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Supreme Court of Texas.
Gilbert Kerlin, Individually, Gilbert Kerlin, Trustee, Windward Oil and Gas
Corp., and PI Corp.
v.
Concepcion Sauceda, et al.; from Cameron County; 13th district.
No. 05-0653.

March 10, 2006

Appearances:
Jeremy Jason Gaston, Mayer Brown, LLP, Houston, Texas, for petitioner.
Jules L. Laird Jr. , Houston, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 05- 0653, Gilbert Kerlin versus Concepcion Sauceda, et al.
COURT MARSHALL: May it please the Court. Mr. Gaston will present argument for petitioner [inaudible] reserve five minutes for rebuttal.

ORAL ARGUMENT OF JEREMY JASON GASTON ON BEHALF OF THE PETITIONER

MR. GASTON: Thank you, Mr. Chief Justice and may it please the Court. There are two issues I'd like to focus on in this matter on behalf of petitioners. The first is laches and the second are our no evidence arguments concerning the jury's findings regarding the 1942 settlement of Havre v. Dunn. (103rd Dist.Ct. Cameron Cty, Tex. June 21, 1928) First, laches, because it is logically threshold to the merits issues. As the Court is aware, laches applies when a plaintiff unreasonably delays in filing suit and the passage of time has prejudiced the defendant in some form or fashion including either a change in his position or some sort of loss of evidence that makes it-- that impairs the ability to defend against the suit. Two prongs then. The first prong here, the delay, the nature of the delay, and the length of delay is undisputed. Over 50 years passed before the 1942 settlement of Havre v. Dunn and the 1993 filing of suit. And there was

no shown reason for the delay because all the facts necessary to, to, to learn about any claim were known as of 1942 and that, that is ...

JUSTICE: Is fraud, is fraud a reason to toll the statute on laches?

MR. GASTON: We would say in this situation, ordinarily, fraudulent concealment is a means of either tolling statutory limitations or it could be a defense to the unreasonable-- claim of unreasonable delay for laches. But in this situation where the claim of fraud is essentially the affirmative merits claim of the plaintiffs and it is based on the evidentiary record from the 1940s and the laches argument is that that record is unreliable because of missing witnesses. It, it becomes a, kind of, bootstrapping argument to use fraud to avoid the otherwise application of laches. In other situations, for example, there could be a, a claim of fraudulent concealment where the, the claim of fraud is not tied to the evidentiary record whose reliability has been compromised then, then I don't think there would be an inconsistency here, though we think a Court has to decide which, which should trump. Should laches trump or should fraudulent concealment trump?

JUSTICE: So, we've over and over said laches don't, don't apply or rarely applies if limitations hadn't run.

MR. GASTON: And that is true, the-- I think the ...

JUSTICE: [inaudible] in fact, has there ever been a case where we applied laches where limitations has not run?

MR. GASTON: I have not seen a case where a claim filed-- well, let me put that in two parts.

JUSTICE: That's because the legislature passes these statutes and limitations with exceptions to them and normally if we say well, we just disagree with that. We're going to, we're going to toll it earlier based on laches it's-- we're a little bit out of our sphere, aren't we?

MR. GASTON: And I, I agree that that presents a novel question in a case like this where the statutory periods initially are short, two years, four years and it's only through the application of statutory tolling or tolling through fraudulent concealment that you get to extend it 50 years. And I have not seen and I'm not sure there is a case where there has been a conflict between laches and statutory limitations that have been tolled. The, the cases were-- what the cases do say and this Court has said, 'Is that ordinarily when the limitations period hasn't expired, laches would only apply in an extreme case.' Well, we would say if any case is an extreme case, this is an extreme case first off. And second, that when the tolling, the basis for tolling like fraudulent concealment or, in this case, statutory tolling based on the claim that the underlying conspiracy arose while the petitioner was in Texas, when both bases are-- of tolling are based again on the plaintiff's affirmative claim of fraud, it looks back at the 1940s record to figure out ...

JUSTICE: But, but absence from the State, that's not fraud. I mean, you're just absent from the State.

MR. GASTON: That is not fraud but the time period is based on when a-- the alleged conspiracy arose and if the defense on the merits is that while there was no conspiracy but I cannot defend against that claim because the documentary and personal record has, has been compromised, then the timing of when the conspiracy arose because the jury here found that if there was any conspiracy, it didn't arise until the petitioner, Kerlin, had left the State, which would mean statutory tolling.

JUSTICE O'NEILL: Well, actually, the question said, do you find

that Kerlin was physically present in the State and committed any act in furtherance of the conspiracy? And surely the signing and entering into the settlement is what formed the basis of the conspiracy charge.

MR. GASTON: Well, I think that the plaintiff's, the plaintiff's sure theory was the settlement itself-- what, what Kerlin signed at that time were the documents required to quit claim in any of his interest that were adverse to the opposing parties in the settlement. And he also signed a reconveyance deed to give the Balli grantors their full original-- whatever interest they had back. The claim of conspiracy is based on later letters that suggest that there was an agreement not to give the reconveyance deed back to the Balli heirs.

JUSTICE O'NEILL: And if there was any evidence to support that, that that was the, the end of the conspiracy then certainly his being here and entering into the settlement agreement is an act in furtherance of the conspiracy if, in fact, they had decided that's what they were going to do.

MR. GASTON: And I think there, there are two key points there. One is if, in fact, that is what they have decided they were going to do then, at-- in November of 1942 versus hypothetically deciding they were going to do that months later when the letters from people other that Kerlin are dated. So then, there's-- the first question is 'it would be an act in furtherance of the conspiracy if a conspiracy and agreement had, in fact, arisen but there is no evidence of any agreement between any of the parties to trade any acreage in the settlement for the Juan Jose interest and certainly no evidence as of November 1942.' The, the second part though, and I think it's equally or perhaps even more important is that on this record there is no evidence connecting petitioner Kerlin to what others may have done later, months later. And they--- and those others would include Seabury and the opposing parties, Attorney Davenport and the opposing parties for the McCampbell's attorney, Eckhardt, and Kerlin's uncle, Gilbert, all of whom there is documentary evidence tying in some form or fashion to the potential agreement by Seab - Seabury to not give the reconveyance deed back. So if a conspiracy could be based on that but it doesn't connect to Kerlin then, then there would still be no evidence of, of any conspiracy involving him and no evidence of any conspiracy at the ...

