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., RESPONDENTS

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

Argued April 22, 2008

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE BRISTER filed a concurring opinion, in which JUSTICE HECHT, JUSTICE MEDINA ,and JUSTICE WILLETT joined.

In 1829, the State of Tamaulipas, Mexico, recognized the claims of Padre Nicolas Balli and his nephew, Juan Jose Balli, to Padre Island. Since then, the island's ownership has been the subject of numerous legal disputes, including the present one. *See, e.g., U.S. v. 34,884 Acres*, No. C.A. 142 (S.D. Tex. 1948), *aff'd sub nom De Lourett v. Kerlin*, 182 F.2d 750 (5th Cir. 1950); *State v. Balli*, 190 S.W.2d 71 (Tex. 1944); *Havre v. Dunn*, No. 6515 (103rd Dist. Ct., Cameron County, Tex. June 29, 1928). In this case, more than 275 descendants of Juan Jose Balli sued Gilbert Kerlin, individually and as trustee, as well as his wholly owned companies, Windward Oil & Gas Corp. and

PI Corp., asserting that Kerlin had defrauded them of oil and gas royalties and other interests in Padre Island. We hold that the Ballis' claims were not subject to statutory tolling and, accordingly, are time-barred. We therefore reverse and render judgment for the defendants.

I. Background

In 1829 the State of Tamaulipas recognized the claims of Padre Nicolas Balli and his nephew, Juan Jose Balli, to what is now known as Padre Island. When Padre Nicolas died, his interest passed by devise to his seven nieces and nephews, including Juan Jose. In 1830, Padre Nicolas's heirs partitioned the island, leaving Juan Jose with the northern four-sevenths of the island and the other heirs with the southern three-sevenths. On the same day, Juan Jose conveyed his interest to Santiago Morales. Several months later, Morales and Juan Jose signed a rescission agreement after Morales became concerned about the clarity of Juan Jose's title. Despite the rescission agreement, however, Morales later mortgaged part of the property and conveyed the remaining portion of the property to Jose Maria Tovar. The rescission agreement, in large part, formed the basis for the Ballis'[1] claims in this suit to an existing interest in Padre Island. In the 1840s, the other Padre Nicolas heirs conveyed their interests in the southern half of the island to Nicolas Grisanti.

The court of appeals' opinion sets out in some detail the history of the Ballis' claims and the various suits over title to Padre Island. *See* 164 S.W.3d 892. For purposes of our discussion, however, suffice it to say that by the early 1900s the Ballis' interests in the island under Juan Jose Balli's title had largely disappeared, either through conveyances or adverse judgments, and a federal

[1] We refer to Juan Jose Ballis' heirs collectively as "the Ballis."

court had resolved various title disputes by awarding possession of the island to a number of parties. *See Grisanti v. Am. Trust Co. of N.J.*, No. 18 (C.C.S.D. Tex. Nov. 16, 1905).

In 1923, Lizzie Havre filed a trespass to try title suit against three of the defendants who had been awarded possession in *Grisanti*: Pat F. Dunn, Sam A. Robertson, and W. E. Callahan. Dunn and the other defendants cross-claimed for title to and possession of all of Padre Island, except for the southernmost 7,500 acres. The Balli heirs were cited by publication, but did not appear. The district court ultimately granted title and possession of Padre Island, but for the southernmost 7,500 acres, to Sam A. Robertson and W. E. Callahan. Two of the cross-defendants timely filed a bill of review, which remained pending until the late 1930s.

In 1937, Gilbert Kerlin's uncle, Frederick Gilbert, was contacted by several people who had discovered evidence of an agreement to rescind the 1830 sale between Morales and Juan Jose Balli. Frederick Gilbert formed a partnership with them to pursue a claim to Juan Jose's interests in the island based upon the rescission agreement's existence. Gilbert put his nephew, a New York attorney, in charge of the venture, and Kerlin traveled to Brownsville to locate Juan Jose's heirs and purchase their interests. Kerlin contacted Primitivo Balli, the patriarch of the family, who agreed to assist him in securing all of Juan Jose's interests from the various heirs. Kerlin told the heirs that he was obtaining the deeds to clear title to Padre Island, and that each deed would reserve a 1/64th of 1/8th royalty in the grantor. The heirs allege Kerlin also assured them they would receive some compensation if he received anything through the deeds. Kerlin, as trustee, obtained eleven general warranty deeds from the heirs, each containing a reserved royalty interest.

