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Supreme Court of Texas.  
Gail ASHLEY, Petitioner,  
v.  
Doris D. HAWKINS, Respondent.  
No. 07-0572.

December 11, 2008.

Appearances:

R. Brent Cooper, Austin, TX, for Appellant.  
James B. Manley, Cleveland, Texas, for Respondent. Lance Craft, Austin, TX, for State of Texas, Amicus.

Before:

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

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 07- 0572, Gail Ashley versus Doris D. Hawkins.

SPEAKER: May it please the Court, Mr. Cooper will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: May it please the Court. Article 16.063 of the Civil Practice and Remedies Code, as interpreted by the court of appeals in this case, is unconstitutional. Now, this Court is faced, I believe, with two choices. One is to go ahead and declare 16.063 as unconstitutional or the second alternative is to reverse Vaughn v. Deitz, so that 16.063 may be interpreted in a fashion that avoids its unconstitutional infirmities.

JUSTICE O'NEILL: Well, what about Number 3; apply Kerlin?

MR. COOPER: Well, glad you brought that up, Your Honor. Kerlin which this Court decided a couple of months ago took a side step around Vaughn v. Deitz. We had the dissent in Vaughn v. Deitz, who argued that the fact that a defendant has a statutory agent either the secretary of state or then the commissioner of motor vehicles operates to be as a presence in the state so that they're not absent from the state. That was rejected in Vaughn v. Deitz. This Court though and, Your Honor,

wrote the majority opinion in Kerlin said, well, we're not going to reverse Vaughn v. Deitz. However, we are going to say that if a defendant, in that case Mr. Kerlin who continually received royalty payments periodically over a long period of time, is conducting business, that would subject him to service under the long-arm statute, then he is present and he is not absent for the purposes of 16.063.

JUSTICE O'NEILL: Well, in long-arm statute also says commits a tort in [inaudible] v. Park, why wouldn't an automobile accident apply?

MR. COOPER: I believe the commission of a tort would subject a defendant to service under the long-arm statute. But as I interpret it and read the majority of opinion, it was the continued doing business, the continued receipt of the checks over a period of time, that would subject the defendant to liability or service under the long-arm statute and would operate as a presence in the State of Texas. If -- if -- if the -- commission of a tort a -- a one-time tort was basically to make the defendant present in the State of Texas, then I think the -- the viability of Vaughn v. Deitz would be totally undone and there would have been a reversal. But the majority as I read in Kerlin, seemed to be going to great lengths not to reverse Vaughn v. Deitz, but to make that distinction.

JUSTICE O'NEILL: Well, we relied on the language of the long-arm statute when we said it really doesn't matter for presence whether somebody has been appointed an agent for service, but we said the long-arm statute defines presence and it defines presence as a contract or a tort. So, it would seem to fit the little wording of this -- of the long-arm statute.

MR. COOPER: Well, as I read the -- the facts in this case, the -- the court was focusing on the fact that Mr. Kerlin continued to receive royalty payments allegedly that belonged to someone over a period of time, and it -- it was this receipt of these royalty payments over the period of time that operated as a presence --

JUSTICE O'NEILL: Well, let me just say it's your view that, it doesn't apply?

MR. COOPER: Well, the way I interpret the majority opinion. Because it seems like to me, Your Honor, that if -- if we're saying a one-time event, a one-time of tort would make the defendant present for all times within the state, then the Vaughn v. Deitz really would have no applicability. And the -- the way I read the concurring opinion in Vaughn v. Deitz -- excuse me, in Kerlin was that -- they were arguing for the presence that is the fact that you had a statutory agent meant that you were present in the state and subject to service, and therefore, you were not absent for the purposes of 16.063. It was -- it was, the way that I read it. Now, if -- if the Court obviously, you wrote the opinion and you know it probably better than I or anyone in here, is intended for Kerlin to mean that a -- a one time foray through Texas by a non-resident and you -- you have a motor vehicle accident and that that operates to -- for the next 10, the next 20 years make you present in the state if we indulge in that interpretation as far as the long-arm statute, former 2131b and 17.044, then that would cure I believe the constitutional infirmities that exist with respect to 17.063. But -- and I don't see from looking at Kerlin that there is a whole lot of disagreement that 17.063 under the commerce code clause has problems. It was created at a time when we didn't have long-arm statutes, we didn't have substituted service, we didn't have rule 106, 108 and it's the -- the concerns that the legislature had back in 1841 when it was originally passed, certainly are not present here today. And as -- as the U.S. Supreme Court in the Bendix case, certainly



noted, when you apply the--the pack balancing test, the--the interest of the state in protecting the creditors really is not that great because the creditors in Texas are protected.

