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Supreme Court of Texas.
Shell Oil Company; Swepi LP d/b/a Shell Western E&P, Successor in Interest to Shell Western E&P, Inc.
v.
Ralph Ross.
No. 10-0429.

October 4, 2011.

Appearances:

Marie R. Yeates of Vinson & Elkins, LLP, for Petitioners.

Mark L. Perlmutter of Perlmutter & Schuelke, LLP, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Court is ready to hear argument in 10-0429 Shell Oil Company and others v. Ralph Ross.

ORAL ARGUMENT OF MARIE R. YEATES ON BEHALF OF THE PETITIONER

ATTORNEY MARIE R. YEATES: Thank you, Your Honor. Your Honors, the issue on this appeal is whether the royalty owner who seeks to use the fraudulent concealment doctrine in order to avoid the statute of limitations on a stale claim for underpayment of royalty has a due diligence obligation to inquire of his lessee where the face of his royalty statement reveals a potential problem with the royalty payment. And an even further additional issue that's interesting here is whether that duty to inquire of the lessee applies even where the plaintiff claims that the lessee made a fraudulent misrepresentation on the face of the royalty statement. Yes, Your Honor?

JUSTICE DEBRA H. LEHRMANN: Ms. Yeates, may I ask you was there something suspicious on the face of these statements?

ATTORNEY MARIE R. YEATES: Yes, Your Honor, absolutely.

JUSTICE DEBRA H. LEHRMANN: Could you explain that, please.

ATTORNEY MARIE R. YEATES: A diligent review of the royalty statement, actually any reading of the royalty statement, would have show that the price on which Shell was paying royalty on the lease wells, those are the wells located on the lease, differed dramatically from the price on which Shell was paying royalty on the unit wells, which are wells within the unit but not on the lease. And remember that it's Mr. Ross' position that Shell was required to pay royalty for both the lease wells and the unit well on the price that Shell received for the gas.

JUSTICE DEBRA H. LEHRMANN: And he could tell that from looking at those?

ATTORNEY MARIE R. YEATES: Yes ma'am, yes ma'am. And there is a royalty statement in the record. It's Plaintiff's Exhibit 6. There's one of them in the record and you can tell from the face of the royalty statement. So this was something that should have put Mr. Ross on notice of the need to inquire of his lessee. Now Mr. Ross says once--

JUSTICE DALE WAINWRIGHT: What was that thing on the face of the statement that puts him in notice?

ATTORNEY MARIE R. YEATES: The thing on the face of the statement, Your Honor, is the dramatic difference in the price on which Shell was paying royalty on the unit wells on the one hand versus the lease wells on the other hand.

JUSTICE DALE WAINWRIGHT: Your brief talks about a 28% to 93% variance depending on the statements, is that what you're talking about?

ATTORNEY MARIE R. YEATES: That's what I'm talking about and this went on for months and months. Now the Plaintiff, Mr. Ross, says well once the royalty, once the lessee makes an alleged fraudulent misrepresentation, then the duty of the royalty owner to inquire of his lessee just goes away and he bases this argument on some language in BP Marshall to the effect of the Plaintiff discovering the lessee's wrongdoing "through means other than the lessee's representations". But, Your Honors, BP v. Marshall doesn't hold that if the lessee makes a misrepresentation then the royalty owner's duty or the lessor's duty to inquire of the lessee just evaporates. And more importantly, BP v. Marshall wasn't dealing with a situation like this case where the royalty statements not only allegedly contained a misrepresentation, but also contained this information that should have put the royalty owner on notice of the need to inquire of his lessee. Now the Court of Appeals said well, yes, there's a discrepancy on the royalty statements, but you know, the royalty owner might have thought there was an innocent explanation for that that maybe the MMBTU heat content of the gas was different between the lease wells and the unit wells and maybe that accounted for it. But, Your Honors, there's nothing in this court's jurisprudence in HECI and Horwood and BP v. Marshall that suggests that a plaintiff can satisfy his duty of due diligence for fraudulent concealment by just saying well, yea, there might be an innocent explanation instead of making the inquiry to make sure maybe there's not an innocent explanation. And so we believe he's not entitled to rely on a possible innocent explanation where the face of the royalty statement showed this discrepancy.

JUSTICE DALE WAINWRIGHT: What's your answer to the question of, well the Plaintiff argues if I'd undertaken all the due diligence in the world, it wouldn't have proven to me the problem that I'm suing on.

