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Supreme Court of Texas.
Exxon Corporation and Exxon Texas, Inc., Petitioners,
v.
Emerald Oil and Gas Company, L.C., and Laurie T. Miesch, et al.,
Respondents.
Nos. 05-1076, 05-0729.

February 13, 2007

Appearances:
Shannon H. Ratliff, Ratliff Law Firm, P.L.L.C., Austin, Texas, for petitioners.
Eileen O'Neill, Ware, Jackson, Lee & Chambers, L.L.P., Houston, TX, for royalty interest owners, plaintiffs-appellees-respondent.

Before:

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

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COURT MARSHALL #1: Thank you. Be seated please. The Court is ready to hear argument in 05-1076, Exxon Corporation and Exxon Texas versus Emerald Oil and Gas and Laurie T. Miesch and others.
COURT MARSHALL #2: May it please the Court. Mr. Ratliff will present argument for the petitioner. Petitioner reserves six minutes for rebuttal.

ORAL ARGUMENT OF SHANNON H. RATLIFF ON BEHALF OF THE PETITIONER

MR. RATLIFF: Chief Justice. May it please the Court. This is the second installment arising out of the same third claim brought.
JUDGE: Can you talk about the statute of limitations issue, I think I'll address quite very pointly in the last part.
MR. RATLIFF: Yes, Sir. The statutes of limitations again, in my judgment, absolutely dispose of this entire case that says the fraud claim brought in place by Emerald. What happened, and your Honor, we've got to pull out in your-- behind the time line and I apologize that it's long but that's just the way it is. What happens is, is that there is this evidence that as early as 1990, the royalty owners were being informed by their own experts and their own lawyers, that if Exxon carried out, it's in announced intention to plug and abandon the wells

and terminate that there would be waste that there would be a loss of royalty to this royalty owners and that information was conveyed to them in 1990 of August. If you look this same royalty owners do not indirectly free different sets of royalty owners that sealed up every tank but the early as the plan by June, the royalty owner was in August, August 29th of '96 in which that pleading kind of mimicked the pleading that Emerald had filed earlier on July 15, '96.

JUDGE: When did the Exxon plug the first well?

MR. RATLIFF: The well? That's interesting, a good question because two of the wells included in their damage-- in their damage calculations in this case were plugged in 1972. So Exxon had been plugging wells on this property over a period of time when they came to the point that in Exxon's point of view the, the, the lease had been economically depleted. They can no longer profitably operate these wells.

JUDGE: And their wells plug prior to August of 1990 that are within a year or two of that date? Is that ...

MR. RATLIFF: I would have to look. There is ...

JUDGE: Would that be on the record?

-MR. RATLIFF: There is an exhibit that's in the record that I think shows those plugging dates, but I-- and I apologize that I can't give you the record, Justice Wainwright. But the fact of the matter is plugging and abandoned these wells had been going on, on this entire lease that Exxon operated for years, and they were finally down to the last few wells and as a matter of fact, one of the things that these royalty owners did was they asked and this is defendant's Exhibit 82 in the booklet, they asked some people named, Walker and McBerlin to go in, and analyze these and see if there was any continued economic potential, and Walter and McBerlin did so in September 4th of 1990. Quote, Mr. O'Connor said, "Prematurely plugging these wells would cause unnecessary loss of these reserve to the mineral interest owners." Six years after that, it brought suit. He also-- one of the other claims they say as well, but you, you hid from us the potential and you hid from us information that we only got in discovery even though-- think, as a matter of fact, the royalty owners didn't, didn't have a fraudulent consume of a claim but it doesn't matter because in this very same letter, those experts say, "I suggest you pursue access to and copies of Exxon interpreted geologic information such as structure maps, isopach maps, and sand maps on each reservoir in the field," and they go on to say, "This day could be inviable to future development in the area."

JUDGE: If the-- if there is a cause of action for improperly stuff and stuff down the hole when you abandoned it -

MR. RATLIFF: Correct.

JUDGE: - that would be objectively verifiable, directly undiscoverable. Wouldn't it?

