

**No. 05-0653**

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**In The  
Supreme Court of Texas**

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

*Petitioners,*

v.

**CONCEPCION SAUCEDA, ET AL.,**

*Respondents.*

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

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**PETITION FOR REVIEW**

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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
22. Raquel Balli
23. Raymond Balli
24. Esteban Balli, Jr.
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## 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 later, 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 also 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 that respondents claim to be worth more than \$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 found for respondents on all legal issues material to this petition. After conducting an accounting of past mineral lease rentals and bonuses, the court entered judgment on the verdict 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 respondents pre- and post-judgment interest and \$1,620,000 in attorney's fees. The trial court denied respondents' post-trial request for an equitable accounting and disgorgement of profits relating to the surface sales proceeds, and their related request for 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 *et al.* Plaintiffs (listed *supra* at ii-viii).

*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) (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).

## 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

### *Briefed:*

1. Whether a party waives a running objection to inadmissible evidence by testifying about that evidence to explain or rebut it.
2. Whether an unaccepted settlement proposal is competent to prove the value of a claim or the existence and terms of a settlement.
3. 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 acreage in fee simple.
4. Whether estoppel by deed applies to conveyances or reservations of personal interests.
5. Whether a 50-year delay in filing suit establishes laches when it results in the loss of relevant witnesses and documents.
6. Whether a trial court has discretion to balance the equities in deciding the scope of an equitable accounting.

### *Unbriefed:*

7. Whether prior adversity between parties to a federal court judgment is necessary to apply collateral estoppel in a state court case.
8. Whether the assertion of conflicting title claims between co-parties to a condemnation proceeding establishes adversity.
9. Whether estoppel by deed applies to reserved property rights.
10. Whether the court of appeals erred in ordering an equitable accounting of profits from the sale of surface land rights based on a breach of fiduciary duty allegedly arising from the ownership of an executive mineral interest.
11. Whether Texas may constitutionally toll limitations against nonresident defendants who otherwise are amenable to long-arm service of process.
12. Whether a trial court may disregard a jury finding supported by the evidence on the ground that the finding purportedly conflicts with another finding.
13. Whether the judgment interest provisions of the Texas Finance Code apply to cases pending on appeal as of the effective date of those provisions.
14. Whether a party can recover in equity the lost time value of money on a claim that does not allow the recovery of pre-judgment interest for that time period.

15. Whether legally sufficient evidence supported the jury's findings, including the jury's findings of conspiracy, object of conspiracy, and breach of fiduciary duty.

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 it in 1830. 170 years later, a Cameron County jury found that respondents were the rightful owners of parts of the island based on an alleged conspiracy from the 1940s. Respondents' claims were unfounded, self-contradictory, and based on incompetent evidence, speculation, and innuendo. In addition, respondents' 50-year delay in bringing suit resulted in the loss of critical witnesses and documents, further compromising any 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 an additional accounting of profits petitioners have earned since 1961. According to respondents, the judgment is now worth over \$70 million. To achieve this staggering result, the court of appeals applied legal principles that conflict with this Court's precedents and incorrectly decided issues of substantial importance to the jurisprudence of this State and all *bona fide* property owners in it.

#### **STATEMENT OF FACTS**

In 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. Juan José owned the north half and his uncle owned the south half. *Id.* When Juan José's uncle died that year, the south half passed to his seven nieces and nephews, including Juan José. *Id.* Juan José then owned the north half plus one-seventh of the south.

In 1830, Juan José sold his interest to Santiago Morales. *Id.* Because Juan José owned more than half of the island, the partition of the island in the 1830 sale created two unequal divisions, later known as the Northern and Southern Divisions. DX66. Soon

after the sale, Morales claimed that the original 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, Morales treated the Northern Division as his own by mortgaging and selling parts of it. This Court thus concluded more than 60 years ago that Juan José ultimately cleared his title to Morales's satisfaction. *State v. Balli*, 190 S.W.2d 71, 87 (Tex. 1944).