ATTORNEY MARIE R. YEATES: Well, Your Honor, I don't think he--

JUSTICE DALE WAINWRIGHT: Do you have to show, in that scenario, a bit of a hypothetical, that the due diligence would have turned up evidence of the problem?

ATTORNEY MARIE R. YEATES: Good question, Judge Wainwright, who has the burden of proof? And on the due diligence obligation for fraudulent concealment, remember it's the plaintiff who's trying to avoid the statues of limitations by using fraudulent concealment. So it's his burden of proof to prove that he exercised due diligence and the charge is set up that way, puts the burden on him to prove that he reasonably didn't discover,

right? And so when he tries to prove that he exercised due diligence, one of the things that he would have to show is it would have be futile to ask Shell and he tried to show that, but we would argue that the evidence didn't reveal that it would have been futile because Mr. Garrison, who's the head of royalty relations at Shell, testified that royalty owners routinely ask Shell what price did you get for the gas? They even come in to Shell's offices and Shell provides the information. And Shell even keeps a log of which royalty owners came in and asked or called and asked and the Ross' never appear on that log because they never made any inquiry of Shell. Now it's true that Mr. Ross' expert, based on one experience he had had with Shell, gave his expert opinion that Shell's not cooperative with royalty owners, but we believe that expert opinion is no evidence under the legion of this Court's decisions on when an expert's opinion is legally sufficient evidence because it's completely conclusory and unsupported.

JUSTICE DEBRA H. LEHRMANN: If, in fact, there was a duty to inquire then, what if, I mean is that the end of the duty? In other words, what if they would have lied about it?

ATTORNEY MARIE R. YEATES: Well, if the Plaintiff had proven that he asked Shell and Shell lied, that might be a different situation.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY MARIE R. YEATES: Except even there, Your Honor, there's the public records that the Plaintiff could have gone to and that's where I was going next.

JUSTICE DEBRA H. LEHRMANN: Okay.

ATTORNEY MARIE R. YEATES: Here, Mr. Ross, Sr. testified, and this is Volume 4, page 18 of the record that he knew that the state had an interest in the minerals under his lease and he knew that Shell was paying royalties to the state and he knew he could have called the General Land Office to find out what price Shell was paying royalty on for the state. He knew all that, but he never made, never made that inquiry and, in fact, if he'd made that inquiry, the states records, GLO records would have revealed that, again, Shell was paying royalty to the state on a price much higher than the price that Shell was using to pay royalty to the Ross's.

JUSTICE DEBRA H. LEHRMANN: So you're saying that he really couldn't rely on the answer that he was given? He may have the duty to inquire, but he really can't rely because even if they would have lied, then he still would have had to go the next step to look at the public records.

JUSTICE DEBRA H. LEHRMANN: Your Honor, I think the Court's decision in BP Marshall reflects that if the public's records would reveal the truth [inaudible] before he can, and BP deals with the discovery rule and the fraudulent concealment doctrine, the plaintiff has to establish that he took advantage of the public records as well. The ready access of information as the Courts said in HECI. And--

JUSTICE DALE WAINWRIGHT: Counsel, Counsel, on that point, I can't tell if it would be possible to go to the public records and determine if there is some discrepancy that can be determined. The Respondent quotes a Shell witness that says the way you calculate the state royalties is different and you really can't tell a whole lot from what the royalty owner should have received. Can you or can't you?

ATTORNEY MARIE R. YEATES: Your Honor, I'm glad you asked because you really can't tell from the GLO record what price Shell paid, what price Shell received for the gas. What you can tell is what price Shell paid royalty on to the state and it's that price that's much higher.

JUSTICE DALE WAINWRIGHT: Say that again.

ATTORNEY MARIE R. YEATES: You can't, you can't tell from the GLO record, at least based on this appel-