JUSTICE O'NEILL: Well, tell me what-- how would you read the statement that Gilbert apparently wrote to Seabury, I think it was in the letter, that the Balli interest would 'die in Kerlin?'

MR. GASTON: Right. And what-- there, there are two ways of looking at that statement. In, in out of context it sounds ...

JUSTICE O'NEILL: Well, I mean, [inaudible] asking if there are two ways of looking at that statement, then there are some evidence to support the jury vote.

MR. GASTON: No, because when-- on a, on a claim that's based on meager circumstantial evidence, the, the nefarious inference that could be drawn from that, if it's equally susceptible of another equally available but not, you know, nefarious inference, you, you can't support your claim of a conspiracy based on the, on the-- what seems to be a nefarious connotation. Here, however, in context, although the context is disrupted by the lack of all living witnesses except for, except for Kerlin, there, there, there is no nefarious context because if Gilbert, as the principal of the joint venture, decided, 'Well, we're not going to give the reconveyance deed back,' that was within his rights to decide and that letter says, 'We had decided to do so but we are under no moral obligation to do so.' And so if, in fact, that happened, mainly that the deed was not given back, if Gilbert, not

Kerlin, but Gilbert, it's confusing because it's Frederic Gilbert and Gilbert Kerlin, but, but at Gilbert's instruction it, it is true that the Juan Jose interest which was owned entirely, except for a minor reserved royalty interest owned entirely by Gilbert, would effectively 'die in Kerlin' because he was holding it as trustee. But it, it doesn't-- there are several things that doesn't show and is no evidence of that would be necessary to support the plaintiff's claim. First, it's no evidence that any opposing party to this settlement ever agreed to pay anything for that interest and certainly not 7,500 acres. And it is no evidence again that, that Kerlin who was the nephew holding the deeds as a trustee who was not in Texas, except for a few days in November of 1942, had, had anything to do with that decision.

JUSTICE: May I ask you about the 16.03-- 63 [inaudible] tolls limitations if a defendant is absent from the State of Texas. And 40 years ago in Vaughn versus Deitz (430 S.W.2d 235), we said that 'International Shoe (410 S.W 2d. 235) and minimum contacts and all the things that now we understand you can be absent from Texas but you can still be sued here.' Was Vaughn versus Deitz rightly decided? Did you all argue that one way or the other?

MR. GASTON: Well, and, and the State has filed an amicus brief on this and, and I think there are several points where we agree with the State and I-- and it's probably worth mentioning those points where we agree. First is, we believe the case can be decided on, on other issues without having to reach a constitutional question. And the, the-- and, and the State is correct that in the Court of Appeals, this basis for not applying statutory tolling was, was not raised but it was raised in the trial court. And so the State is correct that unless this Court were to find that it was-- effectively deny someone's right to a fair trial or some other fundamental right the toll limitations [inaudible] there wouldn't be a basis for this Court to, to necessarily reach the issue. But on the, on the merits, if appointing an agent for service of process constitutes a consent to general jurisdiction even though the State law provides for service of process and Constitutional law says that "jurisdiction is constitutional if, if you meet the requirements either for general or specific jurisdiction." Then, unless there is case law interpreting the statute or another statute saying that, saying that the mere appointment won't be consent to general jurisdiction, I, I do think you, you have a constitutional problem.

JUSTICE: Well, the, the point that was raised in the trial court but not the Court of Appeals was the constitutionality of 16.063.

MR. GASTON: The constitutionality as applied to toll against the defendant who was otherwise amenable to service of process.

JUSTICE: Did you argue in both places whether 16.03 just didn't apply to people who could be sued in Texas?

MR. GASTON: No. The only, the only way that came up would be through jury charge objections say-- requesting the Court to say that if a person had an, say, had an agent in the State like an attorney or, or somebody else, registered agent that that wouldn't-- that, that you wouldn't be able to toll against them. But I, I don't believe the issue. I have-- I'm not familiar with the, the argument or case that, that you're describing.

JUSTICE: Back on the laches question, you-- is, is there evidence that you-- there is detriment or harm resulting from the delay? And what was the Court of Appeals' holding on that?

MR. GASTON: The, the-- to begin with, the Court of Appeals holding was that while unreasonable delay could be assumed or not tolled with, the petitioners had not shown, had not shown precisely what harm they

suffered. What petitioners had argued in the Court of Appeals is that the loss of a handful of witnesses including all the alleged co-conspirators except for Kerlin and court records including the Havre v. Dunn court records itself were missing. And what the Court of Appeals was correct in saying is that you-- petitioners didn't speculate about what that evidence would've shown. For example, they could've speculated that if Seabury had been alive he would've said, "I told the original grantors that nothing was received for their claims" or "I, I gave them the reconveyance deed. And the fact that it wasn't recorded just is, is not my fault." But ...

JUSTICE: So your, your argument here is that we should presume harm from the absence of deeds without any specific evidence of [inaudible]?

MR. GASTON: Nearly, nearly. The, the argument here is that when the defendant has shown unreasonable delay by the plaintiff and shown that a category of presumptively relevant evidence concerning the plaintiff's claim is unavailable, then the risk of not knowing precisely what that evidence shows must be applied against the plaintiff who, in theory, could come forward and say, "Well, that's not actually relevant to these legal claims." Or that evidence is actually equally available for some of the-- some other source. But here, the, the basic argument in the trial court on the point was that plaintiff's claim that these individuals conspired against their ancestors. But none of these individuals was available to testify and Kerlin ...

JUSTICE O'NEILL: But the point they're making is that Kerlin himself was there and how could he be prejudiced if he is the one who was in charge of putting this whole deal together?