MR. RATLIFF: No, Sir, I don't believe so. I don't believe so at all. It could be unject-- objectively verifiable idf something was in the hole. But in terms of its inherent, its discoverability, I think it is discoverable from all of the sources that it'd been noted to in this Court's jurisprudence. And as a matter of fact, in more than ways. First of all, as was pointed out in ATCI versus Neil and Wagner and Brown, they could make an inquiry of a lessee. If that didn't work, they could in ...

JUDGE: Those, those are production records. I, I didn't say, is there a place on the-- is it D5 or you put, you know, paper cups and other stuffs you throw down the hole?

MR. RATLIFF: Is there a place on the D5?

JUDGE: Right. You s-- you're, you're basically saying there's regular permission records that would expose all of these. We're, we're are the form that I asked you look kind of detritus that you put in the hole.

MR. RATLIFF: There's, there's nothing on the form that would show that and what the form, we submit says-- I-- maybe ...

JUDGE: Well, I'm just want to-- I mean, you know a, a, doctor could write an operative report or lift a scalpel and a sponge inside.

MR. RATLIFF: Correct.

JUDGE: They usually don't, and when they don't it's considered inherently undiscoverable. It's-- you could certainly have discovered by cut them open again. What I'm just wondering that, you know, that one's been around for 40 years. That's inherent, sponge left in the abdomen that's inherently -

MR. RATLIFF: That's correct.

JUDGE: - undiscoverable, period.

MR. RATLIFF: But ...

JUDGE: And I don't see how this is any a difference.

MR. RATLIFF: Because the cement company that does the plugging is an independent company. It has to file an independent report. The railroad commission employees who are there at the time of the plugging also file reports and that's what the D, the D5 was that shows it. Third, under Railroad Commission Rules when I'm going to plug a well, I must notify the royalty owners, and they are allowed to come and observe. At that time, they would also be free to question contractors who are involved in the operation. The fact of the matter is, though, Justice Brister, nobody says that it was paper cups or detritus in the hole because the problem here, because remember, one thing they did not burying here was a claim for damage to the real estate. Nor did they offer any evidence that the before and after was different. What they claimed is this was a temporary injury. Or at least, that was their argument. They now say that there was damage to the real estate. Well, if there was, they failed to present that claim.

JUDGE: If they weren't paper cups in the hole, what was in the hole? What is junk in the hole? I know it's in the -

MR. RATLIFF: [inaudible]

JUDGE: - I know it's in the Railroad Commission rigs and both partu uses in the birefs. What is junk?

MR. RATLIFF: Well, actually I don't-- I don't know that they-- and like the commission refers to it as non-drillable material is one form, for example, in gate, while your engaged in a drilling operation, you may lose a tool in the hole.

JUDGE: Like a loaded perforating gun?

MR. RATLIFF: You could like guess. You -

JUDGE: Which ...

MR. RATLIFF: - could lose that or you could lose in time. You may set a packer in the hole and for whatever reason, somebody forgets to retrieve it.

JUDGE: When I-- when I think of junk, I think of stuff in my attic I need to keep rid off.

MR. RATLIFF: Right.

JUDGE: Did, did, did, did somebody pack up the truck and -

MR. RATLIFF: If, if you lessen ...

JUDGE: - dump my attic trash in there?

MR. RATLIFF: I've got to-- I've got to concede to you ...

JUDGE: I'm just trying to get a visual of what the junk is.

MR. RATLIFF: I understand, and I've got to concede there are-- there is testimony from a couple of witnesses and I think from Mr. O'Connor himself that he looked down the hole and he saw a rotary drill and look-- that looking back adding that there were wrenches in the hole. It sounded like they unloaded a hardware store into the hole actually. If you read the-- If you read the testimony. The fact of the matter is, in this case, Emerald was able to complete many of these wells that they complaint about, and a critical factor here is, Emerald's own experience here shows that under the [inaudible] that existed at this time, this lease had produced past-- it's, it's a lot because if you take all the expenses-- extra expenses they say they incurred to trot a drill around this material or they give drill through it. You take all those expenses and set them aside and you take the income that Emerald earned less the reduced royalty that they paid to the O'Connor's which is a 30 percent as opposed to a 50 percent on the Exxon lease. Emerald laws met. Emerald proved itself these were uneconomic at least. Even when Emerald produced over it.

JUDGE: This-- all of these could have been treated in the lease, I suppose. As a matter of expressly and, and was lost.