late record, what price Shell received for the gas. The statement that's made in the GLO record is what price is Shell paying the state royalty on. And in this instance, the prices that Shell paid royalty to the state on was much higher, consistently for years, than the prices that Shell paid royalty to Mr. Ross. And so the point I want to make clear is we can't say on this appellate record that if you'd gone to the state records, you would have discovered your injury in the sense that you would have know what price Shell got for the gas. You would have known what price Shell paid royalty to the state on and that price is much higher than the price that Shell was paying to Ross. So really what I'm using the public records for here is to demonstrate that that too would have shown the discrepancy that should have alerted Mr. Ross to inquire of Shell. Because our point is he needed to inquire of his lessee which is, that's why this case is the counterpart to Horwood. Remember Horwood is a discovery rule case and Horwood holds that where the royalty owner's being underpaid royalty because the deductions are excessive, the royalty owner cannot use the discovery rule because it's not inherently undiscoverable since he could have asked his lessee. And if he'd have asked his lessee, he could have figured out that the deductions are excessive. The same thing applies here. If Mr. Ross had asked his lessee, Shell, he would have found out that the price that he was being paid royalty on was the wrong price, but he made no inquiry of Shell for all those years even though he could have done so. And so this case is the counterpart of Horwood for the fraudulent concealment doctrine. The same theory or rationale of Horwood that says it's not inherently undiscoverable because the royalty owner can ask the lessee in Horwood and so, therefore, the discovery rule doesn't apply. Here, the plaintiff can not satisfy his due diligence obligation because he could have asked the lessee. And if he'd asked the lessee, he would have learned of his injury within the statute of limitations period. And this really comes back to the statement that this Court has made over and over again in its cases and I'm quoting that language in Kerlin, the Kerlin case where the Court said royalty owners are not entitled to make no inquiry for years on end and then sue for contract breaches that could have been discovered by due diligence exercised within the statute of limitations period. And that's what this case is about. And it's not an unfair burden on the plaintiff. It's not because remember in HECI, this Court pointed out that the relationship between the mineral lessee and lessor is not a fiduciary relationship; it's not a special relationship. It's a pure contractual relationship where both parties have to protect their rights and this is just an instance where the royalty owner did absolutely nothing for years and years and years to protect his rights.

JUSTICE EVA M. GUZMAN: So they would never be entitled to rely on the factual assertions in the statements as they relate to the payment?

ATTORNEY MARIE R. YEATES: I don't have to go that far here, Justice Guzman, because here on the face of the statement, I have this discrepancy. So certainly where the royalty owner has a, sees a discrepancy or should see a discrepancy on the face of this royalty statement, then, no, we would say he cannot just rely on the royalty statement. And this is different from a lessor just relying on his lessee for purposes of underlying liability. Like you see, that's the point that Justice Owen made in HECI where the Court said look, you know it's one thing to just rely on your lessee with respect to liability for an implied covenant in the lease, but you don't get to just rely on your lessee when you're trying to avoid the statute of limitations using the fraudulent concealment doctrine or the discovery rule.

JUSTICE DAVID M. MEDINA: In Justice Alcala's dissent, she covers that part, but there's also the reference to fraudulent concealment. So let's say if the party here would have looked at the records like you said they should have and apparently this is what case law says it should be doing. What about the allegation that Shell was concealing all this information anyway?

ATTORNEY MARIE R. YEATES: Your Honor, I'm glad you asked because the truth of the matter is they don't get there on that aspect of their contention either. They don't really have evidence of any fraudulent concealment. They've got jury findings of it, but they don't have evidence. Because remember what they say the wrong by Shell here, what was Shell trying to conceal, right? We paid royalty to Mr. Ross on the so-called arbitrary price, which was the price that nobody at Shell could understand how it happened. Even though Shell audited it's 45,000 royalty owner payments regularly, they just so happened never to have audited Mr. Ross. So we don't know why in this record we were paying this arbitrary price for Mr. Ross and several other royalty

