stale claims because the inherent absence of evidentiary context corrupts the adjudicative process and, ultimately, prevents appellate courts from being able to conduct a proper legal sufficiency review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 811-12 (Tex. 2005) (holding that courts must review evidence in context to conduct a legal sufficiency review and that courts cannot affirm judgment based on favorable evidence taken out of context).

When plaintiffs are allowed to bring stale claims based on tidbits of evidence and evidentiary omissions, and when few witnesses even remain alive to testify, the ensuing adjudication turns not on the weight of relevant evidence, but instead on whose

conjectures the jury decides to believe. Absent reliable evidence, such a decision is necessarily driven by sympathy and emotion, and here, it is hardly surprising that the jury had more sympathy for local residents whose ancestors allegedly were swindled out of their share of a property settlement by a New York lawyer and his alleged accomplices. Condoning this type of “adjudication,” however, transforms judicial proceedings into outlets for misplaced emotional verdicts while encouraging others to simply wait for the best evidence to disappear through death and decay so they can raise claims based on speculation and conjecture punctuated by a few shreds of isolated “evidence.”

In addition, having to defend against stale claims undermines the settled expectations of defendants like Kerlin. Indeed, Kerlin had sold his surface rights in Padre Island more than 30 years before suit was ever filed and had further divested his personal ownership of island mineral rights during the 1980s. 12RR110-11, 115. Nevertheless, he was forced to defend himself in this suit for the last ten years of his life. Then, after he died, the court of appeals added insult to injury by inflating the trial court’s judgment so as to require an accounting of all profits Kerlin had earned since 1961 from the sale of those surface proceeds, even though the records to conduct such an accounting no longer existed. Op. at 927. Obviously, if Kerlin had known in 1961 that a Texas court one day would seek to unwind 40 years of financial transactions (where he would bear the risk of losses while the benefit of gains would go to others) he never could have justified selling the land in the first place and its further development undoubtedly would have changed. Allowing plaintiffs to seek such extraordinary relief after such extraordinary delay unfairly defeats settled expectations:

[T]he social interest in preserving free marketability of property, recognized in recording and registration acts and in statutes of limitations, can be undermined by allowing repeated litigation of the same title on various

grounds existing at the time the first action is brought. It is also unjust to a party who may have made improvements on land in reliance on the first judgment; or worse, it may discourage him from improving his land in the first place.

King Ranch, 118 S.W.3d at 758 (quoting *Developments in the Law – Res Judicata*, 65 HARV. L. REV. 818, 827-28 (1952)).

Given the above, Kerlin raised defenses of laches and limitations. The jury found, however, that respondents were not guilty of laches, and the trial court held that respondents were entitled to statutory tolling by reversing the jury's contrary findings. The court of appeals affirmed both of these results. As next explained, these determinations were erroneous as a matter of law, and this Court should grant review to correct these errors that threaten all who rely on the passage of time to give repose.

B. Respondents are guilty of laches because their 50-year delay in filing suit was unreasonable and resulted in the loss of presumptively relevant evidence.

To prove laches, a defendant must show that he was harmed by a plaintiff's unreasonable delay in asserting legal or equitable rights. *See Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998) (“Two essential elements of laches are (1) unreasonable delay by one having legal or equitable rights in asserting them; and (2) a good faith change of position by another to his detriment because of the delay.” (internal quotation marks omitted)). Here, the jury found that respondents were not guilty of laches. CR4788-4807 (Pet. App., Tab 5). On appeal, Kerlin urged reversal of this finding because:

- Respondents had waited over fifty years to file suit.
- All underlying facts and occurrences needed to put respondents on notice of any claim, such as the settlement of *Havre v. Dunn*, had been matters of public record since 1943.
- Kerlin told the “patriarch” of the Balli heirs in 1954 that he had obtained nothing for the Juan José interest in that settlement, then repeated the same thing to one of the named plaintiffs in 1985.

- Evidence relevant to plaintiffs' claims, including witnesses (Seabury, Davenport, and Gilbert) and documents (parts of the court files in *Havre v. Dunn*, *State v. Balli*, and *Kerlin v. King Ranch*), was unavailable to Kerlin due to the passage of time.
- Although the Balli heirs had transferred to Kerlin in 1938 all their claims save a minuscule retained royalty interest, they nevertheless asserted claims to Padre Island in subsequent federal eminent domain proceedings, including claims to a fee interest, strongly suggesting that they were aware that Kerlin had transferred such claims back to them, rather than receiving anything of value for them in the *Havre* settlement.

Kerlin Appellants' Br. at 1, 4, 12-16, 33-34, 45; *see also* 2RR22, 60; 10RR99-100, 103, 140; 12RR49-50, 52; 15RR150, 171-80; 16RR67-69; 20RR208-09; 21RR165-68, 208-09; 25RR194, 198-99.

The court of appeals correctly assumed that petitioners had met the first prong of the laches standard, *see* Op. at 914, but nevertheless held that they had failed to establish the second prong, *see id.* (“[W]e conclude that the Kerlin Group failed to show detriment or harm resulting from the delay.”). The court of appeals apparently faulted petitioners because they could not show what evidence might have been derived from the unavailable documents and witnesses, thus letting *respondents* benefit from the unsurprising fact that neither side could prove what missing witnesses and documents might have shown.

This turns the laches rationale on its head by letting tardy plaintiffs benefit from the fact that neither side could prove what the witnesses and documents might have shown. Since it was respondents who delayed more than 50 years to file suit, the benefit of any doubt as to the substance of missing yet presumptively relevant evidence should be given to petitioners. After all, if Seabury had been alive, he might have proven or corroborated that he tried but was unable to obtain anything in settlement for the Juan José interest (either for Kerlin or the Balli heirs); that he informed the Balli heirs of this; and/or that he had delivered the reconveyance deed to them. Because he was not around, however,

respondents unfairly were able to use such evidentiary “omissions” against petitioners.

Although a party must show harm to establish laches, this Court should clarify that when the passage of time is so extreme as to result in the loss of presumptively relevant witnesses and documents, the underlying reliability of judicial proceedings is inherently compromised and harm must be presumed, thus shifting the burden to the plaintiff to prove that the missing evidence is somehow equally available elsewhere. To be sure, in most ancient cases like the instant one, plaintiffs will not be able to meet that standard, but that is how it should be.