MR. GASTON: And that's precisely the point is he, he was neither in charge nor present for the post-November 1942 events. He was in the Army and outside of the Texas. The-- where the, the final-- the, the settlement of Havre v. Dunn didn't just occur in November of 1942. It stretched out all the way through the, the spring of '43 when the case was dismissed and, and apparently went even longer to get all the documentation done. But Kerlin wasn't around to explain the purpose or motivation behind the isolated letters that were left, letters saying that not Seabury but other people saying that Seabury said, 'He would not give some other opposing parties any document that might be used to cloud their title.' Letters from people other than Kerlin saying, we'll let the Juan Jose interest 'die in Kerlin,' whatever that could be intended to mean. He had to sit there as we point out in, in our reply brief and say, 'I don't know. I don't know. I don't know. I was, I was ...'

JUSTICE O'NEILL: But if there's evidence in the record that, that would support a jury finding that Kerlin was a co-conspirator and I understand you dispute that, but if there were some evidence to support that finding, then, presuming that, how would you establish pre-- prejudice if the co-conspirator themselves are in the Courtroom?

MR. GASTON: And I, and I think that, that really, that makes it a tougher case, certainly. But even then, the, the problem is, is that, as, as this Court explained in the, in the King Ranch versus Chapman (1185 S.W. 3d 742)case, when you have an old evidentiary record that is not complete, it may have a lot of documentary evidence but it's still not complete, it's almost as though you're, you're trying to read tea leaves where you can see many different pictures in what's remaining. And if in isolation you can say, this person could've been a co-conspirator, that doesn't change the-- and, and say it's legally some evidence of it. It doesn't change the fact that that person can't

defend against the claim in the same way they could under a full evidentiary record. And so the, the harm is not if there is some evidence and therefore he has to lose. The, the harm is that the defendant is denied a chance to present as good a case as, as provided for by the statutory periods which is we say should not have been tolled if based on ...

JUSTICE O'NEILL: So the, the prejudice would be that you couldn't present as good a case as possible? Where do you draw the line if, if you presume there's evidence to support him being a co-conspirator?

MR. GASTON: I don't think you have to-- I think you, you have to be able to say the, the evid-- the context for assessing that, whether the context for assessing that evidence is, is sufficient to actually make a legal determination.

CHIEF JUSTICE JEFFERSON: Justice Wainwright had a question. Do you still have that?

JUSTICE WAINWRIGHT: No, it was covered by your question, Chief. Thank you.

CHIEF JUSTICE JEFFERSON: How does the estoppel by deed apply to any of these?

MR. GASTON: The way estoppel by deed would figure in here is if, if, if the Court reached the question of whether there was any basis for the royalty award either because laches or limitations didn't, didn't bar that claim also, the Court would need to decide whether a estoppel by deed applies to a-- to estop a grantee from disclaiming that a reservation in a deed which is like a quit claim in that it doesn't [inaudible] to convey land. It just purports to convey whatever interest the grantor may have in the land, if any. And our rationale on that point is that in those circumstances, there is no basis for an estoppel because there's no inconsistency with the grantee saying, 'I didn't receive anything by, by that, by that deed.' In other situations, there can be an inconsistency if, if, if one finds that the deed effectively amounts to a representation by the grantee that the grantor did have the title. And no case has ever applied estoppel by deed in that circumstance when the deed was like a quit claim except in a very old case where it was a necessary link in the, in the person's chain-- the only link in their chain of title.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. Are there further questions? Thank you, sir. The Court is now ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Laird [inaudible] argument for the respondent.

ORAL ARGUMENT OF JULES L. LAIRD JR. ON BEHALF OF THE RESPONDENT

MR. LAIRD: May it please the Court, ladies and gentlemen of the audience, Counsel. Judge, King Ranch is not of this case. King Ranch was 112 years old. It's a bill of review. It was a case involving parties that were not available to testify whereas in this case, Gilbert Kerlin testified for seven days in a two-and-a-half-month-long trial.

JUSTICE: Everybody else was dead.

MR. LAIRD: Everybody else was dead except for, for some of the ...

JUSTICE: [inaudible] all, all the, like, what, 59 of the 63 heirs who allegedly-- who sold these interests. No question, they sold them

[inaudible]. They're dead including the head of the clan who did all the liaison back and forth. They're dead. Kerlin's lawyer is dead. The lawyer for the other side that negotiated these deeds [inaudible] is dead. How many-- so everybody has to die. There can't be one person left for laches to apply.

MR. LAIRD: There was one person left and that was Kerlin.

JUSTICE: I know. I'm saying then you're [inaudible] okay. So, so you're not prejudiced because one person surviving who is the person we're suing for millions of dollars. In arguing, this Harvard lawyer took advantage of the poor folks, my clients. He is an interested party. Wouldn't it be a little stronger case to have some non-interested parties backing up his, his testimony if they weren't dead?

MR. LAIRD: It'd be great to have every witness that we would have available, Judge. But in this case ...

JUSTICE: Well, I mean, how, how long does laches last, a thousand years?

MR. LAIRD: No, sir. But it does last for 50 years and ...

JUSTICE: Is there any case where we've ever had that last 50 years?

MR. LAIRD: Judge, there's six other Supreme Courts who have held 50 years or longer is sufficient even for laches. We've cited that, I think, in our brief. Let Texas should not be the only State where you can get away with fraud if you successfully hide it and conceal it for 50 years.

JUSTICE: Well, of course, that's the question.

MR. LAIRD: And that is the issue.

JUSTICE: That's-- the, the reason limitation, statute of limitations you can get away with all kinds of things because limitations runs and we don't get to the merits of whether that happened or not. And that's the question here.

MR. LAIRD: Yes, sir.

JUSTICE: We-- if we presume this is a fraudulent Harvard lawyer then, of course, nobody would want him to get away. But if-- before we decide that question, we have to ask ourselves, is waiting 50 years on a land title to half of Padre Island ...