MR. RATLIFF: Well, one of the things actually and one of the things we've got in this deal as an example of one lease, this lease is about as detailed as any lease you'll see had certainly for advantage lease of this time. It goes so far as to say if you've dug pits, how you all set this top soil aside and then fill in the pits and make sure you put the topsoil back in place to restore. It has detailed, it has a detail provision about what Exxon will do. We need a ba-- plugs and abandons a well and it says that they will take every precaution to ensure that oil and gas does not leak out of the well and that salt water and oil and gas does not penetrate some other fresh waters on. It, it does have those in one of-- cause one of our claims as it relates to the royalty owner's claims. The O'connors and the Meisches is that everything is covered under this lease and therefore, all of their tort causes of action are gone, because-- and and we-- and we cite to this Court's authority DeWitt County and others saying that where the lease has dealt with it, you are not dealing with the contractual obligation.

JUDGE: And-- just so I'll, just to be-- so I'll be clear on this. While, while the lease is in effect, right. So the lessee owns the well.

MR. RATLIFF: The lessee owns the well boarder. Yes, Sir.

JUDGE: And then, when the lease terminates, there's a reverter, it goes back to the lessor and then he owns the well. So these provisions in the lease would be the protect that reverter that might be damage some other way.

MR. RATLIFF: That, that's correct. That derived a reverter and, and also the lease speaks to one, one of their big complaints other than as, Justice Wainwright pointed out junk in the hole. One of the things they call junk in the hole was tubing that was cut, because the Exxon witness testified they believe they could get a better cement job to seal off fresh water sands that the tubing was cut and left in the hole. One of the the things the lease specifically provides is, is at the lessee's option on termination, they make-- they may cut the casing and withdraw that casing if they choose to do so. If they don't do it, it becomes the property of the land owners, because it goes back to them under the right-- under the right of reverter.

JUDGE #4: Just want to clear on this and to take the worst case scenario that, that Exxon deliberately sabotage these holes to make the

reentry harder for any subsequent operator, are you saying that even under the and, and, and the misrepresented on the form of what they had done and to the Railroad Commission, are you saying that even under those circumstances, there is no cause of action for either the royalty owners or for Emerald?

MR. RATLIFF: I am saying that, your Honor because-- I'm saying it because first of all, any claims that the royalty owners had were long sentence they had because of statute of limitations. Secondly, there has been no waste the oil and gas is there if it's economic to recover it, it can still be recovered. On the fraud claim, we're saying that if it is not enough under the Ernst & Young analysis, if it is not enough that when accountant gives a certification in connection with a merger transaction and consents to its inclusion that there is no evidence of intent on the part of Exxon to defraud anybody with a W-3 that take the worst case intentionally didn't contain the information. A W-3, fist of all, there's no indication that subsequent lessees like Emerald who were not even in existence or somebody that Exxon would understand there was a some special likelihood would resort to this records. The evidence here is even scanned pure than the affidavits that were submitted in Ernst & Young. They had an Exxon employee saying, "Yeah, he knew pi-- people might look at those records." You have Mr. John Hayes and experts can will placed, he said, "Well, I advice my clients to look at those records." That is not the sort of evidence that I think this Court has held is sufficient to establish and it does create an unlimited class of plaintiffs, not just equally or stock holders or bondholders. Thank you.

JUDGE: Any further questions? Thank you. The Court is ready to hear argument from the respondents.

COURT MARSHALL #2: May it please the Court. Ms. O'Neill will now present the argument for the respondent. Ms. O'Neill welcome the first [inaudible].

JUDGE: Ms. O'Neill, what interest with Exxon or any other party have to deliberately sabotage a well hole?

ORAL ARGUMENT OF EILEEN O'NEILL ON BEHALF OF THE RESPONDENT

MS. O'NEILL: I'm sorry, your Honor. Could you repeat that?

JUDGE: What interest would Exxon or any other parties, such as Exxon have on deliberately sabotaging a well hole?

MS. O'NEILL: You mean, why would Exxon do -

JUDGE: That's it.

MS. O'NEILL: - what it did in this case?

JUDGE: And I'll repeat of question?

MS. O'NEILL: Okay.