Alternatively, this Court should consider imposing a higher standard of proof for ancient claims, such as the clear and convincing evidence standard that exists as a limited exception to the preponderance of the evidence standard in certain cases. *Cf. Bogart v. Somer*, 762 S.W.2d 577, 577 (Tex. 1988) (per curiam) (“[T]he burden of proof in refuting the presumption of gift is by clear and convincing evidence.”); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (per curiam) (adopting clear and convincing evidence standard of proof for civil commitment proceedings); *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 119 (Tex. 2000) (public-figure plaintiffs in defamation cases must establish malice by clear and convincing evidence).

Without a presumption of harm (or increased burden of proof), plaintiffs may avoid a laches defense simply by delaying long enough to ensure the unavailability of relevant evidence and, in turn, the inability of the defendant to establish what that evidence might have proven. This cannot be the rule. Not only is it unfair, but it encourages stale litigation rather than deterring it.

* * *

The standard for allowing litigants to maintain 50-year-old, fact-based claims is

important to the jurisprudence of this State. By allowing plaintiffs to use the passage of time to defeat a claim of laches and support their ability to prove stale claims through conjecture and sympathy, the court of appeals' decision sets a dangerous precedent and one that is particularly pernicious when it involves property rights. Indeed, the court of appeals' decision effectively permits a party to call into question any land title at any point in time if he alleges that some fraud infected its title in the remote past. *See also Arias v. Kerlin*, No. 13-03-364-CV, 2006 Tex. App. LEXIS 92 (Tex. App.—Corpus Christi Jan. 5, 2006, pet. filed) (mem. op) (not designated for publication) (remanding fraud claims for trial based on unsupported allegations dating back to the 1840s). Instead, defendants in such circumstances should be entitled to invoke laches to avoid the time and expense of years of litigation. To enable lower courts to dispose of speculative ancient claims, this Court should grant the petition, hold that such extreme delay is presumptively harmful when relevant categories of evidence are missing, and reverse the court of appeals' judgment. *Havre v. Dunn* was settled in 1942, and 1993 is simply too late to complain:

This case demonstrates the wisdom in protecting the stability of final judgments. Richard King and William Chapman, along with every witness with personal knowledge of the events at issue, have long since expired. The paper trail of evidence, though surprisingly detailed, cannot turn speculation about King's motives into evidence of his fraud. Assuming we had the ability, more than a century later, to ferret from history facts supporting the Chapman heirs' claim, we must nevertheless presume that, absent extrinsic fraud, the 1883 judgment settled the dispute, once and for all.

King Ranch, 118 S.W.3d at 758.

C. *As the jury correctly found, respondents are not entitled to statutory tolling.*

Respondents' 50-year delay in filing suit meant that their claims were facially barred by limitations. Their fraud, breach of fiduciary duty, and breach of contract claims were all subject to a four-year limitations period, while their conspiracy claim was subject to a two-year limitations period. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003, 16.004, 16.051

(Vernon 1997); *Harrison v. Bass Enters. Prod. Co.*, 888 S.W.2d 532, 537 (Tex. App.—Corpus Christi 1994, no writ); *Chandler v. Chandler*, 991 S.W.2d 367, 394 (Tex. App.—El Paso 1999, pet. denied). Respondents sought to avoid these short periods of limitations by invoking statutory tolling under § 16.063, which tolls limitations against nonresidents during the period they are absent from the State if they originally were in the State when the alleged wrong occurred. Op. at 914 (citing *Howard v. Fiesta Tex. Show Park, Inc.*, 980 S.W.2d 716, 723 (Tex. App.—San Antonio 1998, pet. denied); *Wyatt v. Lowrance*, 900 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1995, writ denied)).

As next explained, the trial court and court of appeals erred in applying statutory tolling here, thus ignoring this Court’s admonition that “ ‘[t]he primary purpose of limitations, to prevent litigation of stale or fraudulent claims, must be kept in mind,’ ” whether the claim it operates to bar is perceived as meritless or meritorious. *S.V.*, 933 S.W.2d at 6 (quoting *Robinson v. Weaver*, 550 S.W.2d 18, 20 (Tex. 1977)).

1. The trial court impermissibly reversed the jury’s findings that respondents were not entitled to statutory tolling.

At trial, respondents claimed they were entitled to statutory tolling because Kerlin had not been “present” in Texas for more than two years since November 1942. 11RR47. Under the jury’s verdict, however, respondents were not entitled to statutory tolling because the jury found that Kerlin had *not* participated in any conspiracy or breach of fiduciary duty while in Texas. CR4781-83 (Pet. App., Tab 5). Over Kerlin’s objection, the trial court reversed the jury’s “presence” findings and upheld the application of statutory tolling for respondents’ claims. 42RR46-52; CR4964 (Pet. App., Tab 6).

On appeal, Kerlin reiterated his objection that it was impermissible for the trial court to reverse the jury’s presence findings because those findings had been supported by the evidence. Kerlin Appellants’ Br. at 42. The court of appeals rejected this argument,

holding that no evidence supported those findings and that the jury's liability findings otherwise supported a reversal of the jury's presence findings given that Kerlin was briefly in Texas in connection with the *Havre v. Dunn* settlement. Op. at 918-19.

The court of appeals' analysis was error because the jury's presence findings were supported by legally and factually sufficient evidence, including Kerlin's testimony that he had received nothing in the *Havre v. Dunn* settlement for the Juan José interest. See 11RR110; 12RR57-58; *infra* Parts II-III (demonstrating that no evidence supported respondents' fee and royalty interest claims).

Thus, the *most* that could be said is that the jury's presence findings were in conflict with the jury's liability findings. The existence of a conflict, however, does not empower a trial or appellate court to pick and choose the findings it wants to change. See *Steinberg v. Comm'n for Lawyer Discipline*, 180 S.W.3d 352, 358 (Tex. App.—Dallas 2005, no pet.) (trial court “may not . . . select from conflicting findings those which [it] approves”). Rather, courts must uphold jury findings supported by legally and factually sufficient evidence, and if a fatal conflict with other findings still exists, the only remedy is a new trial.¹¹ *Ford Motor Co. v. Miles*, 141 S.W.3d 309, 315 (Tex. App.—Dallas 2004, pet. denied). Here, however, no fatal conflict exists because the jury's liability determinations cannot be upheld on the merits. See *infra* Parts II-III. For these reasons, the court of appeals' judgment upholding the trial court's imposition of statutory tolling should be reversed.