At some point, Kerlin and Gilbert decided to pursue other claims to Padre Island independent of their agreement with the persons who had uncovered the Morales rescission agreement, and they obtained a number of other titles that had been cut off by the *Havre v. Dunn* judgment. Kerlin sought to vindicate all of those claims by obtaining a new trial and pursuing a cross-action in *Havre v. Dunn*. His attorney, F. W. Seabury, filed the motion in the name of Kerlin, the heirs of Juan Jose, and two other *Havre v. Dunn* defendants. The Ballis were not informed of the pending cross-action, and Seabury never communicated with them about it.

On February 28, 1940, Kerlin, Gilbert, and Seabury met with the opposing parties to discuss settlement. During the meeting, Seabury argued that the deeds from the Balli grantors were valid and proposed that his "group" should receive forty percent of Padre Island. The case did not settle at that time, but in 1942, Seabury submitted a written settlement proposal under which the Kerlin interests would receive 25,542.6 acres. The proposal suggested that 7,444 acres comprised "acreage that was never divested out of Juan Jose Balli on any theory of the case."[2] The parties ultimately reached a settlement, and a hearing on the motion for new trial was set for November 9, 1942. Kerlin, who was serving in the army at the time, obtained a three-day pass to attend the hearing. At the hearing, a stipulation was filed under which Kerlin was to receive the mineral interests in 1,000 acres of Padre Island located in Nueces County and fee simple title to 20,000 acres of land in the southern division of the island. During the three days he was in Texas, Kerlin, individually and in his capacity as trustee, executed reconveyance deeds to the Ballis. The Ballis were never informed

[2] This contention was based not on the rescission agreement but upon an alternative theory that Juan Jose had only conveyed to Morales "one-half league" of the land he inherited and retained 7,444 acres for himself.

of the deeds, nor were the deeds ever recorded or delivered. Kerlin also visited one of the Ballis, but he did not mention the *Havre v. Dunn* settlement.

Under the settlement stipulation, the parties were required to execute cross-conveyance deeds to each party's respective acreage. One of the parties to the settlement wrote to another that Seabury had agreed not to give the Ballis any recordable instrument that could cast a cloud on the parties' title, and Gilbert advised Seabury that the Ballis' interest would "die in Kerlin." After the settlement stipulation was executed, Seabury filed a motion to dismiss the Ballis' cross-action in *Havre v. Dunn*.

Some thirteen years later, in 1953, Primitivo Balli wrote two letters to Kerlin requesting documents showing his interest in Padre Island. Kerlin responded that he had received no title under the Ballis' deeds. He did not tell Primitivo Balli about the reconveyance deeds, or that *Havre v. Dunn* had been settled. The next year, Kerlin wrote Primitivo that he had been unable to establish that Juan Jose had not sold all of his interest in the island, and that his heirs consequently had no basis to claim any interest. Another eight years passed and, in 1961, Kerlin sold the 20,000-acre surface tract for more than $3.4 million. He also conveyed all of his mineral interests in the island to PI Corp., his wholly owned company. Another of Kerlin's wholly owned companies, petitioner Windward Oil & Gas Corp., acquired one of Kerlin's partner's mineral interests in the island.

In 1985, some thirty-two years after Primitivo Balli's inquiry and twenty-four years after Kerlin sold his interest, Connie Sauceda, a descendant of one of the Balli grantors, contacted Kerlin to inquire about the mineral interests reserved in the Balli deeds. Kerlin told her that the deeds were

invalid, and that she would have the burden of proof in an expensive, time-consuming lawsuit to prove otherwise.