In 1937, a group claimed they had discovered evidence of a rescission of the 1830 sale in the archives at Matamoros. Op. at 904. Word of this claim reached New York attorney Frederic Gilbert, who enlisted his 27-year-old nephew, petitioner Kerlin, to go to Texas, purchase the Juan José interest from the living heirs, and attempt to validate the rescission. 9RR128-32; 13RR224. Kerlin went to Brownsville and began working with real estate attorney F.W. Seabury. 9RR127-29; 17RR121. From the start, Seabury doubted the evidence of any 107-year-old 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. Rescission aside, Seabury believed the Juan José interest worthless because Juan José's heirs had never registered any property interest with Texas and because the land had been adversely possessed for decades. DX115. Nevertheless, Seabury and Kerlin pressed forward in locating 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 issued that 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 (App., Tab 2) (representative deed); 9RR132-36; 10RR39; 12RR80-81, 141-42; 13RR169-71; PX26-36.

Kerlin now owned virtually all of the Juan José interest, such as it was, giving him a “claim” of title – colorable or not – to the *Northern* Division. But in addition to the problems identified by Seabury, Kerlin faced a 1928 judgment in *Havre v. Dunn*, a state court case that settled title to most of the island and extinguished all other claims of title, including those based on the Juan José interest. PX41. Kerlin learned, however, that two parties to that judgment had moved to reopen it. 23RR91-92; PX42. To gain standing to pursue that dormant motion, Kerlin bought a mineral lease from the widow of one of the parties. 10RR64-66; 13RR234-35; PX40. Seabury then moved for a new trial and filed an answer and cross-action on behalf of Kerlin and those whose prior claims of title he was asserting. 10RR67, 70-72, 76-77, 79, 84, 87-89; 24RR138; PX43.

Having successfully intervened, Kerlin started accumulating claims of title to acreage in the *Southern* Division of the island (the Warren, Moore, Cook, and Agnew claims), along with a claim to 2,214 acres in Nueces County (the Kate Gilbert claim). 10RR112-14; 11RR5-8; 13RR225; 15RR115-22; DX369. These claims were independent of the Juan José interest, but, like that interest, they also had been extinguished by the 1928 judgment in *Havre*. *Id.*; 10RR128-30; 11RR42; 16RR123, 125-26. As Kerlin accumulated claims, Seabury sought a favorable settlement for them. In February 1940, Seabury offered to settle for 40% of the island. 10RR132-36; 13RR133-34; 16RR 119-20. That offer was summarily rejected. 10RR136-37; 24RR29-30; PX55.

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

Nevertheless, attempting to salvage some value from the Juan José interest, Seabury developed a theory suggesting that Juan José might not have sold all of the Northern Division in 1830. This theory was based on the proposition that Juan José sold only "one-half league" of the piece inherited from his uncle, which was slightly less than what he had inherited. 23RR74. But this theory was dubious: in addition to adverse possession and the failure to register any interest, an 1856 tax sale would have extinguished any remaining interest Juan José 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 included a tract of 7,444 acres in the *Northern* Division that 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 noted, those "commitments" were limited to a 1/64th of 1/8th royalty interest. As before, Seabury's proposal was rejected; subsequent proposals made no reference to exchanging land or money for the "Juan José interest." DX209b; PX85.

But Kerlin's other claims of title were much stronger. According to the opposing parties' own attorney (Harbert Davenport), the opposing parties had no defenses to the Cook, Agnew, and Moore claims, and defeating the claims derived from Warren and

Kate Gilbert would be difficult. DX205. A settlement was thus reached in November 1942, right before a hearing on Seabury's new trial motions. 11RR22-23, 91-92.