JUDGE: I don't want to see if you can answer or do you think the rest about ...

MS. O'NEILL: I'm just-- I'm trying to understand, your Honor's question and I'm interpreting -

JUDGE: Well, there's been a lot of discussion about and deliberately doing this at and other -

MS. O'NEILL: Correct.

JUDGE: - in line to the commission, why would it be in their interest to do that?

MS. O'NEILL: Why would it be in their interest to do that? Because

they have a 50 percent interest in adjacent lease producing over a common reservoir. The testimony at the trial, your Honor, was from their supervisors on site at the time plugging operations were being done. That these wells were being plugged in a manner in which they were being plugged at, at a time ...

JUDGE: But it's just as Exxe-- but it's just as Exxon last argument just to slide over and continue to work in a, a still hit the well?

MS. O'NEILL: Actually, your Honor there's lots of reasons why you can't slide over and just continue to work, and an important consideration with respect to Justice's Hecht question is: Well, does that mean you're recovering the, the amount of damages for reserves that you could just slide over and produce? And the answer to that is no. The damage evidence at trial was specifically limited to-- where recoverable their reserves right there that could be produced by a, by a-- drawing a new well. The damages were kept at the amount of the cost to draw a new well. That-- that's the damage evidence in this case, and can you simply slide over? There are lots of considerations at play in this. This is the mature field like most Texas fields. This is not a situation where as economically feasible to go in and produce by drawing a bunch of new wells. That is why the Texas legislator chose to adopt severance tax abatements to encourage operators to go back into existing wells to produce remaining reserves out of mature fields and get the severance tax and benefits of those reserves. That's why they did ...

JUDGE: Why aren't you bothered by the statute of limitations here?

MS. O'NEILL: We were not bothered by the statute of limitations as Justice Brister I think is quite so scenically pointed out. This is unquestionably, an inherently undiscoverable injury. We have an injury that is essentially intend in the soil when you're below many feet of soil and we have circumstances which Justice Hecht in his opinion on S.V. versus R.V. indicated we have to look at given intentionally concealed injury. We proved over and over and over again submitting evidence of the well records that were on file with the State, that Exxon filed the W-3A saying that would do one thing. It actually did something else that was not revealed in any public record and not obtained until 1995 when finally Quintana gave up some of those records so it could get a size mix survey on this property. That information was not disclosed in any public record and frankly, your Honors, it is audacious for Exxon to come in on this record and say, "Well, all these lessors had to do was ask some railroad commission employees about what happened out there or go out on the property when it was being plugged, and they would have revealed this damage." That is not the evidence in this lengthy record.

JUDGE: Counsel, do you-- do you agree with the Court of Appeals' standard in expressing what the rule who has on statute of limitations that is, at one point the Court of Appeals says that the prolix into the damage wasn't known until a certain date and then expressly says that to the statute, the cause didn't begin to accrue until there was enough knowledge appealed wide damage.

MS. O'NEILL: Yes, your Honor. It's taken right out of Justice Brister's well-- in PPJ opinion. You have to have knowledge of the wrongful injury.

JUDGE: So, so then if there was damage to tin wells, let's say there was a 121. I know Mr. Ratliff says, it's less than that. Seems like it would be, but let's say that there, there was knowledge on 1990 when the letter was sent saying, "We're going to sue you Exxon." There

was knowledge that there was a wrongful inquiry related to tin wells. Is that enough knowledge appealed wide problems to start to accrual?

MS. O'NEILL: Well -

JUDGE: Well -

MS. O'NEILL: - two, two things ...

JUDGE: - how many wells is enough?

MS. O'NEILL: Two things about that, your Honor. The issue we are here on, on appeal is, whether a date different than the dates found by the Jury are conclusively established by the evidence, and quite remarkably, there is no question the evidence supports both of those dates and you are not under the review standard even get to the question of whether there are other dates the Jury could've found, but putting the whole review standard decide on the 1990 evidence that the, that the, the Exxon wants to rely so heavily on in this case. That entire dispute and all of those documents about which many witnesses testified in addition to the few documents that your handed in this exhibit. That entire dispute centered on the last six wells that were producing at the time Exxon was attempting to re-negotiate the royalty interest and attempting to close in six producing wells.