There are multiple method of service about which they can effect service on someone who has left the state, and then you balance that against the burden on interstate commerce, and that is someone who moves to California could be subjected to a lawsuit 10, 20, or even 30 years later down the road, certainly is a burden on interstate commerce. We are dealing with a federal statute. We also know what at least the -- the Fifth Circuit Court of Appeals feels regarding 16.063. I -- I understand the Cadles opinion has been withdrawn, and the decision referred back to Judge Lyn in Dallas for reconsideration in light of -- of this Court's decision in Kerlin, but we certainly know that absent some relief from Kerlin that the federal courts and again this is a federal constitutional provision that we're dealing with believed that it is 16.063 is constitutionally infirmed and that it would violate the dormant clause of Article 1, Section 8 of the federal constitution.

And so it seems to me that we're -- we're here now, and again we may have three choices. One is, we can declare 16.063 as unconstitutional if we we're gonna apply as the court of appeals did in this case. And where they say if you are out of the state, an out-of-state resident, then the statute is told for however long, be it 10, be it 20, be it 30 years, then you -- it is constitutionally infirmed. In fact, that was sort of the situation that existed in the Cadles case where there had been a guarantee signed, I believe, between 1985 to 1988 and the defendants, the guarantors had been outside the State of Texas for some 20 -- 15, 20 years, and the creditor was trying to assert that the statute of limitations had never run on those guarantees for some 18 or 20 years even though the guarantors in those cases were subject to service by the secretary of state or through some substituted means under rule 106 or 108.

So, one, we can declare it unconstitutional. Two, I believe is reversing Vaughn v. Deitz and, I think, if 16.063 was construed to hold that if there was a statutory agent, be it the secretary of state or in this case the chairman of the Department of Public Safety who was the -- who is the agent for non-resident motor vehicles -- vehiculists who commit torts in Texas, that also I believe, would be an interpretation which would render 16.063 not unconstitutional. And again, Judge O'Neill, as you've pointed out, depending upon how Kerlin is interpreted, the way I read it, I did not see where Ms. Ashley would fit within because she was here, and she did not have the continual contact as Mr. Kerlin did over the period of time which to me seemed to be the focus that the court had in the Kerlin case. If Kerlin were extended to include a -- a one time event, a one time contact, then -- then I agree that would also be a third alternative by which the -- the 16.063 could be interpreted to remove the constitutional infirmities that I believe everybody here in this room feel exist with respect to 16.063.

I will give the Court back some of its time. We would ask the Court to reverse the decision of the court of appeals and to reinstitute the judgment that the trial court had entered in this case. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you Mr. Cooper. The Court will hear argument now from the Respondents.

SPEAKER: May it please the Court. Mr. Manley will present argument for the Respondent. Mr. Craft will present argument for the State of

Texas --

MR. MANLEY: May it please this Honorable Court.

SPEAKER: Mr. Manley will open with the first 15 minutes.

ORAL ARGUMENT OF JAMES B. MANLEY ON BEHALF OF THE RESPONDENT

MR. MANLEY: Thank you. May it please this Honorable Court. It is undisputed that a -- motor vehicle accident occurred on May the 31st 2003. Then a lawsuit was filed by the -- the Respondent, Doris Hawkins, on April the 1st 2005. It is undisputed that the defendant, Gail Ashley, left the State of Texas in 2004; that she left without leaving a forwarding address. She left the State of Texas without changing the address on her Texas driver's license. She left the State of Texas without changing her voter's registration card. She -- she did not make any effort that a reasonable person would've made if they -- if they're leaving their estate and moving somewhere else, to put somebody on notice where they would be. It's also, I believe, based on the record that this petitioner did not rebut the statute in terms of showing that it was not applicable to the facts of this case. But the courts have held --

JUSTICE GREEN: It's also -- excuse me, it's also undisputed isn't it that -- that by having -- by operating vehicle, in the State of Texas, that Ashley was amenable to process under the long-arm statute.

MR. MANLEY: Your Honor, I wanna -- I was gonna address that, yes. I think that -- that Gail Ashley was not amenable to service under the long-arm statute, and that's -- that statute pertains to motor vehicle accidents, statute 16 -- 17.062 of Civil Practice and Remedies Code. In order to utilize that statute and make that person amenable, you have to furnish a current address or a verifiable address to the chairman of the -- of the transportation commission. If you're not able -- if you just make up any address, there's not going to be good service. If you don't furnish an address that the chairman can't forward and give notice to that person, then you have defective service, Your Honor. Well, the statute goes on to say that -- that's failed service.