MR. LAIRD: But Judge, if the Harvard lawyer had not hidden the documents, we wouldn't have had to wait. We would have been able to go forward on the case. We would have been able to -

JUSTICE: When you say -

MR. LAIRD: - talk to witnesses.

JUSTICE: - hid the documents. That's because he?

MR. LAIRD: He secreted the documents from Davenport and Seabury in his New York basement for the full length of time that this case was pending and didn't come available until the time ...

JUSTICE: So, so I'm secreting documents in my file drawer at home, too.

MR. LAIRD: From your lawyers? From your lawyers that were part of the conspiracy and that was the issue -

JUSTICE O'NEILL: Well, -

MR. LAIRD: - in this case, Judges. These, these were the lawyers, Seabury and Eckhardt, and Davenport, were lawyers. Davenport subsequently represented Kerlin and all of those lawyers were there. They were participants in the conspiracy.

JUSTICE: [inaudible] his lawyer died in 1946. So how can he be-- he was still flying airplanes back and forth to Europe until then.

MR. LAIRD: Yes, sir?

JUSTICE: So he was hiding-in from, from his dead lawyer?

MR. LAIRD: No, sir. He was hiding the records from the petitioners in this case so they could've filed suit and done something about it earlier.

JUSTICE O'NEILL: Let me ask you about that.

MR. LAIRD: Yes, ma'am.

JUSTICE O'NEILL: What we talk about fraudulent concealment is, in fact, the question but I'm a little bit confused on that. Presuming, presuming you didn't get there on fraudulent concealment, just for purposes of argument, we still have to deal with the tolling question, right?

MR. LAIRD: Yes, Judge, we do.

JUSTICE O'NEILL: So talk to me about the tolling provision because-- throw out fraudulent concealment, statute of limitations clause, but talk to me about how you go about your tolling argument.

MR. LAIRD: Judge, limit-- limitations is tolled ...

JUSTICE O'NEILL: Well, I mean, I understand the basic premise while someone is not present in the State.

MR. LAIRD: Yes, ma'am.

JUSTICE O'NEILL: But an argument has been made that that statute is unconstitutional because you're able to get jurisdiction over Kerlin. And my question is, if we were to rule in petitioner's favor on that question, would we, in fact, have to overrule Deitz versus Vaughn?

MR. LAIRD: Well, I don't think that-- first of all, petitioners did not raise Deitz versus Vaughn -

JUSTICE O'NEILL: Oh, and that's my question.

MR. LAIRD: - in their arguments below.

JUSTICE O'NEILL: Do they preserve that argument?

MR. LAIRD: They do not preserve that argument below. And this Court should start with the language of the statute which is clear and unambiguous. The Court should look to as the, as the amicus brief of this Attorney General suggested. Look to the other issues first, laches as well as limitations before deciding the constitutionality of the statute. And I think we still have the situation where-- and under statutory tolling, Mr. Kerlin did never-- Kerlin never challenged the answers to the issues in jury questions 9 and 10, in which the jury found that he was part of the conspiracy to breach Seabury's fiduciary duties to the Ballis. It is very important that-- let me, let me get to that if you would [inaudible] be patient. The trial court in their JNOV correctly stated that 'the evidence was conclusively established as a matter of law that Kerlin was physically present in Texas when he committed an act in furtherance of the conspiracy.' In question number 10, Kerlin was-- the jury found that Kerlin was part of the conspiracy to breach the fudiciary duties to the Ballis. In question 12, that Kerlin conspired with Seabury to commit fraud against the Ballis in, in the Havre versus Dunn settlement. And in question 14 which this Court and specifically you, Justice O'Neill, said that 'During the settlement, in question 14, during the settlement of Havre when Kerlin was in Texas signing the documents, he took 7,500 acres for himself which was an act that was in furtherance of this fraud.' And he breached the fiduciary duty to the Ballis at that point in time and then he successfully hid those documents in his, in his, in his basement for the 50 years that it took for them to really ...

JUSTICE: Is he really absent from the State?

MR. LAIRD: He was absent from the State before that time period. But in, in-- from November 6th to the 9th of 1942, he came back to the State of Texas to sign the Havre's-- the Dunn settlement.

JUSTICE: But -

MR. LAIRD: So he was present.

JUSTICE: - in the International Shoe, minimum contacts, personal jurisdiction, the whole-- I mean, historically, this is from Chief Justice Stone's opinion in International Shoe. 'Historically, the jurisdiction of the courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence the presence within the territorial jurisdiction of the court was prerequisite.' But of course, then they go on to say, you can be present even though your body is not present through your agents, through stream of commerce, through doing business there. And so really, I guess Ker - Kerlin had big oil company and all kinds of interest in Texas, right?

MR. LAIRD: Yes, sir.

JUSTICE: No question he could have been sued in the '50s, '60s, '70s, ' 80s because he had plenty of contacts here. So even though he wasn't physically present but was he absent from the State in the sense of the statute?

MR. LAIRD: Since he ...

JUSTICE: [inaudible] seems, seems like you could be-- under International Shoe, he is present. How can you be, how can you be present to get sued but not present for limitations? Do you have two different presences?

MR. LAIRD: Well, very interesting question. My initial impression is that he was not present as the jury found in the two of the questions but he was not present when some of the events occurred. But in the important issues in this case he was present to sign the papers and got a benefit from the 7,500 acres that he found to himself and ...

JUSTICE O'NEILL: If your argument is it has to be not present in the State means actual presence and not constructive presence through having an agent present for service of process.

MR. LAIRD: Yes, ma'am. And the, and the, and the corporations are responsible based upon that acting in furtherance even though their, their State -

JUSTICE O'NEILL: Well, I was going to ask you -

MR. LAIRD: - [inaudible] -

JUSTICE O'NEILL: - about the corporations. Wouldn't you have to concede that they were present here?

MR. LAIRD: Sure.

JUSTICE O'NEILL: So -

MR. LAIRD: Both were present.

JUSTICE O'NEILL: - tolling wouldn't apply as to the corporations.