2. *The application of statutory tolling in this case would violate petitioners' rights under the Federal Constitution.*

¹¹ A new trial is also the only remedy if a conflicting finding is supported by factually insufficient evidence because such a finding cannot be reversed (as required to render judgment). See *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 626 (Tex. 2004) (“As a rule, if a party with the burden of proof offers no evidence on an issue, the opposing party is entitled to judgment. If, however, there is some evidence to prove an issue but that evidence is factually insufficient, the only remedy is a new trial.” (footnote omitted)).

Under current Texas law, if Kerlin had committed a tort against respondents' ancestors while in Texas, the statutes of limitations on those claims would be tolled during his subsequent absence from the state. TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (Vernon 1997); *Howard*, 980 S.W.2d at 723; *Wyatt*, 900 S.W.2d at 362. At the same time, however, the commission of a tort in whole or in part in this State by a nonresident enables service of process under the current long-arm statute and its predecessor. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon Supp. 2006); TEX. REV. CIV. STAT. ANN. art. 2031b(4), *repealed by* Acts of Sept. 1, 1985, 69th Leg., R.S., ch. 959. As such, there is no need to toll the statute of limitations when a nonresident defendant commits a tort in whole or in part in Texas.

By upholding the trial court's application of statutory tolling to Kerlin, the court of appeals violated the federal Commerce Clause. *See* U.S. CONST. art. 1, § 8, cl. 3. Specifically, by tolling limitations against individuals during the time they are not "present" in the State, the court of appeals interpreted the Texas tolling statute to force nonresidents such as Kerlin to either forfeit their limitations defenses against stale claims that arise when they were in Texas or else maintain a continuous and systematic presence in the State thereafter, thus consenting to general jurisdiction of the State on any future claim that might be alleged. *Cf. Acacia Pipeline Corp. v. Champlin Exploration, Inc.*, 769 S.W.2d 719, 720 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Goldman v. Pre-Fab Transit Co.*, 520 S.W.2d 597, 598 (Tex. App.—Houston [14th Dist.] 1975, no writ) (both holding that a foreign corporation consents to state court jurisdiction for all lawsuits against it by obtaining statutory authorization to do business in the state).¹²

¹² One court of appeals has held that appointing an agent for service of process does not establish consent to general jurisdiction. *Juarez v. United Parcel Serv. de Mexico S.A. de C.V.*, 933 S.W.2d 281, 284-85 (Tex. App.—Corpus Christi 1996, no writ). But unless and until this Court holds that such an appointment

Imposing this kind of choice violates the Commerce Clauses because it discriminates against out-of-state commercial interests and imposes an impermissible burden on them: “The State may not condition the exercise of the [limitations] defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988); *id* at 891-93 (holding that state law violated Commerce Clause when it suspended limitations against foreign corporations unless they consented to general personal jurisdiction).

For these reasons, this Court should hold that trial court erred in reversing the jury’s finding that respondents were not entitled to statutory tolling. Alternatively, this Court should hold that application of statutory tolling against Kerlin would be unconstitutional. In addition, and at a minimum, this Court should hold that respondents are not entitled to statutory tolling against petitioners Windward Oil & Gas Corp. and P.I. Corp. because those Texas corporations were never absent from the State.

3. *The jury’s finding of fraudulent concealment does not cure respondents’ limitations problem because that finding was not supported by legally sufficient evidence.*

The court of appeals also held that respondents’ claims were not barred by limitations, even apart from statutory tolling, because defendants were guilty of fraudulent concealment. As a threshold matter, even if fraudulent concealment postponed the *accrual* of any of respondents claims for limitations purposes, it still would represent no defense to laches. If the conditions exist to support a finding of laches, that would trump any finding of fraudulent concealment based on the same evidentiary record because laches calls into doubt the reliability of that record, including any related finding of fraudulent concealment based on omissions in that record, as at issue here. Any other rule would allow plaintiffs

is sufficient for individuals to maintain a continuous “presence” in the State under TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 and that such a “presence” does not establish general jurisdiction, *Juarez* does not obviate the Hobson’s choice for defendants.

to bootstrap and avoid a finding of laches by resort to the same evidentiary gaps that demonstrate the harm to petitioners caused by respondents' original delay.

In addition, fraudulent concealment is no defense to limitations if a plaintiff, through the exercise of reasonable diligence, could have discovered the alleged fraud. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001) ("Fraudulent concealment tolls limitations until the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence." (citing *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 531 (Tex. 1997) (per curiam))). The court of appeals refused to recognize this principle, instead holding that a lack of reasonable diligence matters only in assessing claim accrual under the discovery rule. *Op.* at 918. This conflicts with *Shah* and is outcome determinative of the fraudulent concealment issue, for it undisputed that the final settlement and dismissal of *Havre v. Dunn* was a matter of public record since 1943. *See supra* at pp. 8-9. Likewise, the resulting land title to those parts of Padre Island affected by that settlement were matters of public record. *Id.*; DX31 at 26-27. In addition, in 1953 and 1954, Kerlin told the patriarch of the Ballis that he had obtained nothing of value in the settlement for the original Balli deeds because those deeds had been worthless. *See supra* at p. 9 n.9.

Under such circumstances, respondents and their ancestors were on constructive and actual notice for at least 40 years that they had received nothing under the *Havre v. Dunn* settlement but that Kerlin had received substantial consideration. Nor have they ever shown that they had any more reason for filing suit in 1993 than they had four years earlier (the maximum limitations period for any of their claims) or, indeed, 40 years earlier. In such circumstances, where no previously unknown or otherwise undiscoverable "fact" had come to light, there is no basis for invoking the doctrine of fraudulent concealment. Thus, under any meaningful standard, respondents failed to exercise

reasonable diligence as a matter of law by waiting to file suit until 1993. For these reasons, the jury's finding of fraudulent concealment affords no legally justifiable ground for excusing plaintiffs from limitations or laches.

II. No evidence supported the jury's finding that Kerlin conspired with Seabury to compromise any claims of the Balli heirs for 7,500 acres in fee simple.

A no-evidence point will be upheld when: “(a) [there is] a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; [or] (d) the evidence establishes conclusively the opposite of the vital fact.” *City of Keller*, 168 S.W.3d at 810. “Less than a scintilla of evidence exists when the evidence is ‘so weak as to do no more than create a mere surmise or suspicion’ of a fact.” *King Ranch*, 118 S.W.3d at 751 (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). “The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.” *City of Keller*, 168 S.W.3d at 827. Thus, although courts must credit evidence favorable to the judgment whenever reasonable jurors could do so, they must also credit contrary evidence if reasonable jurors could not reject it. *Id.* As next shown, the jury's finding that Kerlin secretly obtained 7,500 acres for the Balli heirs in the settlement of *Havre v. Dunn* must be reversed because it is as speculative and farfetched as any verdict could be.