JUSTICE GREEN: So the plaintiff controls over whether the defendant is amenable to process?

MR. MANLEY: Sir?

JUSTICE GREEN: The plaintiff controls then over whether the defendant is amenable to process?

MR. MANLEY: The plaintiff does not have the power to get secure service or process with the whereabouts of the -- the tortfeasor is unknown.

JUSTICE GREEN: Uh - huh.

MR. MANLEY: There's no power whatsoever if you -- if you send a certified copy of the petition to the chairman of Texas Highway Commission, you don't furnish a good address, that's gonna come back to you. That's failed service under article 17065 which says, "then the plaintiff may personally serve the defendant."

JUSTICE BRISTER: Well, what's wrong with the address on the driver's license?

MR. MANLEY: Your Honor, it was a 15 -- it was the address that was on the police report, that was on that we -- let me -- let me just back up --

JUSTICE BRISTER: I assume that's the one plaintiff's attorneys always use.

MR. MANLEY: No, that -- that's not -- that's not the way I



operate. I always try to verify a current address by -- well, yes by checking the driver's license.

JUSTICE BRISTER: So --

MR. MANLEY: And then if -- generally, it usually matches up with the accident report, you know. It --

JUSTICE BRISTER: It -- it --

MR. MANLEY: -- if -- if doesn't match up, then we try to verify it another means.

JUSTICE BRISTER: So, you're not -- you're not arguing that there was something wrong with your service in this case? That you've never served her because you gave her an improper address, are you?

MR. MANLEY: No, Your Honor --

JUSTICE BRISTER: 'Cause if your argument is right, then you still haven't served her today.

MR. MANLEY: No. Yeah. No. Let me -- let me just backup and say that suit was filed, service was immediately requested to the district clerk under -- under certified mail. The district clerk of Montgomery County attempted service on three different occasions, it came back unclaimed. Well, as other courts upheld it, if it comes back unclaimed that means the person is not there. So, then we start all the investigative techniques that we employed based on the affidavit that was filed with response to summary judgment. And --

JUSTICE BRISTER: Well, but we've -- we've held your service is accomplished when you serve the transportation chairman. It's not when they--the person gets it. And if -- name of the case escapes me -- Campus Investments case, if it's their fault that the public address is no good, then we're not going to let them come in and say, "Oh, they didn't forward it to me at the right address which I misled them about". I mean if the person in a car wreck gives a false address to the police department, that's not your fault and service on the transportation secretary that does it, doesn't it?

MR. MANLEY: Your Honor, with due respect that does not because that's failed service under the statute. Then the statute specifically says that the non-resident is -- statute specifically says, if the non-resident refuses to accept delivery of the notice or does -- is not able to get delivery, then the -- the defendant-- then the statute goes on to say that the plaintiff can personally serve the defendant.

Let me point out to you. We sought -- asked for citation, by mail, it failed. We then traced the defendant to what we thought was State of California. Within 30 days of that initial citation, Your Honor, we again asked for a --we asked a citation to be issued by certified mail. That was refused. Then we continued to try to locate this lady --

JUSTICE BRISTER: That -- it'll be. We don't have the question in front of us. If you were diligent, then 16.064 doesn't matter.

MR. MANLEY: Well, the courts have been --

JUSTICE BRISTER: The question here, are 16.063 -- question here is, let's assume for a moment you weren't diligent. If you were diligent, that extends it until you get them served. But the question here is, assuming you weren't diligent, is it tolled by 16.063?

MR. MANLEY: Yes, Sir. I mean this Court -- this Court or any other court in this state has never held it that the -- that you must show diligence to enter code 16.063 of the Civil Practice and Remedies Code. The cases I've read have actually said that you don't have to show any type of diligence, although I would argue this, Honorable Court, that the plaintiff exercised due diligence. We -- that was point of two of our --

JUSTICE BRISTER: But the argument of the other side, Mr. Cooper is

making if -- if you have two drivers, let's say it's a three-car accident. And one defendant lives in California and one lives in Dallas. And we wait 10 years and sue them under 16.063. It's too late for the person in Dallas, but it's okay to sue the person in California. And the argument is, under the Bendix case that's unconstitutional 'cause you're telling everybody outside Texas, "if you want the benefit of our limitation statute, you gotta to live here." That's a constitutional problem, according to Bendix, and that's the issue he's raising. Now, why isn't that right?