Eight years later, in February 1993, some of the present Balli parties sued Kerlin, Windward, and PI Corp.[3] Ultimately, more than 275 other Balli heirs joined in the action. The Ballis alleged claims for breach of contract, breach of fiduciary duty, fraud, and conspiracy to commit fraud and breach of fiduciary duty. They sought damages, declaratory relief, the imposition of a constructive trust, and attorneys fees. Kerlin raised several affirmative defenses, including that the Ballis' claims were time barred by the statute of limitations and laches. After a two-month trial, the jury found that Kerlin was estopped from contesting the validity of the deeds executed by the Balli heirs; that the deeds reserved a 1/64 of a 1/8 royalty interest in the Ballis' favor; that Kerlin and PI Corp. breached fiduciary duties they owed the Ballis with respect to their reserved royalty interests; that Kerlin conspired with Seabury to commit fraud and breach the fiduciary duty Seabury owed the Ballis in settling *Havre v. Dunn*; and that Kerlin acquired 7,500 acres of land in his own name for the Ballis' benefit which he failed to share with them.

Regarding Kerlin's limitations defense and the Ballis' claim that his absence from the state tolled the statute's running, the jury found that Kerlin had not been present in the state for either a two- or four-year period between the date of the *Havre v. Dunn* settlement and the date this suit was filed. In addition, the jury found that Kerlin fraudulently concealed the facts and circumstances of the settlement and fraudulently concealed that he was receiving royalty payments that belonged to

[3] We generally refer to the defendants collectively as "Kerlin," although in some contexts we refer to Gilbert Kerlin individually.

the Ballis. Finally, the jury found that Kerlin was not physically present in the state when wrongdoing occurred that formed the basis of the Ballis' claims.

Because some courts have held that limitations is not subject to statutory tolling unless a nonresident committed all or part of a contractual breach or tort here, the Ballis moved to set aside the latter finding, contending that Kerlin's presence in the state when wrongdoing occurred was established as a matter of law. *See, e.g.*, *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). The trial court granted the Ballis' motion. Based on the other jury findings, the trial court rendered judgment in the Ballis' favor for unpaid royalties, mineral lease rentals, and prejudgment interest and attorneys fees. The trial court imposed a constructive trust on an undivided 37.5% mineral interest, but denied the Ballis' request for an equitable accounting. The court of appeals affirmed except for the trial court's ruling denying an accounting, which it reversed and remanded to the trial court for further proceedings.[4] 164 S.W.3d at 903. We granted Kerlin's petition for review to consider the issues presented. 51 Tex. Sup. Ct. J. 445, 457–58 (Feb. 18, 2008). We begin with the threshold issues regarding limitations and fraudulent concealment, as their resolution is potentially dispositive of the parties' remaining claims.

II. Limitations

Statutes of limitation operate to prevent the litigation of stale claims; they

[4] After Kerlin's petition for review was filed, Kerlin and a group of plaintiffs who had reached a settlement filed a motion asking us to sever the equitable accounting claim and vacate that portion of the court of appeals' judgment. We granted that motion.

> "afford plaintiffs what the legislature deems a reasonable time to present their claims and 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. The purpose of a statute of limitations is to establish a point of repose . . . ."

S.V. v. R.V., 933 S.W.2d 1, 3 (Tex. 1996) (quoting *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990)). Kerlin contends the Ballis' breach of contract, fraud, and breach of fiduciary duty claims are barred by the four-year statute of limitations, and that the two-year statute bars their conspiracy claims. The Ballis maintain that the jury's fraudulent concealment findings and the tolling statute preclude the application of limitations in this instance. We first consider whether Kerlin's fraudulent concealment of the Ballis' entitlement to royalty payments and the details of the *Havre v. Dunn* settlement prevented limitations from running.

