IN THE SUPREME COURT OF TEXAS

NO. 05-0653

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

v.

CONCEPCION SAUCEDA, ET AL., II, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued April 22, 2008

JUSTICE BRISTER, joined by JUSTICE HECHT, JUSTICE MEDINA, and JUSTICE WILLETT, concurring.

I concur in the Court's judgment. I understand the Court's reluctance to overrule one of our cases, but 40 years ago Justices Pope, Greenhill, and Steakley were right that *Vaughn v. Deitz* was wrongly decided.[1] Our "absent from the state" statute arose in 1841, a long time before minimum-contacts analysis did; as almost every other state has decided, a person whose minimum contacts

[1] 430 S.W.2d 487, 491 (Tex. 1968) ("The Texas tolling statute . . . is not unique or different from those of other states, almost all of which have held that the presence or absence of a defendant must be solved in terms of jurisdiction over the person.") (Pope, J., dissenting).

make them amenable to suit in a state cannot fairly be said to be "absent from the state."[2] Indeed, such a construction would face serious constitutional problems.[3]

It is unclear why the Court is afraid to say so. No one has argued that we should distinguish rather than overrule *Vaughn* for a very good reason: it is impossible. Both the long-arm business statute here and the long-arm motorist statute in *Vaughn* are part of the same chapter in the Civil Practices and Remedies Code, and both make nonresidents amenable to suit in Texas. Indeed, one can sue a nonresident motorist under either: as a party to a collision,[4] or as one who has conducted business by "commit[ting] a tort in whole or in part in this state."[5] Does the Court mean to say today that limitations is tolled under this Code's section 16.063 if the plaintiff serves the Secretary of State,[6] but not if the plaintiff serves the Transportation Commission Chairman?[7]

But the court of appeals' opinion also purports to say a lot about several other legal doctrines (there are 95 headnotes in the Southwestern Reporter), some of which we have not addressed in a very long time, and every one of which the court of appeals misapplied. If experienced judges can

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[2] *Id*.

[3] *See Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 891-93 (1988) (holding states cannot condition limitations statutes on requirement that nonresidents appoint a local agent for service).

[4] TEX. CIV. PRAC. & REM. CODE § 17.062(a).

[5] *Id.* § 17.042(2).

[6] *See id.* § 17.044(a).

[7] *See id.* § 17.062(a).

make such mistakes, others may follow and the jurisprudence of the state become disoriented.[8] I would straighten a few of these out.

The primary mistake made by the courts below was forgetting that the transaction on which this suit is based was a *sale.* The heirs of Juan Jose Balli (nephew of the Roman Catholic priest after whom Padre Island is named) sold any interest they might have in that island in 1938 to Gilbert Kerlin in 11 duly recorded quitclaim deeds,[9] retaining only a 1/512th interest[10] in any minerals:

> KNOW ALL MEN BY THESE PRESENTS that the undersigned, [each of the Balli heirs], for and in consideration of the sum of $10.00 cash in hand to us paid by Gilbert Kerlin, trustee . . . and other valuable considerations, the receipt of all of which is hereby acknowledged and confessed, have GRANTED, SOLD AND CONVEYED and by these presents do GRANT, SELL AND CONVEY, unto the said Gilbert Kerlin, trustee, all of our undivided interest in and to all that certain tract of land situated in the counties of Cameron, Willacy, Kenedy, Kleberg and Nueces, in the State of Texas, commonly known as PADRE ISLAND. . . . It being our intention to convey all the interest which we have in the hereinabove described premises, and each and every part thereof, by reason of our being the lawful heirs of the said Juan Jose Balli, irrespective of the acreage or quantity thereof, save and except that there is specifically reserved to us a one-sixty-fourth (1/64th) of the royalty of one-eighth (1/8th) of any and all oil and/or gas or other minerals in, on or under our pro rata interest in the above described premises.

Keeping this simple fact in mind, all of the Plaintiffs' claims — and the 15 years of litigation that have followed — collapse in a heap.

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[8] *See* TEX. GOV'T CODE § 22.001(a)(6) ("The supreme court has appellate jurisdiction . . . extending to all questions of law arising in . . . any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.").

[9] Apparently 12 deeds were signed but only 11 were recorded as one appeared to be a duplicate. *See* 164 S.W.3d 892, 905.

[10] The deeds reserve "a one-sixty-fourth (1/64th) of the royalty of one-eighth (1/8th) of any and all oil and/or gas or other minerals . . . ," yielding a 1/512th royalty interest.