MR. MANLEY: Well, Your Honor, that -- that --

JUSTICE BRISTER: We couldn't -- we couldn't -- we couldn't have a statute that says, people in Texas have a four-year limitations for breach of contract, but people in New York, those scheming people, have a 20-year statute of limitations. I mean, that's what the Constitution was all about. 'Cause states did that all the time before we got a Constitution, and so we put some stuff in there that say, look you can't discriminate against New Yorkers just 'cause you don't like them. Right? That would be unconstitutional.

MR. MANLEY: Well, that -- that's not what happened in this case.

JUSTICE BRISTER: Counselor, the question is 16.063 operate that way? If you live in Dallas, you get a two year limitations, but if you live in California, you get a three, four, five or 20 year limitations period?

MR. MANLEY: Well, I can see what the Court's concern is, but I -- we didn't, in this case, Your Honor, take that position. We went ahead and tried to diligently locate the defendant. Unfortunately, this defendant was not amenable to service. Not by certified mail. She became amenable when we got lucky on a sheriff in Sacramento County. We tried to get her served at Apartment 3 in an address in Loma Linda, California. She finally found the lady in Apartment 23 in Loma Linda. So, we got lucky. We were continuously not totally relying on this statute, okay? We were -- you know, diligently trying to find this lady.

True, we want to fall back on the statute for protection because the statute you know, is a suspension statute. It suspends a [inaudible] statute, but this case from lawsuit to service is less than a year; about 11 months. I don't know what else we could have heard in the [inaudible] before the court of appeals, the defendant says that a simple Google would have been able to locate this defendant. I submit to the Court, that if a simple Google could locate a defendant, law enforcement would serve criminal warrant a lot faster, the United States government wouldn't have spent billions of dollars and seven years trying to find Osama Bin-Ladin. A simple Google is not the answer. I don't know what -- if the court wants to tell us how, what we need to do step by step. But at least three or four [inaudible] citations, continuously trying to find it. Through all the investigative tools, 'and I was a private investigator for 15 years. So I'm familiar. We have sources available to locate people. If a person decides for whatever reason to not make themselves amenable for service, it's like hunting for a needle in a haystack.

JUSTICE BRISTER: Did they -- was there -- they -- we are here on a summary judgment, [inaudible] move a summary judgment saying limitation is barred?

MR. MANLEY: That's correct.

JUSTICE BRISTER: And didn't they include in that, that you hadn't -- an argument -- their argument that you hadn't been diligent?

MR. MANLEY: They raise that.



JUSTICE BRISTER: And you responded with what?

MR. MANLEY: I responded with, the fact, Your Honor, the trial court --

JUSTICE BRISTER: What you did?

MR. MANLEY: We paid 16.063, responded with argument, we were diligent, test the affidavit, it was never challenged at the trial court level.

JUSTICE BRISTER: Like were there gaps in that affidavit?

MR. MANLEY: Not in my opinion, Your Honor, there weren't gaps.

JUSTICE BRISTER: The trial judge's opinion apparently there were -

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MR. MANLEY: Well, I didn't -- I didn't --

JUSTICE BRISTER: So, why is it a matter of law, the trial judge heard wrong or that there is at least a fact question and there were -- did you, in fact, made sure there were no gaps?

MR. MANLEY: Yeah. Yes, we [inaudible]. Because we -- we pointed it out in our summary judgment response that we continuously tried to locate this defendant. And it -- from start to finally when she was served which was eleven months later, we were still trying to locate her. So, there -- there weren't any gaps, but I mean, by the fact that citation was initially requested? We didn't wait for a month to request citation; immediately requested, failed service. Thirty days later, we requested another citation where we thought where she was in California; failed service. We continued, but Judge --

CHIEF JUSTICE JEFFERSON: Let me ask you, if we -- if we decided and agreed with you that you exercised due diligence in attempting service, would we reach -- would we still reach 16.063 or not?

MR. MANLEY: I don't think -- I don't think you would, Your Honor. I don't think you would. The Court -- this Court and other courts have never held the requirement that you should exercise due diligence. I don't have problem with that. Obviously, I'd like to have the protection of that statute, so there's no [inaudible], cause -- is a matter of law -- I think we created a fact issue, that should've gone to jury on diligence. We weren't allowed to prosecute this case. My client waited for a day in court. So, I think if the Court found that due diligence was exercised, that satisfies our needs. I think I have one point five six minutes left, I'll save the Court some time if --

CHIEF JUSTICE JEFFERSON: Thank you. Thank you, Counselor. The Court will hear argument from the State of Texas.