MR. LAIRD: It-- it's not a question of applying to the corporations, it's a question of the, the corporations were wholly owned by Mr. Kerlin. They were formed in '46 and '48, -

JUSTICE O'NEILL: But -

MR. LAIRD: - I believe.

JUSTICE O'NEILL: - but I didn't see a piercing the corporate veil or any sort of argument like that. In fact, I'm not sure I noticed in your response brief any response to the argument that in any event the corporations were present, tolling wouldn't apply to them.

MR. LAIRD: But, but the, the harm to the respondent flows from the act in furtherance of the fraud committed by Kerlin when he signed Havre versus Dunn. And when the corporation was [inaudible]

JUSTICE: But let's, let's assume that corporations are liable to your clients. They didn't sue them within four years and that corporations or Texas corporations by definition they have to be present in the State.

MR. LAIRD: Yes, sir, but they didn't discover the fraud until

after that 50-year time period.

JUSTICE: Well, then -

MR. LAIRD: So when the fraud was discovered and the jury found it in the [inaudible]

JUSTICE: If I owned a mineral [inaudible] -

MR. LAIRD: - the corporation.

JUSTICE: - as your clients claim, if I owned a mineral interest from oil and gas wells in Padre Island, after 50 years probably after 30 years, I haven't been paid, I would have thought, 'I wonder if there's something wrong?' I mean, how long can you wait on fraudulent-- I mean after 20 years or 30 years if you haven't gotten a check, we've said, 'in Hetchy case,' you know, if you're not getting checks and you're a royalty owner after a certain number of years you'll notice that something is wrong.

MR. LAIRD: It's just very simple. When Mr. Kerlin signed Havre versus Dunn and got the 7,500 acres, he then talked to Primitivo Balli and told him, you got nothing. You got nothing on the deed. You got nothing in royalty reservations. So Mr. Balli and all of his ancestors had no reason to go forward and look at the corporations and find out anything further because their trusted-- trustee had told them they didn't have anything.

JUSTICE: How, how does your claim survive the 1928 trial of judgment?

MR. LAIRD: The 1928 default ...

JUSTICE: Was a 1928 trial of judgment [inaudible] case -

MR. LAIRD: Because Judge -

JUSTICE: - known publications and all of the Ballis, nobody responded or something [inaudible] but isn't their claims [inaudible].

MR. LAIRD: Because the-- because Kerlin and Seabury raised those claims in the bill of review that they filed in Havre versus Dunn. The ...

JUSTICE: Not on behalf of your clients.

MR. LAIRD: Not on behalf of our clients but because -

JUSTICE: So you're saying -

MR. LAIRD: - but has benefited our clients as a result of the deeds that they've got from the interest.

JUSTICE BRISTER: I'm, I'm puzzled by that. There was this default had said, 'Your clients' -

MR. LAIRD: Yes.

JUSTICE BRISTER: - ancestors had no claims in Padre Island period. And there's no appeal from that, no bill of review filed by the [inaudible].' If-- and then 10 years along later along comes Kerlin-- if I came to you and said, you know, I think you own the Brooklyn Bridge and I'll pay you money to sell your interest. Now, you and I both know you don't.

MR. LAIRD: All right.

JUSTICE BRISTER: But I give you money and you give me a quit claim, say whatever happen to Brooklyn interest, Justice Brister gets. Now, that doesn't-- then, you sue me later on saying, I didn't pay you for something and I have to pay you again for something that we both know you didn't own?

MR. LAIRD: But Judge, let me, let me point to what the Court of Appeals said, 'In their fact of review they said that 'in 1928 the judgment for Robertson and Callahan (139 Tex. 8. 161 S.W. 2d 489) for all of the Padre Island except for the seven--southern 7,500 acres.' And that's 7,500 acres was the same 7,500 acres I believe, I'm saying this correctly that the, that Kerlin fought for and with Seabury (263

S.W. 1107) and against the State of Texas in State versus Balli (190 S.W.2d 71) against the -

JUSTICE: Well, one -

MR. LAIRD: - United States.

JUSTICE: - one of those eight Ballis was all north of Padre Island, I think.

MR. LAIRD: But still they found that that 7,500 acres without distinguishing which one it was, was benefiting the Ballis and it's that 7,500 acres that Kerlin got, that was the fraud against them receiving any of the property or any of the royalty reservations that were reserved in the deeds that he signed -

JUSTICE: But his -

MR. LAIRD: - with them earlier.

JUSTICE: - his defense is, I didn't get anything from them. And it looks like from the default judgment that's got to be right.

MR. LAIRD: What he didn't get anything, he sold the 7,500 acres for over $3.5 million -

JUSTICE: Well, -

MR. LAIRD: - in '61.

JUSTICE: - he got a lot of property from another folks, too. Your, your -

MR. LAIRD: Sir?

JUSTICE: - your client's not the only ones he bought stuff from.

MR. LAIRD: No, sir, that's true but -

JUSTICE: So how do we know he got -

MR. LAIRD: - but he's -

JUSTICE: - anything for your client's interest?

MR. LAIRD: Because our clients were the only one that was defrauded by his actions in the Havre versus Dunn settlement.

JUSTICE BRISTER: They didn't-- if you sued me for fraud but you never own the Brooklyn Bridge, how could you be damaged?

MR. LAIRD: Because -

JUSTICE BRISTER: Let's say I lied to you every day after that but if you didn't ever own the Brooklyn Bridge how would the-- you have any damage from me?

MR. LAIRD: Our point is that they did have an interest in the 7,500 acres that he had held for them and that he by, by not giving them any interest in that by not paying them any royalties in that he defrauded. And then hid that fraud for those number of years.

JUSTICE BRISTER: But if he, he traded-- your theory is he traded it off this royalty interest from property somewhere else, right?

MR. LAIRD: It had, yes, sir.

JUSTICE BRISTER: But I mean, if you have a realty interests, you have a realty interest it can't-- it was not traded off and if your client say they reserved this 1/512th of a mineral interest whoever owns it now owes them 1/512th because Kerlin didn't have it to sell. So aren't you suing the wrong people?