A. Fraudulent Concealment

The jury found that Kerlin fraudulently concealed the fact that he was receiving royalty proceeds belonging to the Ballis, and that he fraudulently concealed the "facts, details, and circumstances" of the *Havre v. Dunn* settlement. Kerlin contends the jury's findings must be disregarded because, as a matter of law, the Ballis could have timely discovered the existence of their claims through the exercise of reasonable diligence. We agree.

A defendant's fraudulent concealment of wrongdoing may toll the running of limitations. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). Fraudulent concealment will not, however, bar limitations when the plaintiff discovers the wrong or could have discovered it through the exercise of reasonable diligence. *Id.*; *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 531 (Tex. 1997);

Nichols v. Smith, 507 S.W.2d 518, 519 (Tex. 1974). In *HECI Exploration Co. v. Neel*, oil and gas royalty owners sued their lessee for failing to advise them of the lessee's successful suit against an adjoining operator for damages to the common field. 982 S.W.2d 881 (Tex. 1998). In evaluating the discovery rule's applicability to the royalty owners' claims, we noted that royalty owners are not entitled to "make[] no inquiry for years on end," and then sue for contractual breaches that could have been discovered within the limitations period through the exercise of reasonable diligence. *Id*. at 887–88. Because several sources of information are available to royalty owners about potential damage to their mineral resources, including their lessees, Railroad Commission records, and visible operations on adjoining property, we held that reasonable diligence would likely reveal any harm, and the discovery rule did not apply. *Id.* at 886–87. Like fraudulent concealment, the discovery rule does not apply to claims that could have been discovered through the exercise of reasonable diligence. While the discovery rule differs from fraudulent concealment in that its applicability is determined on a categorical basis, *HECI* is nevertheless instructive in this case.

After the *Havre v. Dunn* settlement, Kerlin advised the Ballis that their claims were worthless. *Havre v. Dunn*'s dismissal and Kerlin's receipt of more than 20,000 acres in fee simple and 1,000 mineral acres were matters of public record more than forty years before the Ballis filed this lawsuit. The Ballis were on notice that the warranty deeds their predecessors executed contained a royalty reservation, yet they never received any royalties. As a matter of law, the Ballis could have discovered the existence of any claims before limitations expired through the exercise of reasonable diligence. Consequently, unless statutory tolling applies, their claims are time barred.

B. Statutory Tolling

Kerlin argues that the trial court erred in setting aside the jury's findings that he was not present in the state when any portion of the tortious acts occurred. Alternatively, he contends the tolling statute violates the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, to the extent that it applies to the claims against him, by forcing him either to consent to general jurisdiction in Texas or forego the benefits of statutes of limitation.[5] The Ballis respond that no evidence supported the jury's answers to the questions the trial court disregarded, and that the constitutional authority Kerlin cites is inapposite. Because we conclude that the tolling statute does not apply in these circumstances, we need not resolve either of those issues.

Section 16.063 of the Texas Civil Practice and Remedies Code provides that "[t]he absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence." TEX. CIV. PRAC. & REM. CODE § 16.063. Thus, unless Kerlin was somehow present in the state for more than four years since the *Havre v. Dunn* settlement, limitations has not run on the Ballis' claims against him.[6]

A little more than forty years ago, in *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968), we considered the interplay between the tolling statute's substantively equivalent precursor, former article 5537, and article 2039a, now codified at section 17.062 of the Civil Practice and Remedies

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[5] The Attorney General has submitted an amicus brief contending that the statute does not violate the Commerce Clause, and urging us to decide the case on alternative grounds. *See Van Devender v. Woods*, 222 S.W.3d 430, 432 (Tex. 2007) ("Judicial restraint cautions that when a case may be decided on a non-constitutional ground, we should rest our decision on that ground and not wade into ancillary constitutional questions.").

[6] The tolling statute plainly does not apply to the corporate defendants, Windward Oil & Gas Corp. and PI Corp., as it is undisputed that these Texas corporations have never been absent from the state.