ORAL ARGUMENT OF LANCE CRAFT ON BEHALF OF THE STATE OF TEXAS, AS  
AMICUS  
CURIAE, SUPPORTING THE RESPONDENT

MR. CRAFT: May it please the Court, Justice O'Neill, it's unclear to me why Mr. Cooper says Kerlin doesn't apply to this case. It clearly does.

A one time commission of a tort is defined as doing business in the state under the long-arm statute, and therefore, Kerlin would apply in this case. Now Kerlin said that a person is present for purposes of the tolling statute if they are amenable to service and subject to jurisdiction in the state. Clearly under the long-arm statute, this commission of a tort rendered Ashley subject to the jurisdiction of Texas even after she moved to California.

JUSTICE BRISTER: PHC-Minden says the relevant time period is when you file suit, not something that happens before and I guess a

reasonable time before that. Certainly, other people come here and do a tort, you need a reasonable time thereafter to file suit. But that -- if you do a tort once, just passing through the state, that wouldn't last forever, that you're doing business in the state, would it?

MR. CRAFT: It would mean you were subject to a specific jurisdiction in the state for -- during the period of limitations, which is the relevant time period. And so the question really is, was she amenable to service? And this Court has not said what that means. I think this goes to your question, Justice Green. Does the plaintiff control or to what extent does the plaintiff control it?

States have done different things on this. Some simply say, if the person could have been served, they're amenable to service. Justice Brister, some states have ready diligence requirement into it. The person could have been served in the exercise of reasonable diligence. That's something that this Court may have to decide in this case. And here I should point out, one of the things the solicitor general's office is doing is preparing a 50-state survey that will outline what all the states do as to this tolling statutes whether they have been judicially limited as this Court did in Kerlin, and whether there is diligence component and whether there are constitutional challenges. So, the first --

JUSTICE WAINWRIGHT: Are you going to share that foray with the Court?

MR. CRAFT: Yes, we are going to share that with you. We'll be following that as soon as we can.

But that's the first question in this case. The first option is not -- is the statute unconstitutional. That's never the first option. The first question is, does the tolling statute even apply under Kerlin. If the Court determines that it doesn't apply, then the constitutionality of the statute is not implicated, and indeed, she doesn't even have standing to challenge it.

JUSTICE BRISTER: You'd agree [inaudible] Texas couldn't pass a one statute of limitations for residents and a longer one for non-residents.

MR. CRAFT: That's correct under Bendix. But the reason why he's not right about Bendix now is Kerlin. Kerlin fixed the Bendix problem. Because now, we're not imposing --

JUSTICE BRISTER: Same limitations for everybody?

MR. CRAFT: That's right. This person who is in California, who -- who got in the car accident would be subject to jurisdiction and amenable to service, and so that doesn't impose any burden on them. They don't have to stay in Texas. They don't have to appoint an agent. So, there's no longer a constitutional problem, and indeed, every court that has looked at a statute that has been limited the way that our statute has now been limited in Kerlin, has said there's no commerce clause problem. And we cite these cases on page four of our latest brief.

There's another one, I didn't mentioned in there, Hunt v Enzo Biochem, at 471(f) sub 2nd 390. It's out of the Southern District of New York from 2006. There, it rejected a commerce clause challenge to tolling statutes from California, Florida, Massachusetts and South Carolina, because all of those tolling statutes have been limited in the same way that we limited ours in Kerlin. And what happened in the Fifth Circuit; they did issue an opinion saying that our tolling statute was unconstitutional as applied to non-residents. But that was pre-Kerlin. And we raised these same cases in the Fifth Circuit, and they said, those cases may be correct, but the Texas statute is not



narrowly drawn to apply only when someone is not amenable to service.  
And --

JUSTICE HECHT: Because of Vaughn? Because of Vaughn?

MR. CRAFT: Because of Vaughn and -- and other cases have never limited. But then after Kerlin was issued, we filed a petition for panel re-hearing saying now the Texas statute is narrowly drawn. The Fifth Circuit in response granted that petition for panel-rehearing, withdrew the opinion saying that the statute was unconstitutional and sent it back to the district court for reconsideration in light of Kerlin. So Kerlin resolves this constitutional issue and if the statute does apply to her, it's not going to present a problem under Bendix.