MR. LAIRD: No, sir. We're saying the person and the jury found that we sue the person for what he did against the Ballis and I don't think we're, I don't we're pursuing anybody incorrectly in this specific -

JUSTICE O'NEILL: Well, let me -

MR. LAIRD: - [inaudible] -

JUSTICE O'NEILL: - ask you a question. On page 6 of your respondent's brief -

MR. LAIRD: Yes, ma'am?

JUSTICE O'NEILL: - you say as part of the proposed settlement

Gilbert described a 20,000 acre tract formed from various tracts, one of which was described as 7,500 acres for the Juan Jose interest. Is, is what you're referring to there the earlier letter that's Gilbert had written -

MR. LAIRD: That is correct, Judge.

JUSTICE O'NEILL: - that they claim was just a settlement proposal that was never accepted or were there some other statement in the settlement to that effect?

MR. LAIRD: No, Judge, that was the Gilbert letter to Kerlin dated June of 1942. That was 20,000 acres including 7,500 acres of Juan Balli interest.

JUSTICE O'NEILL: And how-- but, but the argument has been made that was nothing more than a settlement proposal and that actually did not form part of the settlement.

MR. LAIRD: It, it still a part of the factual basis that the jury decided for finding that fraud was committed by Seabury and Kerlin.

JUSTICE O'NEILL: Well, I understand that.

MR. LAIRD: And it's, and it's -

JUSTICE O'NEILL: But I, I, I -

MR. LAIRD: - it's that one piece of evidence that [inaudible]

JUSTICE O'NEILL: But the law is that you can't introduce settlement proposals. They're, they're not evidence of anything regarding the actual settlement and if, in fact, the trial court erred in letting this in, is there any other evidence of the 7,500 acres being a part of the actual settlement that was consummated?

MR. LAIRD: Well, Judge, yes, ma'am. There is the September '56 Kerlin affidavit in New York Federal Court that he got a valid and Superior deed and title of the Ballis to Padre Island after 12 years of court battles and fighting the United States and fighting the State of Texas and he relied on that for his, his own benefit up there -

JUSTICE O'NEILL: Well, -

MR. LAIRD: - asserting that same type of [inaudible]. There is-- he never-- the Ballis never received any royalty interest from those 7,500 acres that he signed. He took the 7,500 acres ...

JUSTICE O'NEILL: But I think that's begging the question because my understanding of petitioner's position is that this was an argument they came up with about the 7,500 acres being half a league. They really didn't think it was a good argument. They put it out as a settlement proposal. It never formed the basis of the settlement and some-- what I'm struggling with is if you take out the settlement proposal, what evidence is there that it actually formed the part of the settlement that was consummated?

MR. LAIRD: The fact that he took 7,500 acres in Havre, the fact that he never gave the reconveyance deeds back to Balli as he instructed supposedly [inaudible].

JUSTICE O'NEILL: Well, you say he took 7,500 acres in Havre, I keep getting back to maybe the begging question. He took 20,000 acres.

MR. LAIRD: Yes, ma'am but he also got 7,500 acres of that in Havre settlement.

JUSTICE: But he didn't release any Balli interest. He didn't ...

MR. LAIRD: He reconveyed ...

JUSTICE: He got all this, he got all this stuff, he got all this interest in the settlement and the other side purported they want him to release everything if he had such claims. One thing he didn't release or claim to release was any of the interest you're talking about.

MR. LAIRD: But Judge, if, if that's -

JUSTICE: In the settlement, shouldn't the settlement be whatever the party said, "They were trading?"

MR. LAIRD: It should be but if you have other evidence that supports the fraud committed by them, then you can look to that other evidence and that's the jury did -

JUSTICE: But do you think there's -

MR. LAIRD: - and the trial court -

JUSTICE: - settlement document was a fraud.

MR. LAIRD: I think the settlement document was a fraud. It was part of the fraud, yes, sir. But even if you throw that out I think there is sufficient other additional evidence, factual evidence, that the trial jury as well as the Court of Appeals went over and this Court is looking at legal sufficiency and of course, you can look to some facts to support that. But I don't think the Court wants to go through thousands of pages of documents and deeds and, and proposals to be able to find something to support ...

JUSTICE BRISTER: No, that's our job. Our job is when you've had a long trial like this, studies are not very good on how juries do when there's been two months or three months of evidence, our job is to look through it and make sure that what your clients claim he traded actually got traded because if it actually didn't get traded, the fact that he lied to him, we think he's a bad guy, didn't hurt him because they didn't lose anything. That's what we're supposed to do. And I'm still trying to get he never-- if you never-- if I never turn around and sold the Brooklyn Bridge or your interest in the Brooklyn, Brooklyn Bridge to anybody and the evidence is pretty clear you never owned it, how does that my fraud to you and lying and cheating you make any difference if you never lost anything and I never got anything for it?

MR. LAIRD: We, we still have the other evidence that the jury heard in this case. The letter from Seabury-- from Davenport to Eckert that Seabury should not give the Balli anything that might cloud their newly [inaudible] titles.

JUSTICE O'NEILL: Let me ...

MR. LAIRD: You know, that, that's another piece of evidence that if there wasn't any basis for the 7,500 acres that goes to the Ballis, then why would there be any necess-- necessity to make sure that there was no cloud in [inaudible]?

JUSTICE O'NEILL: Let me just follow up with that. I, I think that there's been a statement made and I probably agree with it that Seabury may have had some conflicts here in, in consummating the settlement because he was representing various interests and perhaps overlap-- lapping tracts. But presume you that you, you are representing various parties in a case like this and some claims are stronger than others and you decide that these claims really aren't very strong because the rescission agreement with Morales that it, it originally began with apparently wasn't panning out so well -

MR. LAIRD: Right.

JUSTICE O'NEILL: - and a new theory comes up but it's a half of league and, and you did your best on behalf of that client to make an argument. The other side didn't buy it and you say, look, okay, these claims just aren't any good. How else would you-- how would you document that? How would you, how would you prove that here other than the way it was done? You throw it out on a settlement proposal, they don't bite, you, you let them know orally. I think there was some testimony that your interests were no good. How else would, would you do that? And, and in the critical that we don't have to witness here, the witness is deceased who was the center of all that strategy?