Under the settlement, Kerlin received 20,000 acres in the *Southern* Division and 1,000 mineral acres in Nueces County. 10RR176-77; 11RR55-57; 16RR86, 170-71; PX96, 96a (App., Tab 3). This represented full value (20,000 acres) for his Cook and Agnew claims, DX271 (App., Tab 4), 15RR120-127, partial value (1,000 mineral acres) for his Kate Gilbert claim to 2,214 acres in Nueces County, and nothing for his Warren and Moore claims. To clear the opposing parties' titles, the settlement required Kerlin to quitclaim the Cook, Agnew, Warren, Moore, and Kate Gilbert titles in favor of the opposing parties. PX96, 96a (App., Tab 3); PX88, 109. The settlement did not require any quitclaim for the Juan José interest. *Id.* Seabury then dismissed the cross-claims he had filed. 11RR83-84; PX99. Seabury died in 1946. 10RR140; 15RR150.

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 worthless. 20RR208-09. Kerlin had no further communications with Primitivo. 12RR66; 15RR169.

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 raised claims of breach of contract, breach of fiduciary duty, fraud, and conspiracy. *Op.* at 908. After a two-month trial in 2000 – in which Kerlin, then aged 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 *Havre* settlement. CR4773, 4775 (App., Tab 5). It further found that Kerlin had acquired in the settlement 7,500 acres in fee simple for Juan José's heirs. CR4777 (App., Tab 5). For that, the jury awarded \$1,092,000, which represented the heirs' alleged portion of sales proceeds Kerlin received in 1961 when he sold the surface rights to the acreage obtained in *Havre*. 12RR82-84; CR4779 (App., Tab 5). The jury also found that Kerlin was estopped from denying the royalty reservations in the original deeds. CR4758-60 (App., Tab 5). For that, the trial court awarded respondents \$70,946.98 in past royalties and an on-going 1/64th of 1/8th royalty in all of Kerlin's Padre Island mineral interests *beyond* the 7,500 acres, which included the remaining mineral interests Kerlin obtained in *Havre* as well as additional mineral interests he obtained after that case. CR4966-67, 4982-84 (App., Tab 6); DX369.

After the jury returned its verdict, respondents moved for equitable relief, seeking appointment of an auditor, an equitable accounting, a constructive trust, and a disgorgement of profits, including profits earned since 1961 on the \$1,092,000 in sales proceeds. CR4929-45 (App., Tab 6). 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 (App., Tab 6). The trial court otherwise denied respondents' requests. CR4965 (App., Tab 6). In addition to a partial award of pre-judgment interest, the court awarded \$1,620,000 in attorney's fees. CR4966-71 (App., Tab 6). Kerlin's motions for new trial and to modify the final judgment were overruled by operation of law, and both sides appealed. Op. at 909. Over four years

later, the Corpus Christi court of appeals affirmed the judgment against petitioners but reversed the trial court's denial of an equitable accounting and disgorgement of profits, remanding the case for further proceedings. *Id.* at 928. Kerlin died in April 2004 at age 94 while that appeal was pending. *See supra* note 1 at i.

### SUMMARY OF ARGUMENT

Respondents' ancestor Juan José once owned the Northern Division of Padre Island, but he sold it in 1830. Over a hundred years later, respondents sold Kerlin their "claim" to the Northern Division, such as it was, reserving only a potential royalty interest. More than sixty years later, a Cameron County jury found that respondents somehow were due 7,500 acres in the Southern Division *and* a royalty interest in the rest of Kerlin's acreage (nearly all of which was also in the Southern Division) based on an alleged conspiracy from the 1940s. The court of appeals parlayed that jackpot into a lottery win of staggering proportions by giving respondents the right to an "equitable accounting" of profits, which they claim is worth over \$70 million. In reaching this result, the court made several legal errors that not only conflict with this Court's precedents but also unsettle the law of evidence, undermine the finality of settlements, and disturb longstanding property rights. A summary of briefed issues follows; page limits prevent discussion of other significant errors. *See supra* at xviii (unbriefed issues).