A. Respondents presented no evidence that the Balli heirs' claims had ever been settled, while petitioners proved those claims had not been part of a settlement.

At trial, respondents claimed that Kerlin conspired with Seabury in the settlement of *Havre* to secretly compromise the outstanding claims of the Balli heirs for 7,500 acres in fee simple but keep that land for himself. A more farfetched claim is hard to imagine.

As a threshold matter, the record evidence indicated that the claims of the Balli heirs had *not* been settled in *Havre v. Dunn*:

- First, the *Havre v. Dunn* settlement did not purport to transfer anything (let alone any portion of the 20,000 acres received by Kerlin) to Kerlin as consideration for compromising any claims derived from the Balli heirs.
- Second, the *Havre v. Dunn* settlement did not require a quitclaim of any property interest belonging to the Balli heirs or derived from them; in contrast, the settlement did require Kerlin to quitclaim a number of his title claims derived from others.
- Third, the title claims Kerlin quitclaimed as part of the settlement exceeded the acreage Kerlin received in settlement and, unlike the Juan José interest, were claims to which the opposing parties genuinely believed they had few, if any, defenses on the merits.¹³
- Fourth, Kerlin conveyed the Juan José interest back to the Balli heirs, and although Seabury was not available to confirm that he delivered that reconveyance, the Balli heirs' actions in re-asserting title claims in subsequent litigation can only be explained on the assumption that they received them. *See* 11RR109-12; 12RR52-58; 15RR171-80; *see also supra* at pp. 10-12.
- Fifth, no witness with any personal knowledge of the underlying events testified that respondents' claims were somehow compromised during the settlement of *Havre v. Dunn*.

Moreover, even if one ignored the above evidence indicating that the Balli heirs claims had not been settled, it was undisputed that in 1938 the Balli heirs had sold to Kerlin virtually all of the “Juan José interest.” As such, it would be utterly irrational to suppose that the tiny claims they retained – a potential 1/512th royalty interest – could ever have been deemed to justify a settlement under which the Balli heirs would receive 7,500 acres in fee simple, even if their claims were thought to have been entirely valid (which no one thought at the time and which courts before and since repeatedly rejected).

¹³ The court of appeals did not consider Kerlin's other title claims in its legal sufficiency analysis, which was error because the existence and value of those claims was undisputed and those claims provided historical context that further demonstrated the irrational nature of respondents' conspiracy theory. *See City of Keller*, 168 S.W.3d at 810-11 (holding that courts must consider material contextual evidence in addressing legal sufficiency points because “in a number of cases, the lack of supporting evidence [for a judgment] may not appear until all the evidence is reviewed in context”).

For these reasons, there was simply no evidentiary basis to support the finding that any property claims of the Balli heirs were settled in the *Havre v. Dunn* settlement, let alone for 7,500 acres in fee simple.

On appeal, Kerlin argued that the evidence respondents presented to support their conspiracy theory was legally insufficient. Kerlin Appellants' Br. at 46-47 (arguing that no evidence supported the jury's findings). In deciding this issue against Kerlin, the court of appeals relied on one of Seabury's settlement proposals to the parties opposing Kerlin's new trial motion in *Havre v. Dunn*.¹⁴ As relevant here, that proposal demanded 7,444 acres "for the Juan Jose interest" based on Seabury's theory that Juan José inadvertently had retained that much acreage when he sold his interest in Padre Island in 1830 to Santiago Morales. Op. at 924-25. Thus, according to Seabury's theory, even if there had been no rescission of the 1830 sale, the holder of the Juan José-derived claims (Kerlin) had a colorable claim to some acreage in the Northern Division of the island. As next explained, however, Seabury's settlement proposal constituted no evidence of a conspiracy to compromise respondents' claims for 7,500 acres in fee simple but then retain that acreage for Kerlin.

B. Seabury's settlement proposal was inadmissible to prove the value of the Balli heirs' claims.

As noted above, there was no affirmative evidence that the claims of the Balli heirs were compromised in the settlement of *Havre v. Dunn*. From that it also follows that there was no evidence indicating the amount for which they had been settled. As a result, the

¹⁴ The court of appeals also relied on a post-settlement letter from one of the opposing parties' attorneys (Davenport) to another attorney representing parties opposing Kerlin (Op. at 906) (Eckhardt), suggesting that Seabury had told Davenport that he was not going to deliver the reconveyance deed to the Balli heirs. Op. at 907. If true, that could mean Seabury breached any obligations he may have had to deliver that deed. Even then, however, there is no evidence that the title claims of the Balli heirs had been settled in *Havre v. Dunn*, let alone that the minuscule potential royalty interest they reserved was the basis for any substantial transfer of acreage in fee simple for their benefit.

only “evidence” respondents presented in an effort to show the value of some secret settlement in their favor was Seabury’s settlement proposal requesting 7,444 acres “for the Juan Jose interest.”

As explained in more detail below, *see infra* Part II.C., no rational juror could have understood Seabury’s reference to the “Juan José interest” as a demand for 7,444 acres *for Juan José’s heirs* because the entirety of the “Juan José interest” was held by Kerlin as trustee for his uncle’s venture (apart from a tiny potential royalty interest). But even assuming for the sake of argument that Seabury’s proposal somehow represented an offer to settle respondents’ retained portion of the “Juan José interest” for 7,500 acres, that proposal was inadmissible because it was offered to prove the value of a claim that was offered to be compromised:

Evidence of . . . offering . . . to accept[] a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. (TEX. R. EVID. 408.)

Like the federal rule on which it is based, the purpose of Rule 408 is to encourage settlements by preventing the use of irrelevant yet potentially prejudicial evidence. *See* FED. R. EVID. 408 advisory committee’s note. This purpose would be undermined if an unaccepted settlement proposal could be used to prove that some disputed claim was worth some particular amount. Here, there was no actual evidence that the Balli heirs’ claims had been settled at all, let alone for any particular amount. Respondents nevertheless convinced the jury that they had been settled for 7,500 acres and the amount was established by Seabury’s purported demand. Using Seabury’s proposal for that purpose facially violated Rule 408.