JUSTICE WAINWRIGHT: So, this resolution leaves Vaughn undisturbed in your opinion.

MR. CRAFT: Vaughn has been effectively overruled because it's been so cabined in by Kerlin that it's not going to come up anymore. Because I can't foresee a case where someone would be subject to substitute service under -- through the transportation commissioner, thereby implicating Vaughn and yet not amenable to service and present in the state under the long-arm statute, under Kerlin. So, I don't think Vaughn is -- is ever going to come up again.

JUSTICE O'NEILL: Well, and - and the problem with that someone passing through in committing a tort as I read Kerlin we did say it's gotta comport with federal due process concerns.

MR. CRAFT: Yes.

JUSTICE O'NEILL: And that situation might not.

MR. CRAFT: It might not I'm -- I'm not aware that that's been -- been challenged though as if -- if you were subject to jurisdiction during the period of limitations that would be the relevant time period.

CHIEF JUSTICE JEFFERSON: Further questions. Thank you.

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: Let's address Kerlin first. Kerlin right -- the paragraph before the conclusion. The majority says in this case -- the jury found that Kerlin was receiving royalty payments that rightly belong to the [inaudible] from January 1st 1966 through February 8th 1991. Suit was filed in Kerlin February 1993. So what I -- Judge O'Neill, I read your opinion saying is from 1966 through 1991 they were receiving these monthly payments and that -- that was presence within the state that would bar the statute of limitations because --

JUSTICE O'NEILL: But that's not what we said in the paragraph before but if you wanna --

MR. COOPER: No, I'm -- I'm just trying to interpret what -- what the court was saying and also we'll see what Judge Lynn does in -- in the Cadle's case but in the Cadle's case it is more like our case because there -- there were guarantees signed by the [inaudible] between 1985 and 1988 then suit was -- then they had no further they moved out of Texas in 1988 and then there was no further contacts with the [inaudible] Texas until they were sued, I believe 2004, 2005, something along those lines. There was no other contacts which would again as some read the Kerlin case have subject them to presence and liability. Not liability but jurisdiction under the -- the long-arm statute. And so I think there is a distinction between the Kerlin case because of all of those contacts --

JUSTICE GREEN: But those -- those contacts stopped two years

before the suit was filed.

MR. COOPER: Correct. And it was those contacts though that -- and again I don't wanna put words in Judge O'Neill's mouth. She is certainly capable of speaking for herself --

JUSTICE MEDINA: No doubt.

MR. COOPER: I'm sorry?

JUSTICE MEDINA: No doubt.

MR. COOPER: No doubt, okay. But it seemed to me that it was the -- the continual effect that every month there was a royalty check that was allegedly, fraudulently being taken that established the presence in Texas that prevented 16.063 from --

JUSTICE GREEN: So one royalty check may not have done it? One accident may not have done it?

MR. COOPER: Well, your present when you received the royalty check back in 1966. But the question is if you received the royalty check in 1966, would that make you present from 1966 up until 1991?

JUSTICE GREEN: Mm-hmm.

JUSTICE HECHT: Was the plaintiff diligent?

MR. COOPER: We don't believe they were in this case, Your Honor.

JUSTICE HECHT: Why not? Why not?

MR. COOPER: We believe there were gaps. If you look at the record, you'll show that for example there was a citation attempted in 05/27/05. There was no new citation issued or attempted until March 17th of '06 in -- on October 11th of '05 in a motion for -- to retain. This case was dismissed from the docket, I believe, once and was set for dismissal at least twice --

JUSTICE BRISTER: It's a ten month -- ten-month unexplained gap?

MR. COOPER: I think there's maybe seven or eight month. In this Court in the Gant case it said, as far as few as three-and-a-half months is not long enough.

The other issue is as far as due diligence, if you have an agent within the State of Texas, someone who's appointed CT Corporation, Judge Brister, you have but I'm intent on trying to serve you personally. You've got an agent in downtown Austin that I can serve, but I'm trying to find you in your Colorado home or where ever to serve you. Now, the question is --

JUSTICE: What?

MR. COOPER: -- is that due diligence if the person has an agent that I could go across the street and serve the entire time period. So we don't believe that there was, due diligence. We believe the trial court was correct in its holding. And we would ask this Court to affirm the judgment of the trial court. Thank you very much.

CHIEF JUSTICE JEFFERSON: Thank you, Mr. Cooper. The cause is submitted and the Court will take a brief recess.

SPEAKER: All rise.

2008 WL 5246388 (Tex.)