1. Respondents' only proof of a conspiracy to convert 7,500 acres allegedly intended for Juan José's heirs was a rejected settlement proposal that conflicted with the terms of the actual settlement. Petitioners had a running objection to this evidence, but the court of appeals held that the objection was waived because Kerlin 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.

2. Admissible or not, a rejected settlement proposal is incompetent to prove the value of a claim or the existence and terms of any settlement. Thus, no evidence supports the finding that the *Havre* settlement awarded Juan José's heirs 7,500 acres in fee simple.

3. Based on the undisputed fact that respondents previously sold any interest they had in Padre Island to Kerlin (apart from a minor royalty interest), no rational juror could conclude that respondents' claims were part of the *Havre* settlement, let alone that the settlement gave respondents a fee simple interest in any acreage.

4. At trial, respondents claimed that Kerlin also owed them a separate royalty interest based on "estoppel by deed." This was inconsistent with respondents' theory that their title claims had been compromised for 7,500 acres in fee simple. Of greater legal significance, the court's holding unjustifiably extends "estoppel by deed" to deeds that, as here, convey or reserve personal interests in property rather than the property itself.

5. Respondents were guilty of laches because they delayed over 50 years in filing suit, which 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 lost evidence must be held against respondents, whose delay caused the loss.

6. The court of appeals held that the trial court had no discretion to limit the scope of an equitable accounting. This holding stripped the trial court of its discretion to balance the equities on matters within its equitable jurisdiction. The equities in fact favor petitioners because the original deeds to Kerlin conveyed nothing of value; respondents' delay in filing suit was the reason financial records for a legal accounting did not exist;

respondents waited until after the jury verdict to even request their expansive accounting; and that request was an end-run around this Court's prohibitions on pre-suit interest.

## ARGUMENT

**I. The only evidence supporting the claim that respondents received 7,500 acres in the *Havre* settlement was subject to a running objection, which erroneously was held waived by petitioner's efforts to explain and rebut the evidence.**

At trial, respondents claimed that Kerlin conspired with Seabury in the settlement of *Havre* to obtain 7,500 acres in fee simple for the Balli heirs but keep that land for himself. Respondents' only "evidence" of this implausible hypothesis was Seabury's settlement proposal seeking 7,444 acres for the Juan José interest. No rational juror could have understood that proposal to seek 7,444 acres for Juan José's heirs because virtually all of the Juan José interest was owned by Kerlin. *See infra* Part III. Even so, respondents used this rejected proposal to imply that such a demand in favor of the heirs had been accepted in the actual settlement, even though the actual settlement documents did not reflect this. Kerlin objected because statements in settlement negotiations are inadmissible to prove a disputed claim or its amount. 9RR49-54; TEX. R. EVID. 408. The trial court rejected this contention but granted a running objection. *Op.* at 920; 10RR157.

The court of appeals held that Kerlin had waived any objection because he later introduced and testified about the rejected offer. *Op.* at 920. But if the court of appeals were correct, its rule would impale litigants on the horns of a dilemma: either they allow their adversary an open field to exploit wrongly admitted evidence or they waive what may be a perfectly valid objection to unfairly prejudicial evidence.

This litigation "ground rule" is of immense practical importance to litigants in Corpus Christi and elsewhere in the State. Moreover, the court of appeals' holding

conflicts with this Court’s ruling that “[h]aving properly objected” a party is “entitled to defend itself by explaining, rebutting, or demonstrating the untruthfulness of the objectionable evidence without waiving its objection.” *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 4 (Tex. 1986). Because Kerlin was granted a running objection to this evidence, he was entitled to refer to and explain the rejected offer to rebut respondents’ arguments that the evidence proved the object of the alleged conspiracy, rather than have to “sit idly by and take [his] chances on appeal or retrial when incompetent evidence [is] admitted.” *Id.* Given its importance to trial practice in this State, the question of whether the *Scurlock* rule remains valid warrants review.