JUDGE: But let me come back to the standard again. I'm-- you know, whether you or successful or not-- I don't, I'm putting that to the side, but the standard used by the Court of Appeals is, is something that got my attention.

MS. O'NEILL: Uh hmm.

JUDGE: If there was a wrongful injury to one well and only one ever, the statute would have begun to accrue, accrue in 1990 of the letter said, "Plugging that wells causing us wrongful injury, you should stop." Right?

MS. O'NEILL: No.

JUDGE: If that's what the letter said.

MS. O'NEILL: Well, if-- okay. If the letter had said your-- that there's two different things going on here, there's the breach of lease claim and the damage to the wells which is the waste claim and I apologize, your Honor, but you're kind of mixing the evidence on the two. They rely on the 1990 letters on the breach of lease claim, on discovery on the breach of lease claim which was a fraudulent concealment finding with the discovery date finding. They do not rely on the 1990 letters as evidence to attack the finding on the discovery well with respect to the waste claim. Now if there'd been a letter in 1990 saying, "We've noticed that you're out there throwing junk in the wells and that's not a proper way to plug these wells under industry strand-- industry standards of the waste statutes." At-- then statute of limitation just would have commenced at least with respect to that well.

JUDGE: Well, then, the Court of Appeal's standard distinguishes that situation from situation where you find the same wrongful injury in 1990 as to one well, but you need to wait until there's multiple findings of injuries to other wells in the field. Does that makes sense?

MS. O'NEILL: It does makes sense because of the consequence that resulted. This is not a situation where these damage was-- damages would necessarily have been suffered. This injury would necessarily have been suffered because one of your wells was junked up. But when you junk up all of the wells on this lease, when you succeed in your efforts to deter someone from reentering any of the wells on your lease. "No you can't get to your minerals," which is what you're entitled to do, and with respect to that I'd like to turn back to

Justice Hecht's comment on the question of: Well, doesn't this just make it more expensive to go into the wells and isn't that really you recovered for? And the answer to that, Justice Hecht, is absolutely not. With respect to the waste claim first, under the very statute that was violated in this case it expressly defines wastes in part as economic wastes. So making it more costly to produces minerals in the State of Texas are legislature has defined this wastes.

JUDGE: Well, the plugging of, plugging the wells makes it more difficult.

MS. O'NEILL: Plugging the well makes it more difficult, but there's a difference between plugging the well according to Regular Industry Standards and in the cost that are involved in reentering that well.

JUDGE: Ask you just to saw it clear, I asked the petitioner which is that, when the lease is in effect, the lessee owns the well.

MS. O'NEILL: When the lease is in effect, the lessee owns the well. Correct.

JUDGE: Lessor has the right of a boarder and if it comes in to a fact, then the lessor own the well.

MS. O'NEILL: That's correct.

JUDGE: Do you think all of this, these tangible problems could be dealt with in the lease by expressively

MS. O'NEILL: I don't know that all of these problems could be dealt with by the lease in expressively. Which it is ...

JUDGE: Which requires you put it in the lease that it have to be plug a certain way-- or, or I was wondering, I, I mean could the lessor and lessee agree with the well wouldn't be plugged at all that that would be the lessor's responsibility.

MS. O'NEILL: I, I don't think, I don't think you could do that, your Honor, because of the separate statutory obligations to plug wells. I don't think an owner and a, a lessee can-- in fact I know in prior decisions of this Court, you can't vary certain requirements with respect to wells. It's not just your interest. The state has an interest not only in, in, you know, the po-- the potential, pollution, the pollution of water -

JUDGE: Yeah.

MS. O'NEILL: - strata or and, then, then, surface rise ...

JUDGE: But, but you could say, it looks to me like-- I was just curious whether the lessor could say, "well because I know all of that things to be done and I'll do it." It may be. But I want at least have the right contractually to designate, don't plug these wells because I'm coming in right behind you as soon as you leave and kind of operate it myself and if I can't make you feel that, that ...

MS. O'NEILL: Well, well in some realm that may be possible. As a matter of practicing the industry, it's not possible. There is no operator who is going to leave a lease with wells, abandoned a lease with wells open because of the potential liability that's going to exist for that, that operators. It's just not got to happen in the industry.