MR. LAIRD: Well, it is critical, Judge, but you don't find in a fraud case, I don't think this Court has ever found, and I don't think you'd ever find even in a criminal matter that, that a person is going to get up and say, oh, yeah, by the way, I committed the fraud and you know, I'm responsible. Kerlin didn't say in so many words and it had to be other testimony besides his cross-examination to establish that in the jury's minds and if you had Seabury present, do you think that he would be able to-- that he would get up and readily admit to violating his client's duties? He never informed them ...

JUSTICE: Wait, wait, wait.

MR. LAIRD: Seabury -

JUSTICE: When, when was he hired as attorney by your clients' ancestors? He never met any of them.

MR. LAIRD: [inaudible] Judge but the, the actions that he did in defending the 7,500-acre interest through all of his 12 years of [inaudible]

JUSTICE: Representing Kerlin?

MR. LAIRD: Yes, Sir, but if Kerlin bought it ...

JUSTICE: Kerlin bought everything they owned except for 1/512th mineral interest. When did he decide to represent all of them? And when did they, if they never met him and never signed anything, when did he ever become their attorney?

MR. LAIRD: He became part of the fraud of Kerlin and by him not notifying them of any of the decisions or any of the judgments or any of the, of the settlements that were made, the Ballis never had ...

JUSTICE: That didn't make him their attorney.

MR. LAIRD: Not necessarily make him ...

JUSTICE: There's a lot of line goes on between lawyers in a case, that doesn't make them attorney for the other side because you lied to them.

MR. LAIRD: It doesn't make him a hired attorney, Judge, but it makes him the attorney for their trustee, for the Ballis and if he, he ...

JUSTICE: Hold up.

MR. LAIRD: Okay.

JUSTICE: If you lied to the other side, you become a trustee for the other side. My word ...

MR. LAIRD: Not, not a trustee.

JUSTICE: We don't need Fraud Law. We can just use trustee-- Trust, Trust Law.

MR. LAIRD: Sir, no, sir. The, the point I'm, I'm getting at is that he was found by the jury to have committed fraud himself in all of his dealings, in all of the instructions that he did as a result of Kerlin, of Gilbert's letter, as a result of his actions on behalf of Kerlin and it was all -

JUSTICE: He never wrote a letter.

MR. LAIRD: - which he ...

JUSTICE: He, he never wrote a letter to the Ballis, did he?

MR. LAIRD: They were never informed him. No, sir.

JUSTICE: And so how did he defraud-- okay. So skipping over whether he was their attorney even though they've never met, how did he defraud them if he never talked to them, and never wrote them?

MR. LAIRD: The jury found that he breached the fiduciary duty.

JUSTICE: I know the jury found-- what the jury found. The jury found he did but I'm trying to find out if there's any possible argument where that's true. How could an attorney defraud somebody who he never spoke to and never wrote anything to?

MR. LAIRD: Well, -

JUSTICE: What's his duty? Or what duty would he have?

MR. LAIRD: - well, Judge, he has a duty of fair dealing to the parties in the case. The Ballis became parties in the case as a result of the findings of the Court in Havre versus settle-- Dunn settlement and, and as a result of that, he did have a responsibility to inform them that they either got nothing in the case or that they got something or at least have something to inform Kerlin to tell them that they got something and Kerlin did not do that.

JUSTICE O'NEILL: Let me ...

JUSTICE: Why did he have that duty? Where do you get a duty that a lawyer has a responsibility to tell someone who's not a client, anything?

MR. LAIRD: Judge, it, it ...

JUSTICE: A lawyer's duty is to his or her client, is it not? And that's a fiduciary duty.

MR. LAIRD: Well, the lawyer ...

JUSTICE: Wait, answer my question. Is it a fiduciary duty to his or her client?

MR. LAIRD: No, sir. What ...

JUSTICE: Well, you mean a lawyer does not have a fiduciary duty to his client or her client?

MR. LAIRD: Well, yes, to his client.

JUSTICE: Okay. If he has that fiduciary duty -

MR. LAIRD: Yes.

JUSTICE: - does he-- is he going to breach that duty by reaching out to someone he has that he doesn't have fiduciary a duty to and explaining to them something to their benefit that might hurt his client. Does he breach his duty to his client by doing that, do you think?

MR. LAIRD: His client signed a reconveyance deed at his-- at either in his [inaudible].

JUSTICE: I understand all of that but my question is, does a lawyer breach-- if I have a duty to Justice Medina and he's my client, I have a fiduciary duty to represent his interest and you're on the other side. Is there a question of my breaching my duty to him if I go start talking to you about what rights you may have that that might to be to his detriment? Is-- isn't there a problem somehow there?

MR. LAIRD: Yes, sir. There's, there's no, there's no breach to the Ballis in that instance that you described.

JUSTICE: And so where does the duty arise that he has to tell them anything if he-- if, if they're not his client?

MR. LAIRD: It's, it's the fraud that the jury found that he committed in his actions based upon Gilbert and his client, Kerlin.

JUSTICE O'NEILL: Let, let me ask you very quickly. My understanding is that didn't Kerlin take the deeds as trustee for the Ballis?

MR. LAIRD: Yes, ma'am.

JUSTICE O'NEILL: And that's the basis of fiduciary duty?

MR. LAIRD: Yes, ma'am.

JUSTICE: I thought Kerlin took his trustee for his New York partners?

MR. LAIRD: He took them as trustees for the Ballis ...

JUSTICE: Yeah, he wouldn't trustee - he, he was a buyer from the Ballis. He bought and left them with a 1/512th reverse--reversionary interest but he was brought to mind when it lists him as trustee. That was trustee for the folks back in New York, the investors.

MR. LAIRD: Well, he was managing the, the purchase of the deeds on the properties for his New York, his New York uncle.

JUSTICE: Just as he back in New York?