**II. The only evidence supporting the claim that respondents received 7,500 acres in *Havre* was incompetent; a rejected settlement proposal cannot establish the value of a claim or the existence and terms of any settlement.**

On appeal, Kerlin argued that respondents’ evidence was legally insufficient to prove a conspiracy whose object was to obtain 7,500 acres that belonged to respondents in fee simple. Kerlin’s App. Br. at 38-39. The court of appeals decided this issue against Kerlin, relying on the Seabury settlement proposal. Op. at 924-25. Yet even if one could view Seabury’s settlement letter as a proposal to compromise the claims of Juan José’s heirs in exchange for 7,500 acres in fee simple for the Balli heirs (*but see infra* Part III), it is undisputed that his proposal was rejected.

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, the Court reached this result despite the fact that a purchase offer is at least some evidence of a property’s value insofar as it shows the amount a buyer may be willing to pay. At issue here, however, is

a rejected settlement proposal, which shows only what some party sought in exchange for relinquishing a claim. Unlike a purchase offer, an unaccepted settlement proposal does not evidence that *any* party is willing to pay anything for the relinquishment of a claim. An unaccepted settlement proposal thus lacks probative value *and* competence.

Moreover, respondents did not merely use Seabury's rejected settlement proposal to prove the value of the claims of Juan José's heirs. They also used it to imply the existence and terms of a settlement of those claims that were not reflected in a subsequent written settlement. But if an unaccepted settlement proposal is incompetent to prove the value of a claim, it is *a fortiori* incompetent to prove the existence or terms of any actual 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, despite the following:

- The Seabury settlement proposal did not state that any fee interest would go to Juan José's heirs.
- 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.
- 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.

To foster the settlement of disputes, this Court should grant review and confirm that unaccepted settlement proposals are incompetent for the purposes discussed above.

**III. No rational juror could believe 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 acreage.**

At trial, respondents convinced the jury that the claims of Juan José's heirs had been settled for 7,500 acres in fee simple. But it was undisputed that, in 1938, Juan José's heirs sold to Kerlin their claims to all surface and mineral rights they had in Padre

Island, reserving only a 1/64th of 1/8th royalty interest. Thus, no rational juror could have found that any “commitments” Kerlin had to Juan José’s heirs could ever have exceeded a 1/64th of 1/8th mineral royalty in whatever he might receive for a release of claims under the eleven deeds.

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 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, a rational juror still would be forced to conclude that Juan José’s heirs could not have obtained in such a settlement anything more than a 1/64th of 1/8th royalty interest in 7,500 acres.

For these reasons, no rational juror could have found that the *Havre* settlement awarded Juan José’s heirs 7,500 acres in fee simple. Review is thus warranted to prevent a massive and utterly unfounded windfall.

#### **IV. “Estoppel by deed” does not apply to conveyances and reservations of personal interests.**

At trial, respondents argued that their title claims had been settled for 7,500 acres in *Havre*, but they also argued that they were *additionally* entitled to a royalty interest in all of Kerlin’s Padre Island property beyond those 7,500 acres based on “estoppel by deed.” Although respondents’ legal theories were inconsistent, the jury accepted them both, and the trial court awarded respondents past and future royalties on all of Kerlin’s

other island acreage, including acreage obtained after the *Havre* settlement.

On appeal, Kerlin argued that estoppel by deed does not apply to reservations or conveyances of *personal* interests in real property, as distinguished from conveyances of the property itself. Kerlin’s App. Brief at 31-33. The court of appeals disregarded this distinction, placing itself in conflict with another court of appeals whose decision was binding precedent. *See Roberts v. Corbett*, 265 S.W.2d 127, 129 (Tex. Civ. App.—Galveston 1954, writ ref’d) (“[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.”).

Here, the deeds at issue did not convey or reserve real property. Rather, they conveyed and reserved the grantors’ personal interests in such property. *See, e.g.*, PX28 (App., Tab 2) (conveying “all the *interes[t]* which [the grantors] have in the hereinabove described premises” and reserving 1/64th of 1/8th mineral royalty out of “our pro rata *interest* in the above described premises” (emphases added)).