JUDGE: So the right claim here basically, when you boil it all down, is a right to have the wells plug a certain well.

MS. O'NEILL: At least according to industry standard and at least according to the rules that govern under the statute. You know, throughout a lease, you, you know the operator has the right to operate as a reasonably prudent operator. That's not a difficult standard for someone to have to meet in production or all the other aspects of the lease, and under the statute, we provide them a defense as a reasonably

prudent operator.

JUDGE: Are there regulations that govern how the well is plug?

MS. O'NEILL: Oh. They are plethora of regulations that govern how a well is plugged.

JUDGE: No. Unless there are remedy, when wells are not plug in accordance with the regulation.

MS. O'NEILL: There is not a remedy for the owner under the statute. The Railroad Commission's ability to grant a remedy is very limited. You-- they can, they can fine somebody for about $10,000 or they can, they can enjoy now-- the injunction is not going to do you much good where your wells have already been trashed and plugged. And $10,000 it's not going to make up for the damage that was done to your ability to recover these minerals. I'd like to speak for a minute that more specifically to the rules governing plugging operations. A law has been set here about the facts that some of this W-3's disclosed the fact that there, that cost-- that casing had been cut. There was days of evidence at trial concerning the proper method for plugging these wells and no one, no one stood up and said the way these wells were plugged complies with industry standards. And what happened here was, if you are not going to cut and pull casing, you must perforate it. You shoot it and you squeeze the cement out through the holes that are perforated into the casing. If you're going to cut casing under the regulations, you have to pull it. Now, it's true that casing gets cut and it doesn't get pulled and it remained in the hole. But in the industry, that only happens when an attempt to pull is made and they can't get it out of the hole. That's important for two reasons. Number one, if you've cut it and you can't get it out, it retains its integrity. It doesn't shift when you attempt to reenter the hole and you're able to reenter. Number two, that's not what was done here. There is evidence in this case that Exxon didn't even have the equipment on the lease to, to attempt to pull the casing. There were reent-- that the people who were out on the lease doing this operation asks, "Why aren't we pulling the casing?" It would be cheaper to do this. But the cut casing was left in the hole and even if you going to look at that W-3 and it references cut casing and operator according to all the evidence is going to understand that to mean it's stable. Now, I just have a few minutes left but I would like-- yes.

JUDGE: I'm, I'm going to follow up on the statute of limitations. The letter of August 1990 that you've talked about record six wells.

MS. O'NEILL: Correct.

JUDGE: A last well was plugged about a year later in 1991. Correct?

MS. O'NEILL: Correct.

JUDGE: So if the letter was sent claiming improper plugging in wastes as to six wells, would there be some -- in hard question for your side -- noticed at least look into that rest of the plugging that occurred within a year 'cause your clients didn't intervene the case 'til 1996.

MS. O'NEILL: Your Honor, the 1991 letter doesn't speak to, doesn't speak to plugging. What it's talking about is, these are producing wells. We have someone who's interested in coming in and continuing production taking an, an assignment of the lease with respect those six wells. So that per-- even though you can't economically produce any longer because you're Exxon and you have high cost and you have a 50 percent royalty. We have this little operator over here who can come in and economically produce those six wells and-- so we would like you to assign the lease to him with respect to the six. So if you plug them,

in the sense that if you stop production, if you stop production then that's a waste, because we have another operator who can produce them. That letter is not about improper plugging.

JUDGE: Yeah. You may be right. The letter I'm looking at is actually dated September 12th, 1990 and it says, "Plugging and abandonment of the referenced wells would commit waste and be contrary to public policy of the law." So we move the date backing up. September 1990, at least some of your client say, "If you plug the wells you going to commit ways and we're going to sue you." The last of the wells and the hole filled this plug a year later.

MS. O'NEILL: Uh hmm.

JUDGE: Do you get five years to figure out how you're damaged or just the statute of limitations to figure it out that-- another way to put the question is, is there an obligation that you're on noticed to at least look in to as of 1991 at the latest? Maybe 1990, but there's a problem going on here. The very problem that you identified in your 1991 letter.

MS. O'NEILL: That's the problem. It wasn't the very problem, and as Justice Brister pointed out in the Schneider Carriers case notice of one potential claim is not-- does not start the statute of limitations running on a completely different claim.