Code, which permits substituted service on a nonresident involved in an automobile accident in this state by serving the chairman of the State Highway Commission. The narrow issue we decided was "whether Article 5537 . . . applies in a case where substituted service of process is available under the provisions of Article 2039a." *Id.* at 488. We held that it did. *Id.*

Article 2039a provided that

> [t]he acceptance by . . . a person who was a resident of this State at the time of the accrual of a cause of action but who subsequently removes therefrom . . . of the rights, privileges and benefits extended by law to such persons of operating a motor vehicle . . . within the State of Texas shall be deemed equivalent to an appointment by such nonresident . . . of the Chairman of the State Highway Commission of this State . . . to be his true and lawful attorney and agent upon whom may be served all lawful process in any civil action or proceeding . . . hereafter instituted against said nonresident . . . growing out of any accident, or collision in which said nonresident . . . may be involved while operating a motor vehicle . . . within this State, . . . and said acceptance or operation shall be a signification of the agreement of said nonresident . . . that any such process against him . . . served upon said Chairman of the State Highway Commission . . . shall be of the same legal force and validity as if served personally.

Act of May 8, 1959, 56th Leg., R.S., ch. 502, § 1, 1959 Tex. Gen. Laws 1103, 1103–04 (codified at TEX. CIV. PRAC. & REM. CODE § 17.062). Article 2039a thus created a binding legal presumption that nonresidents, by driving on Texas roadways, had appointed the chairman of the State Highway Commission their agent for service of process in lawsuits arising from motor vehicle accidents within the state. We concluded that article 5537, section 16.063's precursor, "refer[red] to the absence of the defendant from or presence within the territorial limits of the state," and the availability of substituted service on the Highway Commission chairman was irrelevant to that inquiry. *Deitz*, 430 S.W.2d at 490. Accordingly, limitations was tolled during the driver's absence. *Id.*

We did not consider the effect of the general longarm statute in *Deitz*. Just as article 2039a deemed the Highway Commission chairman the agent for service of process for nonresident motorists in suits stemming from in-state accidents, the general longarm statute provides that "the secretary of state is an agent for service of process on a nonresident who engages in business in this state . . . in any proceeding that arises out of the business done in this state . . . ." TEX. CIV. PRAC. & REM. CODE § 17.044(b). But unlike article 2039a, in addition to providing for substituted service, the general longarm statute specifically addresses a nonresident defendant's presence within the state's territorial limits for purposes of personal jurisdiction; specifically, the statute provides that a nonresident does business "in this state" if, among other acts, the nonresident contracts with a Texas resident and either party is to perform in whole or in part here, or the nonresident commits a tort in whole or in part in this state. TEX. CIV. PRAC. & REM. CODE § 17.042. Of course, the longarm statute only affords in personam jurisdiction if "jurisdiction accords with federal due-process limitations." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 575, 569 (Tex. 2007) (citing *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002); *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990)). But if a nonresident's contacts with the state are sufficient to afford personal jurisdiction under the general longarm statute, as it is undisputed Kerlin's were, then we can discern no reason why a nonresident's "presence" in this state would not be established for purposes of the tolling statute.

In this case, the jury found that Kerlin was receiving royalty payments that rightfully belonged to the Ballis from January 1, 1966, until February 8, 1991, and that he continued to deceive

the Ballis about the *Havre v. Dunn* settlement from its execution until the same date. Thus, whether or not Kerlin was constructively present in Texas because he was subject to service of process via the secretary of state, he was present by doing business in this state as the statute defines that term. Because Kerlin was doing business here and was thus not absent from Texas, the tolling statute does not apply and limitations bars the Ballis' claims. Because the Ballis' claims are time barred, we need not address Kerlin's other arguments.

III. Conclusion

The record conclusively establishes that the Ballis could have discovered Kerlin's wrongful conduct through the exercise of reasonable diligence. In addition, the statute of limitations was not tolled because, under the general longarm statute, Kerlin was present in the state. Accordingly, the statute of limitations bars the Ballis' claims. We reverse the court of appeals' judgment and render judgment for Kerlin.

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Harriet O'Neill
Justice

OPINION DELIVERED: August 29, 2008