Estoppel by deed should not apply to conveyances of personal interests because a person legitimately can convey his “interest” in a piece of property, whether or not he has any interest. In contrast, a deed purporting to convey the real property itself necessarily assumes the grantor has title. Thus, even if it sometimes makes sense to preclude a party from denying the validity of a real property conveyance, it does not make sense to estop a party from challenging the scope of a conveyance of a purely personal interest because such a challenge does not contradict anything about the conveyance. Likewise, there is no equitable basis to apply estoppel by deed to reservations contained within conveyances of personal interests. Because the court of appeals’ holding conflicts with

binding precedent and unsettles property rights, this issue merits review.

**V. A 50-year delay in filing suit establishes laches when it results in the loss of relevant witnesses and documents.**

The *Havre* settlement has been a matter of public record since 1943. Moreover, Kerlin told Juan José's heirs in 1954 that he had obtained nothing for the Juan José interest in that settlement. Respondents then delayed until 1993 before filing their claim that the *Havre* settlement was tainted by a conspiracy. This delay resulted in the loss of relevant witnesses, including Gilbert, Seabury, and Davenport, as well as court records in long-closed cases like *Havre*. 2RR60; 10RR99-100, 140; 15RR150, 172-74; 25RR194.

The court of appeals held that laches was unavailable because petitioners failed to show harm from the delay, Op. at 914, apparently because petitioners could not show what evidence might have been derived from those missing documents and witnesses. But that is the whole point of laches: because respondents delayed so long in filing suit, the evidence was lost to all parties. Thus, the benefit of any doubt as to the substance of missing evidence must be given to petitioners. Any other view would let parties avoid a laches defense by simply delaying long enough to ensure the unavailability of relevant evidence. Because the standard for allowing litigants to maintain 50-year-old, fact-based claims is important to the jurisprudence of this State, review should be granted.

**VI. A trial court has discretion to balance the equities in deciding the scope of an equitable accounting.**

After the jury awarded respondents millions of dollars on their 50-year-old claims, respondents sought to enhance their jackpot through an "equitable accounting" of profits Kerlin had earned since 1961 on \$1,092,000 in sales proceeds. The trial court denied that request, but allowed an equitable accounting of mineral lease rentals, which added over

\$400,000 to the judgment. That addition was not enough for the court of appeals, however; it held that an equitable accounting of profits was mandatory because a “legal” accounting was unavailable due to the loss of historical financial records. Op. at 927.

The fact that a legal accounting was unavailable, however, just meant that any accounting would be equitable in nature, not that the equities necessarily weighed in favor of conducting one. The court of appeals thus stripped the trial court of its inherent discretion to weigh the equities and decide whether respondents justly deserved some greater award, and if so, how much. Moreover, the trial court had several bases for deciding that the equities weighed against hyperinflation of the jury’s verdict, including the fact that the original deeds conveyed nothing of value and the lack of financial records was caused by respondents’ 50-year delay. In addition, respondents’ request for an accounting of profits was untimely (having not been raised until they got a surprise jury verdict in their favor), and it also was an attempt to circumvent this Court’s prohibition on pre-suit interest when no written demand is made prior to suit. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531 (Tex. 1998). Thus, the trial court’s action on the equitable accounting – which nevertheless added over \$400,000 to the jury’s verdict – could not have been an abuse of discretion.

Because the scope of a trial court’s discretion on equitable matters is an issue of great importance to the jurisprudence of this State, this Court should grant review.

### CONCLUSION

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

Respectfully submitted,

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NOVEMBER 7, 2005

## CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2005 a copy of the foregoing **PETITION FOR REVIEW** was forwarded to the following counsel, including counsel of record for respondents, in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by Certified Mail, Return Receipt Requested:

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