JUDGE: That wasn't my question. My question was, notice of problems with six wells. Improper plugging and abandonment that would cause wastes. The language in your letter isn't true.

MS. O'NEILL: Correct.

JUDGE: Doesn't that put you on notice to look into the rest of the field. I didn't say does it start the accrual of the cause of action. That's a different question. Does it put you on notice to look into it? And then the notice time you get is the statute of limitations to look into.

MS. O'NEILL: There-- if there were any facts at the time that gave us any indication, that our wells are being plugged improperly, that casing was being cut, and that junk was being thrown in the wells to prevent them for-- from reentry. That would be one issue. That's not fact.

JUDGE: Why did you write the letter that says plugging will cause waste if you didn't have concerns.

MS. O'NEILL: Plugging was-- would cause waste because under the circumstances at that time, there was another operator who could continue to produce the wells profitably. That's the wastes that's being discussed in 1990. No one-- there is no evidence in this case. None, that any person was aware that Exxon was meanwhile out there on the lease throwing junk down these wells and cutting case and then leaving it. None. There's not a shredded evidence on the records that the wastes that's being discussed there is closing and producing wells that an operator could come in and produce, and that's it.

JUDGE: Are you sharing time with Ms. Hankton aren't you?

MS. O'NEILL: Yes I-- yes I am.

JUDGE: Or if there are no further question, we'll hear from Ms. Hankton.

MS. O'NEILL: All right. Thank you, your Honors.

MS. HANKTON: Exxon takes the position that the Ernst & Young decision forecloses Emerald's fraud claim. It does not. This is the circumstance that the Court was talking about in Ernst & Young that gives arise to a fraud claim on a factual basis. Look at the evidence in Ers-- Ernst & Young. There were Ernst & Young merger related perspectives that were used to later purchase securities. And it was

that factual matter that the Court used to determine that there was not in a special likelihood that the, that the, that the defendant would know of-- that someone was going to rely on the records. This case is not that one. Here's the evidence. Operators retaining customarily rely on plugging reports and deciding whether to reenter wells. Exxon admitted it knew subsequent operators would rely on its public reports. Exxon knew at the time it filed the reports that several operators including a predecessor to Emerald, were interested in re-developing the track and attempting to obtain the waste. There's evidence that Exxon sabotage the wells for the express purpose of preventing the re-entry by just such a subsequent operator. There was evidence that experienced plugging and reentry professionals said at trial that Exxon's conduct was definitively vindictive and clearly designed to damage the wells and the reservoir.

JUDGE: What-- is it a, is it a-- the importance that there's no claim of drainage. [inaudible]

MS. HANKTON: No. There's not.

JUDGE: But-- what, isn't-- doesn't that [inaudible] mean that if it had that motive, it's not getting, it's not capitalizing on it. Exxon was trying to know more minerals out of reservoir. It's not getting to do that or you sue for them, you sue for drainage.

MS. HANKTON: No, your Honor. The, the fraud claim-- the only thing that is in the directed verdict motion that Exxon talked about was the fact that they said there was no evidence of intent to induce. At the directed verdict hearing, for example, at 11 of the reporter's record at page 120. Exxon said there has been evidence, some evidence of any right that there are misrepresentations on the forms, W-35. Okay? So we've got all the other elements. The only thing we're hereon is the question of intent to induce at the time they filed the reports, and under the Ernst & Young Standard, that evidence that I've just presided to you gives that to you. That's all we're hereon. I mean, the truth is is that Emerald was out on directed verdict on this claim, and never went further on it. We never got to the point of putting a damage clase-- case on, on behalf of Emerald or to talk about what that was. The point is, is that this is a fraud clai-- case under Ernst & Young without any question. Drainage claim is not essential. The damages were never as, as Ms. O'Neill said. The damage claims rather royalty owners were never in that way. We're talking about whether it's economical to produce these wells and the impact that this fraud-- that this, this tortuous conduct caused on the ability to do that, and that's a, that's a legitimate claim under Texas Law that is separate from a drainage claim. Thank you.

JUDGE: [inaudible]

REBUTTAL ARGUMENT OF SHANNON H. RATLIFF ON BEHALF OF PETITIONER

MR. RATLIFF: Yes, Sir.