At trial, Kerlin duly objected on this basis to respondents’ use of Seabury’s

proposal. 9RR49-54. The trial court overruled Kerlin's objection but granted a running objection. Op. at 920; 10RR157. On appeal, the court of appeals held that Kerlin had waived his objection because he later introduced and testified about Seabury's unaccepted offer. Op. at 920. If the court of appeals waiver holding were correct, it would impale litigants on the horns of a dilemma: either they allow their adversary an open field to exploit what they believe to be wrongly admitted evidence or they waive what may be a perfectly valid objection to unfairly prejudicial evidence.

Clearly, this ruling is unsustainable. Indeed, this Court has held that a party whose objection to inadmissible evidence has been overruled can confront the objectionable evidence on its own terms and then challenge its admissibility on appeal if necessary. *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 4 (Tex. 1986) ("Having properly objected" a party is "entitled to defend itself by explaining, rebutting, or demonstrating the untruthfulness of the objectionable evidence without waiving its objection."). Having obtained a running objection, Kerlin was entitled to refer to and explain the Seabury letter to rebut respondents' arguments that it proved the object of some alleged conspiracy. He was not required to "sit idly by and take [his] chances on appeal or retrial when incompetent evidence [is] admitted." *Id.* Any other rule not only would be unfair to litigants, but also would waste court resources because a defendant who successfully refutes objectionable evidence on its own terms may avoid the need for appeal, remand, and retrial. If a defendant must "sit idly by" in order to later contest the admissibility of such evidence on appeal, however, there is no opportunity to avoid such an outcome.

The court of appeals' misapplication of this rule undermines the fairness of trial proceedings as a procedural matter, discourages settlement offers as a substantive matter, and conflicts with *Scurlock*. For these reasons and because this litigation ground rule is of

immense practical importance to litigants in the State, this Court should grant the petition and hold that Kerlin's objection was not waived; that Seabury's settlement proposal was improperly admitted; and that respondents' remaining evidence was legally insufficient to support the jury's finding that Kerlin obtained 7,500 acres in fee simple for the Balli heirs. This Court should then reverse the court of appeals' judgment on this issue.

C. Seabury's settlement proposal was incompetent to prove the value of the Balli heirs' claims.

Even if Kerlin had not objected to Seabury's settlement proposal or even if that objection was somehow waived, there is not a scintilla of evidence that Seabury's settlement offer was ever accepted, let alone that the outcome was a fee simple transfer for the benefit of the Balli heirs. Manifestly, an unaccepted settlement proposal is incompetent to support the jury's finding that Kerlin had obtained 7,500 acres for the Balli heirs in the settlement of *Havre v. Dunn*. As such, it cannot support the jury's verdict:

It has long been the rule in Texas that incompetent evidence is legally insufficient to support a judgment, even if admitted without objection. Thus, evidence showing it to be incompetent cannot be disregarded, even if the result is contrary to the verdict. If the rule were otherwise, incompetent evidence would *always* be legally sufficient, because the evidence showing it to be incompetent could never be considered.

City of Keller, 168 S.W.3d at 812.

In the context of land disputes, an unaccepted purchase offer has been held incompetent to prove the value of the subject of the transaction. *See Hanks v. Gulf, Colo. & Santa Fe Ry.*, 320 S.W.2d 333, 336 (Tex. 1959). And notably, this Court reached that result despite the fact that a purchase offer is, at least in theory, *some* evidence of a property's value since it shows the amount some buyer is willing to pay at some particular time. At issue here, however, is not an unaccepted purchase offer from a buyer, but an unaccepted settlement proposal that shows only what one party wanted in exchange for

relinquishing a claim. Unlike a purchase offer, an unaccepted settlement proposal does not indicate that any party is willing to pay anything for the relinquishment of the claim in question. Consequently, the unaccepted settlement proposal thus lacked probative value and was incompetent to prove the value of the Balli heirs' claims.

Nor did respondents simply use Seabury's unaccepted settlement proposal to prove the value of those claims. They also used it to imply the existence and terms of a settlement that were not reflected in any subsequent writing. If an unaccepted settlement proposal is incompetent to prove the value of a claim, surely it is *a fortiori* incompetent to prove the existence or terms of any actual but otherwise undocumented settlement. Nevertheless, respondents were permitted to use Seabury's proposal to convince the jury that the parties in *Havre* settled the claims of Juan José's heirs for 7,500 acres in fee simple for the heirs' benefit, despite the fact that (1) Seabury's settlement proposal did not state that any fee interest would go to Juan José's heirs; (2) the actual settlement did not mention or purport to extinguish or release the claims of Juan José's heirs, let alone award them 7,500 acres in fee simple; and (3) the actual settlement required Kerlin to quitclaim his other claims of title but did not require him or Juan José's heirs to quitclaim the Juan José interest.

Because the use of unaccepted settlement proposals to prove the value of disputed claims or the existence and terms of undocumented settlements will discourage settlements, this Court should grant review and confirm that unaccepted settlement proposals are incompetent for these purposes.

D. No rational juror could read Seabury's letter to propose settling the claims of the Balli heirs for 7,500 acres in fee simple for those heirs.

Even if Seabury's letter was competent to prove that the Balli heirs' claims had been settled in *Havre v. Dunn*, any rational juror necessarily would have understood his

demand of 7,500 acres for the “Juan Jose interest” to reference the interest held by **Kerlin** because Kerlin, as trustee for his uncle’s venture, held nearly 100% of the “Juan Jose interest.” Likewise, any rational juror would necessarily have understood that Kerlin’s “commitments” to Juan José’s heirs were limited to their minuscule reserved portion of the Juan José interest: namely, a 1/512th mineral royalty in whatever Kerlin might receive in exchange for a release of claims under the heirs’ eleven deeds. Indeed, even if a reasonable juror could find Seabury’s statement ambiguous, that ambiguity cannot support respondents claims. *See City of Keller*, 168 S.W.3d at 813 (“ ‘When the circumstances are equally consistent with either of two facts, neither fact may be inferred.’ ” (quoting *Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991))); *see also King Ranch*, 118 S.W.3d at 755 (“As we recognized in 1857, we must apply a presumption in favor of ancient judgments, particularly those involving land titles, lest the passage of time destroy them.”).