MR. LAIRD: Yes, sir. And they, and they ...

CHIEF JUSTICE JEFFERSON: Mr. Laird, your time has expired. Are there any other questions? Thank you, Counsel.

MR. LAIRD: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: We'll hear rebuttal.

REBUTTAL ARGUMENT OF JEREMY JASON GASTON ON BEHALF OF PETITIONER

MR. GASTON: Just a couple of brief points, I want to clear up a couple of record issues. One of the many coincidences in this case is that no mention of 7,500 acres. The 7,500 acres at the extreme southern tip of Padre Island that was not part of Havre v. Dunn has nothing to do with, with this case. The 7,500 acres and the theory of it is that the extreme southern end of the northern division so that, that I think is pretty clear if you follow the, the judgments but it can be confusing. Related to that, outside of Seabury's unaccepted settlement offer, it mentioned 7,500 acres. There, there is no evidence-- and a letter from, from Gilbert-- involving Gilbert discussing that same settlement offer, there is no other evidence of that number 7,500. And, and I think that's important because at the end of the day even if you accepted everything and if you found that that was improperly admitted you, you wouldn't be able to sustain the jury finding because there was no evidence of, of the 7,500 acres and the affidavit that respondents mentioned that Kerlin filed in Federal Court in 1956, we discuss that at page 23 of our reply brief and it is-- it does, does not discuss the Balli titles specifically. It talks generally about the various titles he acquired, all of-- many of which he acquired both individually and as trustee and those were the titles he obtained ...

JUSTICE: From other people, not the Ballis.

MR. GASTON: That's right. And those were the people-- I think it's important to know those were people whose titles were believed to be strong if the Havre v. Dunn 1928 judgment could be reopened. If it could be reopened even the opposing parties were, like, we don't have any defense to those claims, they, they were equivalent to our claims and so that is why no one except maybe the unfortunately, his Uncle Gilbert who started off on this spree to, to try and make good of something, he-- he's in New York not on the ground understanding the history of this, nobody except maybe a few people who didn't follow the history thought that the Balli claims had any value at this late date. So the, the second main point I wanted to, to respond to, has to do with the statutory tolling issue ...

JUSTICE O'NEILL: I, I have a question about that. Presume with me that laches doesn't apply when limitations hasn't run which is I know you said that 'in this instance it should have but let's presume it doesn't, that puts us solidly into the Tolling question.'

MR. GASTON: I'm sorry?

JUSTICE O'NEILL: That puts us solidly into the tolling question. Let's take out fraudulent concealment, we still got to deal with the tolling issue and, and they tell me you didn't preserve it

MR. GASTON: Well, the, the-- there are two arguments on tolling. One is that the jury found there should be no tolling and because ...

JUSTICE O'NEILL: Well, okay. I mean, that they-- that he wasn't here in the State and I understand that that's a bit of an evidentiary point but, but even let's say that there's some evidence to support the jury's finding-- well, I guess, let's say the findings were sort of conflicting ...

MR. GASTON: If they-- if the findings are conflicting ...

JUSTICE O'NEILL: I, I don't want to go down that. What I'm trying to, to get at is did you preserve the tolling question?

MR. GASTON: The constitutional tolling issue was made several places in the trial court that either in submitting it to-- you shouldn't submit this question because the statute would be unconstitutional as applied here or after the verdict that it would be unconstitutional to enter the judgment on that basis. In the Court of Appeals, the argument on tolling was the statutory you shouldn't have disregarded the jury findings and so ...

JUSTICE O'NEILL: So it was not preserved at the Court of Appeals.

MR. GASTON: It was not raised in the Court of Appeals, the constitutional issue, and that's why we say the State's amicus brief is correct that there are reasons to, to excuse that and reach it because application of tolling in your ...

JUSTICE: But your, your argument in the Court of Appeals was the tolling provision just didn't apply.

MR. GASTON: It didn't apply because ...

JUSTICE: Not that it was unconstitutional, it just in-- inapplicable.

MR. GASTON: It was inapplicable as, as the jury found. And, and although respondents have, have stated that 'the conflicting findings some of them weren't challenged, I would just note our reply brief footnote, I believe it's 9 makes clear where we, where we, where we did challenge the findings 9 and 10.'

CHIEF JUSTICE JEFFERSON: But the question is 'And I'm not sure I understood the answer, can we reach the constitutionality here because it was not preserved in the Court of Appeals?'

MR. GASTON: Yes. We're not asking the Court to do that because we believe other ways of resolving the case are jurisprudentially better. The Court can, I think it would have to invoke the doctrine that it would be fundamental error to apply 50 years of tolling to somebody who at the time-- now, the State's brief talks about the merits in relation to cases from the 1980s and '90s. I think that makes the constitutional question harder because at the time in the 1940s is you know, is, is it appropriate to start tolling against someone who is, who is certainly available for service of process and has interest and contacts with the State?

JUSTICE O'NEILL: That's what they're claiming you didn't preserve.

MR. GASTON: In the Court of Appeals, yes.

JUSTICE: And Counsel, we explained on several occasions that we will rarely invoke fundamental error to reach issues that they are not assigned to error of the courts below.

MR. GASTON: Yes.

JUSTICE: You have an uphill battle there, don't you?

MR. GASTON: I, I think that's right and, and I do think that the ...

JUSTICE: It's the other way you think we could reach the constitutional issue? You said there were two.

MR. GASTON: Oh, I'm so [inaudible] I would have-- well, there are more than one exception but I don't believe the other exception applies in this case and that's why I believe the, the statutory question that

the jury was entitled to find at the minimum even if it believed, if it believed the theory of a conspiracy, it was entitled to find that nothing involving Kerlin occurred until months after, if it all, the 1940-- November 1942 dates that he was in Texas and so the jury was correct that he wasn't there. And when we think that holds regardless of what you believe about the merits of the plaintiff's theories and separately, of course, we have our arguments that there is no evidence supporting that.

CHIEF JUSTICE JEFFERSON: Other questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

THE COURT MARSHAL: All rise.

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