JUDGE: This problem-- I think I finally got an answer to the question on why Exxon would have an interest in, in trashing, in plugging the wells and I think the answer was because a smaller operator can produce this well-- these, this well cheaper and more profitable than Exxon could. At aside-- I mean, what interest would any company have in, in doing this thing. I'm naive to this type of operation on appeal ...

MR. RATLIFF: I know of no-- I know of no interest and of course. You know, Exxon doesn't agree that that's what happened but I have to concede we had, we had a couple of witnesses that said that. But there is no answers. As a matter of fact, Exxon's economic interest, if it could have gotten all these people so anxious to have this lease, they could've save themselves all the cost of plugging these wells which are not insubstantial. What, what they-- what we've got here is, is what we hear every time they speak is: "Junk the hole. Junk the hole." Did they sue us for that? No. They did not sue us for junking the hole. They sued us for waste. The very thing that Justice Wainwright pointed out, they've been told in 1990 that if you do this as to this as to these six wells, you're going to deprive us of-- one place in the letter says $15,000,000 royalty income, another place it says, it may be five, take the lower number. That normally would get most people's attention. They were told that. They were told that by their own hired experts who had access to the data. But I'd like to go back to something because Justice Brister asked me, "Well, how would anybody, how would anybody know?" Let's take the HCCI versus Neil. The injury in that case was damage to an underground reservoir approximately 10,000 feet below the ground. It was not even on the lease. It was only a joining tract of land. In those circumstances, this Court held that is not an inherently undiscoverable injury and therefore, discovery will doesn't come into play, but the honest truth is on the basis of the facts in this record, it doesn't matter whether it's discovery will, whether it's fraudulent concealment, or whether it runs from the date that Exxon abandoned the wells. On every claim but the fraud claim, they're barred because they simply waited too long to proceed. Now, the question was asked a statement was made that nobody testified that what Exxon did in terms of cutting the casing and, and leaving it in the hole was a proper way. As a matter of fact, a former railroad commission employee testified that's exactly the way Railroad Commission of Texas plugs and abandons a well. It was exactly the way Exxon--there was evidence to the contrary from other witnesses have said, "I've never seen it done that way." But it's not true that nobody had ever done that. They, they-- when they say there's no, that there's otherwise no remedy, the fact of that matter is I think it, Counsel mention there was a fine of $10,000, there's a fine of $10,000 a day for improper plugging. The commission can count me in and plug it at your expense and charge you plugging cost. They can impose other penalties and fines. The attorney general can come after you and they can appoint a receiver to operate your other properties.

JUDGE: Penalties and fines for this sort of conduct if true of junking the hole.

MR. RATLIFF: That's correct. if they find that we did not follow the regulations. So there, there are other remedies and this is not a situation in which-- that this, there needs to be this several claim, but I want to mention one other thing that just seems to me is totally beside the point here or, or is being missed. If they lease to a subsequent lessee and the question was: Did that lessee have to drill a well? They would not judge it on the basis of: Could they re-enter the hole and drill it on a cheaper basis? They would judge it on the basis that can make drill a well from the ground down, recovers sufficient hydrocarbons to where they have a probable right to make a profit. A probable profit after taking into account royalty cost and drilling cost. Their own witness, George Height, said, "Well, the reason these reserves down here are lost. It's because you can't afford to drill. You can't afford to get down their tool," but that does not mean that

if-- that means at that time, this was an uneconomic property. It may be completely economic today and if so they will be recovered. Another fact that I have not mentioned is in the zones that they identified as having not been properly developed by Exxon, Emerald entered both zones produced the oil and gas and paid royalty to these royalty owners that are still suing. On the fraud claim, the only thing I could do there is invite the Court to prepare the testimony of the Exxon employee and the testimony of Mr. John Hayes about whether there was some expectation, special expectation that a certain class of people would look at this and compell that to the affidavits in the Ernst & Young case. I will submit to the that if the Ernst & Young affidavits were insufficient to establish and intent to defraud the evidence in this record is even more remote in that point. Thank you.

JUDGE: Any questions? Thank you, Counsel. The cause was submitted that concludes the arguments for this morning and the ...

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