The Heirs Had Nothing to Sell

Juan Jose Balli sold his interests in Padre Island to Santiago Morales in 1830. This Court so held in 1944 in *State v. Balli*.[11] Balli's heirs have never lived on Padre Island, never worked it, never paid taxes on it. Their sole claim to title — that Balli and Morales rescinded their sale — was rejected by this Court in *State v. Balli.*[12]

But even assuming that holding was not binding on these heirs, any claim the heirs had to Padre Island was extinguished by a default judgment in 1928 in *Havre v. Dunn*. There, all Balli heirs known and unknown (the ancestors and privies of all current claimants) were served by publication in a case regarding title to these parts of Padre Island. When none of the Balli heirs appeared, all were defaulted. One non-Balli claimant filed a motion for new trial within the two-year period for setting aside a default served by publication,[13] but none of the Balli heirs did. Thus any interest the heirs held in Padre Island was extinguished in 1928, ten years before they met Gilbert Kerlin.

Estoppel By Deed Does Not Apply

The courts below disregarded these facts based on an "estoppel by deed" — that because Kerlin bought quitclaim deeds from the heirs and used them in the hope of gaining something thereby, he was estopped to claim that they conveyed him nothing.[14] While we have not written much about

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[11] *See* 190 S.W.2d 71, 81 (Tex. 1944) ("On January 19, 1830, Juan Jose Balli . . . conveyed to Santiago Morales his original one-half of Padre Island, together with one-half league more that he had acquired by inheritance from his uncle, the Priest Nicolas Balli.").

[12] *Id*. at 87 ("It may be inferred from these proceedings that Balli cleared his title to the satisfaction of Morales.").

[13] *See* TEX. R. CIV. P. 329(a).

[14] 164 S.W.3d at 915–16.

estoppel by deed in a long time, the 2003 RESTATEMENT (THIRD) OF PROPERTY describes at least two reasons why estoppel by deed has nothing to do with this case:

> Under the doctrine of estoppel by deed, a purported transfer of land that the transferor does not own becomes enforceable and takes place automatically if the land is later acquired, but only if the deed represents to the grantee that title of a specified quality is being conveyed, which most warranty deeds but few quitclaim deeds do.[15]

This case does not involve after-acquired title, no Balli heir having bought or inherited any part of Padre Island in over 170 years. Even if they had, the quitclaim deeds they gave Kerlin did not warrant title, so estoppel by deed could never apply.[16]

Relying on a court of civil appeals case from 1892, the court of appeals extended estoppel by deed to the much broader proposition that "'all parties to a deed are bound by the recitals therein.'"[17] But even assuming that is true, the heirs' deeds contained no recitals of ownership or title; they were mere quitclaims.[18] While the deeds reserved a 1/512th royalty, Kerlin never denied that reservation;

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[15] RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 6.1, comt. f (2003).

[16] *See Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 770 (Tex. 1983) ("[W]hen one conveys land by warranty of title, or in such a manner as to be estopped to dispute the title of his grantee, a title subsequently acquired to that land will pass *eo instante* to his warrantee, binding both the warrantor and his heirs and subsequent purchasers from either."); *Robinson v. Douthit*, 64 Tex. 101, 105 (1885) (finding estoppel by deed because donor's deed was "neither in form nor substance a mere quitclaim"); *see also* RESTATEMENT (FIRST) OF PROPERTY §§ 166, 167 (noting that "a quitclaim deed . . . affords no foundation for either an estoppel by deed or an equitable transfer"); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 311.1, at 583–84 (noting estoppel by deed is likely inapplicable to a quitclaim); M. Benjamin Cowan, *Venue for Offshore Environmental Crimes: The Seaward Limits of the Federal Judicial Districts*, 49 VAND. L. REV. 825, 856 n.165 (1996) ("Quitclaim deeds by definition contain no warranties of title, and as such are categorically excepted from the doctrine of estoppel by deed."); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729, 745 n.52 (1972) ("[E]stoppel by deed is invoked in law when there is an attempted transfer by warranty deed.").

[17] 164 S.W.3d at 915 (quoting *Wallace v. Pruitt*, 20 S.W. 728, 728–29 (Tex. Civ. App.—Corpus Christi 1892, no writ).

[18] *See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 486 (Tex. 2005) ("A warranty deed to land conveys property; a quitclaim deed conveys the grantor's rights in that property, if any.").

he was trying to deny that the heirs had any interest to convey *before* the reservation, a matter as to which the quitclaim deeds were silent. As nothing about Kerlin's claim was inconsistent with the deeds, the courts below erred in holding they created title in the heirs.

The Heirs' Royalty Claim Is Against Someone Else

But even assuming all this could be ignored and the heirs held a 1/512th royalty, they have sued the wrong man. The heirs' claim for royalties lies against the operators who have been producing minerals from those properties since 1938. That was not Kerlin; he released any interest he had in those same properties in 1942. The lands Kerlin got in the 1942 settlement were in southern Padre Island and Nueces County — lands Juan Jose Balli never even arguably owned. The heirs' tiny royalty interest did not follow Kerlin wherever he went; if the heirs have a royalty claim, it is against someone else.