Under such circumstances, and keeping in mind that respondents bore the burden of proof, there was simply no legally sufficient evidence for the jury to conclude that Kerlin secretly obtained 7,500 acres in fee simple for the benefit of the Balli heirs, which he had absolutely no reason to do, then conspired with Seabury to keep that land for himself. Indeed, the absurdity of such a conspiracy is reflected by the fact that it would have attributed nearly 1/3 of the settlement’s value to the Balli heirs’ interest, even though Kerlin held almost 100% of the Juan José interest, not to mention numerous other claims of title that, unlike the Juan José interest, formed the stated basis for the settlement.

E. No rational juror could find that a party with a dubious claim to a minor royalty interest in certain acreage could ever receive, in settlement of that claim, 100% of the surface and minerals rights to that substantial acreage.

It is undisputed that, in 1938, Juan José’s heirs sold to Kerlin any and all interest

they may have had in all surface and mineral rights in Padre Island, reserving only a 1/64th of 1/8th royalty interest. As a result, even if one believed that Juan José retained 7,500 acres from his 1830 sale, and even if one believed his interest remained valid in 1938 (despite the 1856 tax sale, decades upon decades of adverse possession, and the Ballis' failure to register any property interest), and even if one believed that Kerlin and Seabury conspired to settle the claims of Juan José's heirs secretly, and even if one believed that the opposing parties in *Havre* elected to settle those claims for 100 cents on the dollar without obtaining any release, quitclaim, or other documentation of the settlement, any rational juror *still* would be forced to conclude that the most Juan José's heirs could have obtained in such a settlement was a 1/64th of 1/8th royalty interest in 7,500 acres, *not* 7,500 acres in fee simple as the jury found.

Nevertheless, the court of appeals upheld the jury's finding based on the idea that "conflicting" arguments could be made as to what Seabury's letter meant. Op. at 924. But as explained above, respondents' "conflicting" argument was irrational in light of other undisputed evidence. As such, the court of appeals' reasoning violated this Court's principles governing legal sufficiency review:

- "[E]ach piece of circumstantial evidence" must be viewed "not in isolation, but in light of all the known circumstances."
- "When the circumstances are equally consistent with either of two facts, neither fact may be inferred."
- "[D]rawing an inference based on meager evidence [is] unreasonable"
- "[S]ome suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence."

King Ranch, 118 S.W.3d at 755 (internal quotation marks omitted); *City of Keller* at 813-14 (internal quotation marks omitted); *see also id.* at 810-11 (courts must consider material contextual evidence when resolving legal sufficiency issues).

At root level, the absurdity of the jury's finding demonstrates the pernicious results that arise when stale claims are combined with isolated evidence, missing witnesses and documents, and misguided sympathy. To prevent outlandish outcomes that result in unfounded and undeserved windfalls, this Court should grant review and reverse the court of appeals' judgment on this issue.

We note further that the same court of appeals recently conflated the plaintiffs in this case with the members of an entirely different branch of the Balli family: the claimed descendants of Jesus Balli who are plaintiffs in *Arias v. Kerlin*, *supra* (Tab 1). Like respondents here, the *Arias* plaintiffs claim fraud by Kerlin in connection with the settlement of *Havre v. Dunn*. Unlike respondents, neither the *Arias* plaintiffs nor their ancestors had *any* prior relationship with Kerlin. By upholding the jury's finding of fraud here, however, and then conflating the current plaintiffs with those in *Arias*, the court of appeals decision impermissibly suggests that the *Arias* plaintiffs (and perhaps all the thousands of descendants of all heirs of Padre Nicolas Balli) can make use of the jury's fraud findings here for collateral estoppel purposes. For these reasons, this Court should consolidate its review of these two cases to prevent the jury's unsupported findings from being used for additional erroneous purposes. *See also* Petitioners' Motion to Consolidate or Consider as Related Cases (filed Apr. 26, 2006).

III. Respondents' separate royalty claim fails because estoppel by deed does not apply to conveyances or reservations of personal interests.

At trial, respondents claimed that Kerlin owed them past and future royalties on all Padre Island mineral acreage he obtained in the *Havre v. Dunn* settlement as well as all rights obtained thereafter. Respondents based this claim on the eleven deeds Kerlin had received from the Balli heirs in 1938. Putting to one side the fact that Kerlin reconveyed the Juan José interest to the Balli grantors, respondents could have been due a reserved

royalty under those deeds only if those deeds had conveyed some interest in Padre Island to Kerlin in the first place. In other words, although those deeds reserved a 1/64th of 1/8th royalty interest in whatever they conveyed, that reservation amounted to nothing if the Balli heirs lacked good title at the time of the conveyance: they would have conveyed nothing and thus reserved nothing. Consequently, before respondents could recover some royalty interest under those deeds, they first had to prove that they had obtained from their ancestors good title to at least some part of Padre Island and possessed that good title at the time of the 1938 deeds. For example, respondents could have attempted to prove that Juan José Balli and Santiago Morales had truly rescinded the 1830 conveyance. But respondents did not prove this or any other claim of title at trial. Nor could they, for as this Court previously held, Juan José transferred his entire interest in Padre Island to Santiago Morales in 1830 and cleared his title to Morales' satisfaction. *State v. Balli*, 190 S.W.2d 71, 87 (Tex. 1944).

The trial court let respondents invoke the doctrine of “estoppel by deed” to excuse themselves from having to prove they had conveyed to Kerlin, and therefore reserved, good title to any of Padre Island, thereby allowing the jury to ignore the fact that those deeds were worthless when written. As applied in this case, that doctrine prevented Kerlin from arguing that the deeds conveyed nothing of value and that he had obtained his Padre Island acreage through other claims of title. As a result, respondents obtained an unfair reward from the jury: a “reserved” royalty interest on acreage they never owned in the first place.

On appeal, Kerlin argued that estoppel by deed did not apply to the deeds from the Balli heirs because they were conveyances of *personal interests* in real property (like a

quitclaim)¹⁵ as distinguished from actual conveyances of real property itself. Kerlin Appellants' Br. at 31-33. The court of appeals disregarded this distinction, thus placing itself in conflict with *Roberts v. Corbett*, 265 S.W.2d 127, 129 (Tex. Civ. App.—Galveston 1954, writ ref'd). In that case, the only issue was whether estoppel could apply to a quitclaim deed, and the court of civil appeals held it could not:

[A] conveyance of land which, by its terms, limits the estate granted to the “right, title and interest” of the grantor, is not such a conveyance as will estop the grantor from asserting title to an interest thereafter acquired by him.