The Settlement Did Not Affect the Heirs' Claims

But even assuming the heirs had some interest to claim against Kerlin, Kerlin's 1942 settlement in *Havre v. Dunn* did not touch it. "In order to effectively release a claim in Texas, the releasing instrument must 'mention' the claim to be released."[19] Kerlin released a number of claims he had bought from others in the *Havre v. Dunn* settlement, but the settlement documents make no mention of releasing claims arising through the Balli heirs.

The heirs' only evidence that the settlement involved their claim is an unaccepted settlement demand sent by Kerlin's attorney, F.W. Seabury, asking for 7,500 acres "[f]or the Juan Jose interest."

[19] *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991).

But that wasn't for the heirs — Kerlin had *bought* the "Juan Jose interest" for himself, the heirs retaining only a tiny royalty. Moreover, a settlement offer in Texas courts is "not admissible to prove liability for or invalidity of [a] claim or its amount."[20] The court of appeals held Kerlin had waived this objection by testifying about the offer after it was admitted;[21] but since the trial court had granted him a running objection, he "was entitled to defend [him]self by explaining, rebutting, or demonstrating the untruthfulness of the objectionable evidence without waiving [his] objection."[22] As a matter of law, Kerlin got nothing for the heirs' claims in the settlement documents, and there is no evidence otherwise.

The heirs gained nothing from the settlement of *Havre v. Dunn* because they never appeared or made any claims in the case. The claims Kerlin made were his own, which he had bought and owned outright; he could neither have made nor settled the heirs' tiny mineral claim *because he did not own it*.

Kerlin Was Not the Heirs' Fiduciary

Like any other buyer, Kerlin owed his sellers (the heirs) no fiduciary duty after buying their interests.[23] The court of appeals located a fiduciary duty in the duty a holder of executive rights owes

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[20] TEX. R. EVID. 408.

[21] 164 S.W.3d at 920.

[22] *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 4 (Tex. 1986).

[23] *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997) ("[T]o impose [a fiduciary] relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit.").

to royalty owners.[24] But this duty is limited to benefits that accrue from a mineral *lease*, not a *sale*;[25] as Texas law has long recognized, leasing minerals imposes duties that selling them does not.[26] Texas law has never required an owner who is selling a mineral interest to negotiate a sales price for royalty owners who are *not* selling. The court of appeals inexplicably held that Kerlin violated a fiduciary duty by not giving the Ballis some of what he got from selling his own interest rather than theirs. There is no such duty.

Having Your Own Attorney is not a Conspiracy

Nor could Kerlin be liable for conspiring with Seabury, his own attorney, to commit fraud or breach the latter's fiduciary duty to the heirs *because the heirs were never Seabury's clients*. It is undisputed Seabury never met or spoke with any of the Balli heirs; how exactly could he have become their attorney? And if he was not their attorney, how exactly could failing to disclose something to them be fraud or breach a fiduciary duty? It is true that Seabury filed an answer in *Havre v. Dunn* in the name of each of the heirs, but it has long been the rule that an assignee (Kerlin) can sue in the name of his assignors (the heirs).[27] Because the heirs had been named and served by publication in

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[24] 164 S.W.3d at 916; *see Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984) ("[T]he duty of the executive ... requires the holder of the executive right . . . to acquire for the non-executive every benefit that he exacts for himself."); *Schlittler v. Smith*, 101 S.W.2d 543, 545 (1937).

[25] *In re Bass*, 113 S.W.3d 735, 744 (Tex. 2003).

[26] *See HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 889 (Tex. 1998) (citing *Danciger Oil & Ref. Co. of Tex. v. Powell*, 154 S.W.2d 632, 635 (Tex. 1941)) ("The decision in *Danciger* drew a distinction between oil and gas *leases* and *conveyances* with a reservation of mineral interests. The obvious purpose of a mineral lease is for the lessee to conduct exploration and drilling within a defined period of time. That is not the case with conveyances of mineral interests." (citation omitted)).

[27] *Tex. Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co.*, 442 S.W.2d 315, 316 (Tex. 1969).

Havre v. Dunn, it was perfectly proper for Seabury's bill of review seeking to reopen that suit to be filed in their names, even though the title claims (if any) now belonged to Kerlin. As Seabury was not the heirs' attorney, he owed them no fiduciary duty or duty to disclose anything that occurred.

Conclusion

Recent years have seen a number of suits in South Texas seeking to reopen title claims to lands that have been dormant for decades or centuries.[28] The court of appeals' opinion here will go a long way toward encouraging such suits, should someone make the mistake of considering it a correct statement of Texas law. I would disabuse them of that notion.

Scott Brister
Justice

OPINION DELIVERED: August 29, 2008

[28] *See, e.g.*, *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003); *Aguillera v. John G. and Marie Stella Kenedy Mem'l Found.*, 162 S.W.3d 689, 692 (Tex. App.—Corpus Christi 2005, pet. denied).