Id. at 129. Further, because this Court refused the petition for writ of error in *Roberts*, its decision was binding precedent on this issue that the court of appeals ignored. *See Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 754 (Tex. 2006) (“In cases after 1927, ‘writ refused’ denotes that the judgment of the court of civil appeals is correct, with such cases having equal precedential value with the Texas Supreme Court’s own opinions.” (internal quotation marks omitted)).

Although the distinction between conveyances of personal interests in property and conveyances of property itself may seem subtle at first glance, it is a crucial distinction, especially given the underlying principle on which estoppels are based. Indeed, although numerous varieties of estoppel exist, they serve the similar purpose of preventing injustices that arise when a party takes inconsistent positions in different situations. *See Kuehne v. Denson*, 219 S.W.2d 1006, 1009 (Tex. 1949) (“The purpose of estoppels is to prevent inconsistency and fraud resulting in injustice.” (internal quotation marks omitted)); *Robinson v. Robinson*, 961 S.W.2d 292, 301 (Tex. App.—Houston [1st Dist.]

¹⁵ Under the usual definition, quitclaim deeds also lack title warranties, although the presence or absence of a warranty is not the determinative question here. Rather, the determinative issue is whether a deed conveys a personal interest in property or purports to convey the real property itself. *See Stonum v. Schultz*, 138 S.W.2d 825, 828 (Tex. Civ. App.—Galveston 1940, no writ) (“[M]ere covenants of warranty amount at most to collateral contracts or undertakings between the parties thereto, and their privies, and neither constitute a part of the conveyance itself, nor strengthen or enlarge the title thereby conveyed.”).

1997, no pet.) (“[T]he purpose of estoppel is to prevent parties from asserting inconsistent positions that result in injustice.”).

Estoppel by deed is no different. When that doctrine applies, the parties to a deed are estopped from challenging title as determined by the deed. For example, suppose a grantor conveys a piece of real property to a grantee yet lacks title to the property at the time of the conveyance. If the grantor then obtains good title from the actual owner, the title effectively will vest in the original grantee because the grantor would be estopped “by deed” from denying the validity of the original conveyance, despite the fact that he acquired title after the deed issued:

The language in the deed whereby the grantors convey the fee simple estate in the land constitutes a recital which imports an assertion by them that they are the owners in fee simple of the land; and, having thus asserted the fact of their ownership, the grantors are estopped to deny such fact.

Lindsay v. Freeman, 18 S.W. 727, 729 (Tex. 1892). In such a situation, the application of estoppel by deed is a powerful but fair remedy because any other view would excuse the grantor from having misrepresented his original ownership status in the original deed. As such, an estoppel is required to prevent the injustice that otherwise would arise from a grantor taking inconsistent positions.

In contrast, consider a deed that conveys no real property but only the grantor’s personal interest, if any, in certain property. If the grantor does not actually own the real property in question at the time of the conveyance, the deed conveys nothing yet there is no misrepresentation because the deed did not purport to transfer *title* to the property, just the grantor’s “interest” in the property, if any, and that interest is simply non-existent if the grantor lacks an interest. In such a situation, if the grantor subsequently obtains title from the true owner, title would not revert to the grantee through estoppel by deed as there is

nothing inconsistent in the grantor's claiming "after acquired" title when he previously did not purport to convey anything more than he had or otherwise misrepresent a claim of title. In short, a person can honestly convey any "interest" he may have in a piece of property whether he possesses any interest or not. Indeed, that is one of the key attributes of quitclaims deeds. As the Supreme Court recognized long ago in a case under Texas law,

[w]here the deed, although containing general covenants for title, does not on its face purport to convey an indefeasible estate, but only the right, title, and interest of the grantor, in cases where those covenants are held not to assure a perfect title, but to be limited and restrained by the estate conveyed, the doctrine of estoppel has been considered not to apply

Hanrick v. Patrick, 119 U.S. 156, 175-76 (1886) (internal quotation marks omitted). Consistently, this Court refused the petition for writ of error in *Roberts v. Corbett* and since then, has never applied estoppel by deed to a quitclaim.¹⁶

As with *Roberts*, the deeds from the Balli heirs did not convey or reserve actual title to real property. Rather, they conveyed and reserved each grantor's personal interest in certain property. See, e.g., PX28 (Pet. App., Tab 2) (conveying "all the *interes[t]* which [the grantors] have in the hereinabove described premises" and reserving 1/64th of 1/8th

¹⁶ Before *Roberts*, this Court once applied estoppel by deed to a quitclaim. See *Waco Bridge Co. v. City of Waco*, 20 S.W. 137 (Tex. 1892). Whether *Waco Bridge* was overruled in whole or part by the Court's refusal of the writ in *Roberts*, the holding of that case is distinguishable from the present case. In *Waco Bridge*, the Court held that a property owner could be estopped by a reservation in a quitclaim when the quitclaim was the property owner's only source of title to part of the land in question. See *id.* at 139 ("Plaintiff's only evidence of title to the entire two acres was through the deed to it from the Trices, and the Giddings [quitclaim] deed is the only conveyance shown by the evidence to have ever been made to the Trices, or either of them."). Here, however, the deeds from the Balli heirs were not a necessary link in Kerlin's chain of title at all. See *supra* at pp. 10-11.

In *dictum*, the Court in *Waco Bridge* suggested that estoppel by deed might also apply in circumstances where a quitclaim "was not a necessary link in [the owner's] chain of title," *id.* at 140, but the Court has never applied that *dictum* but instead has applied estoppel by deed only in cases involving actual property conveyances. See, e.g., *Adams v. Duncan*, 215 S.W.2d 599, 601 (Tex. 1948) (deed in question "convey[ed] the 640-acre William Duncan Survey"); *Greene v. White*, 153 S.W.2d 575, 582 (Tex. 1941) (deed in question "conveyed . . . the 133 acres of land conveyed by [a prior] deed"); *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 879 (Tex. 1940) (deed in question "conveyed . . . certain tract or parcel of land in Orange County, Texas, known as the Josiah Jordan Survey"); *Lindsay v. Freeman*, 18 S.W. 727, 729 (Tex. 1892) ("The intention of the grantors to convey an estate in fee-simple thus appears upon the face of the instrument. This instrument is not a mere quitclaim or a release or a conveyance of the right, title, and interest which the grantors then had." (citation and footnote omitted)).

mineral royalty out of “our pro rata *interest* in the above described premises” (emphases added)). Nor is it surprising that the deeds were worded this way: they were prepared by Seabury, who knew that any claim of title based on the Juan José interest was a long shot. *See* 11RR109-10; *supra* at pp. 4, 6-7.

As a result, there was no inconsistency when Kerlin contended at trial that the Balli heirs had no legitimate interest in Padre Island since 1830 and that the 1938 deeds conveyed and reserved nothing. The trial court thus erred in allowing respondents to “prove” their entitlement to a royalty interest without first proving they had good title to some part of Padre Island. By affirming the trial court’s error, the court of appeals put itself in conflict with *Roberts* and has effectively created a “reverse warranty of title” for all quitclaim deeds that contain a reservation, a result counter to the basic purpose of such deeds, which let parties quiet title to property interests without title guarantees.

In sum, although it sometimes makes sense to estop a party (especially a grantor, which Kerlin was not) from denying the validity or scope of a real property conveyance, it does not make sense to estop a party from challenging the scope of a conveyance or reservation of a personal interest because such challenges are not inconsistent with any prior conveyance. While there might be extraordinary circumstances in which estoppel by deed could properly be applied against the grantee, this is surely not one of them. Any representations about the existence of good title that might inhere in the deeds were made by the Balli heirs, not by Kerlin. Accordingly, Kerlin was guilty of no inconsistency in denying that the Balli heirs possessed good title to any part of Padre Island, and there is no foundation for an estoppel. Because the application of estoppel to this situation unnecessarily broadens a limited doctrine affecting property rights, this Court should grant the petition and reverse the court of appeals’ judgment on this issue. Because respondents

proved no other theory of estoppel, this Court should reverse the jury's estoppel finding.

IV. At minimum, respondents' recovery cannot exceed the greater of their royalty and fee simple claims based on the doctrine of election of remedies.

At trial, respondents claimed that they were entitled to a royalty interest in all of Kerlin's mineral acreage based on estoppel by deed. In addition, they inconsistently claimed they were entitled to a fee interest in 7,500 acres based on the theory that their interests had been relinquished in the *Havre v. Dunn* settlement in exchange for that fee interest. The jury, in a showing of either its confusion or its bias, found in respondents' favor on both claims. As explained above, estoppel by deed should not apply to the deeds in question, and the jury's finding regarding the 7,500 acres was not supported by legally sufficient evidence. At minimum, however, the doctrine of "election of remedies" mandates that respondents cannot recover on *both* their royalty and fee interest claims because they are inconsistent.

Election of remedies is a doctrine that can erect a bar to relief when a party "(1) . . . successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice." *Medina v. Herrera*, 927 S.W.2d 597, 600 (Tex. 1996) (internal quotation marks omitted). At trial, Kerlin claimed that the inconsistency between respondents' fee interest and royalty interest claims prevented them from recovering on both claims. 37RR18-19. The trial court rejected this contention, 42RR55; CR4963 (Pet. App., Tab 6), and the court of appeals affirmed:

The Kerlin Group argues that the election of remedies doctrine bars recovery of damages for unpaid royalty interests and recovery of damages for the sale of the surface rights to the 7,500 acres. However, each of these damages arise out of separate causes of action for separate wrongs. Accordingly, the election of remedies doctrine is not applicable as argued by the Kerlin Group. Therefore, we overrule this additional issue. (Op. at 926.)

But under this Court's statement of the rule in *Medina*, election of remedies is not inherently limited to situations where different remedies arise from the same cause of action. Rather, the question is whether "two or more remedies, rights, or states of facts . . . are so inconsistent as to . . . constitute manifest injustice." 927 S.W.2d at 600. Here, that standard is manifestly satisfied. If respondents truly had a royalty interest that was compromised for 7,500 acres in fee simple during the settlement of *Havre v. Dunn*, they would no longer have that royalty interest as to acreage beyond those 7,500 acres. In other words, had respondents' claims actually been part of the settlement in *Havre v. Dunn*, respondents would have had to relinquish any rights they had in the land in question, which would have included their rights under the deeds, as those were the only potential rights they had. Conversely, if respondents, at the time of trial, truly retained a royalty interest in Padre Island under the 1938 deeds, it would be entirely inconsistent to claim that they were nevertheless beneficiaries of the *Havre v. Dunn* settlement. Rather, they would still have the claims they had when they issued those deeds.

For these reasons, if this Court disagrees with the analysis given in Part II, it should apply election of remedies as additional support for the relief requested in Part III. Alternatively, if the Court disagrees with the analysis presented in Part III, it should consider election of remedies as additional support for the relief requested in Part II.

CONCLUSION

For the above reasons, the Court should grant the petition for review, reverse the outstanding judgment of the court of appeals,¹⁷ render judgment in favor of petitioners, and vacate the court of appeals' opinion. Petitioners also request such other and further relief to which they are entitled.

¹⁷ The court of appeals' judgment on the equitable accounting issue raised by the Saucedo Plaintiffs as cross-appellants was previously severed and vacated by this Court on March 10, 2006.

Respectfully submitted,

MAYER, BROWN, ROWE & MAW LLP

By: _____

Claudia Wilson Frost

Bar No. 21671300

Jeremy J. Gaston

Bar No. 24012685

700 Louisiana Street, Suite 3400

Houston, Texas 77002-2730

(713) 238-3000

(713) 238-4888 (fax)

Counsel for Petitioner

Andrew L. Frey

MAYER, BROWN, ROWE & MAW LLP

1675 Broadway

New York, New York 10019-5820

(212) 506-2500

(212) 262-1910 (fax)

Of Counsel

AUGUST 21, 2006

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2006 a copy of the foregoing **PETITIONERS' BRIEF ON THE MERITS** was forwarded to the following *pro se* respondents in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by Certified Mail, Return Receipt Requested, as follows:

Rebecca Gomez Sexton
1814 Greenbriar Avenue
Brownsville, Texas 78520

George Butcher
619 Sutton Drive
San Antonio, Texas 78228

Rafael Garcia
Rt. 8, Box 606
Brownsville, TX 78520

Ramon Donato Garcia
150 Denise Avenue
San Benito, Texas 78586

Hortencia Garcia
Rt. 8 Box 606-A
Brownsville, Texas 78520

Sandra Pappagiorgio
794 Normandy
Houston, Texas 77015

Pedro Garcia
Rt. 8 Box 606-B
Brownsville, Texas 78520

Esmeralda Gomez Carroll
209 W. Fern
McAllen, Texas 78201

Claudia W. Frost