owners. So for all this record reveals, it was a mistake and so you can't get to fraudulent concealment based on a mistake in payment that shows up in the royalty statement. Then he says well Shell was paying on the unit wells on the weighted average price, remember that? And that, of course, is just a dispute on the law on whether it was appropriate to use the weighted average price or not. That's what part of what this lawsuit's about. And where there's a dispute in the law, we thought we were doing it right. We had some legal authority for the proposition. You can't get to fraudulent concealment because we're paying on the weighted average price when we think we're doing it right. We don't intend to conceal anything. Finally, he's got the payment by the, on the transfer price, remember that years ago, Shell and all the other oil companies were selling the oil and gas to their marketing affiliate and then getting paid on a transfer price. Mr. Ross never got the transfer price because he was getting the arbitrary price. But remember that Shell broadly disclosed that it had paid on the transfer price, that's the October 1995 letter where Shell sent it to 2,000 royalty owners in Texas said we've been paying you on the transfer price. Here's a check to make up the difference between the transfer price royalty and the third-party sale royalty and we want to make it whole. Mr. Ross can't remember whether he got the letter 10 years earlier, but there's evidence in this record that we cut the check for Mr. Ross. So you see, there's no evidence here to show that Shell committed fraud on the royalty statement in any event. I see I'm almost out of my time now. The Court of Appeals put those three types of breaches together, the majority of the Court of Appeals and said multiple breaches equal fraud and we think that zero plus zero plus zero is still zero, that mere breach of contract is not fraud. This evidence is not evidence of any pattern attempted by Shell to underpay royalty by using this method and then this method. What this record reveals is a legal determination they could pay on the weighted average, a mistake on the arbitrary price and a correction of payment of royalty on the transfer price. So we don't believe they have evidence of fraud. We think that the dissenting justice in the Court of Appeals was correct. The dissenting justice who wrote saying that there's no evidence that Shell committed fraud. There's no evidence that they were trying to conceal anything and there's certainly no evidence that Mr. Ross acted with due diligence. Remember, he's a sophisticated oil and gas lawyer. He ran his family's oil and gas interest for years, but he admittedly did absolutely nothing to protect their interest with respect to whether Shell was paying them the correct royalty and on that situation, we think this Court should use this case as the opportunity to write the parallel holding to Horwood. Here Horwood's discovery rule, this is fraudulent concealment doctrine and the same rationale would tell you that the royalty owner for the fraudulent concealment doctrine has to diligently review his royalty statements, he may have to check the public records, in this instance we think he should have and make inquiry of his lessee in the event that there's some discrepancy. Unless the Court has further questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: There are not, thank you, Ms. Yeates, and the Court is now ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Perlmutter will present argument for the Respondent.

ORAL ARGUMENT OF MARK L. PERLMUTTER ON BEHALF OF THE RESPONDENT

ATTORNEY MARK L. PERLMUTTER: May it please the Court, members of the court, the first thing I think it's important to start out with is the question of what kind of a case this is and what the factual pattern really demonstrates and what that means for this Court's legal decision. This is a choice between old-school values and a way of doing things and expecting people to tell the truth versus expecting the worse from people and thereby getting it. And the reason I included a picture of Mr. Ross, who's 83 years old at the time of his deposition, in this exhibit packet that you have before me is because I was, thought it was important for you to understand that this is an old-school kind of guy. When he, he was a lawyer, yes. When he reviewed his oil statements, he expected Shell Oil Company to do what any honorable company would do in the State of Texas and that is to adhere to their statutorily required disclosure requirements. 91.502 of the Natural Resources Code is a state mandate that requires each royalty payer to disclose the amount of, the amount received for the gas and oil that they show.

JUSTICE EVA M. GUZMAN: And I understand that argument, but the discrepancy between the lease wells

and the unit wells, especially if you had spent, I guess the record reveals your entire life in this industry. Why wouldn't that be sufficient to cause you even in his condition or state, 83 years old, some concern?

ATTORNEY MARK L. PERLMUTTER: Well, Your Honor, with hindsight, it's a discrepancy. Without hindsight, it was a difference. Similarly, there's a difference between what is paid each month, the amount that a royalty owner receives each month on their royalty statements is different. And the fact that he did know something about oil and gas is the very thing that caused him to not look into the issue because there were three readily available explanations. One, different contracts applied to different wells. Two, the heating value of the oil and gas from each well could have been different and, three, there's a difference in allowable deductions potentially from well to well. And so if you look at the statement, there's a difference, but there are three readily available explanations.

JUSTICE DALE WAINWRIGHT: Those sound like three good starting points for questions to ask about the differences in this statement, don't they?

ATTORNEY MARK L. PERLMUTTER: Absolutely, Your Honor. I mean there's not any question that there could have been a conversation about that, but the question is whether there was a duty to initiate that conversation given that the oil company has got an obligation to disclose the amount they received. If they--

JUSTICE EVA M. GUZMAN: But they're not fiduciaries, right?

ATTORNEY MARK L. PERLMUTTER: No, but there's a statutorily mandated duty, Your Honor. The statutory, and that's one of the important things in this case. There's a legislative mandated policy that Shell violated by falsely reporting what they got for the gas in this case. And because they falsely reported and because there's a legislative policy that there ought to be a consequence--

CHIEF JUSTICE WALLACE B. JEFFERSON: But if there, but if there is no duty to inquire, then there may be leases out there that are 40 years old where the disclosure wasn't made that now can be the subject of litigation even though witnesses have died and people, memories fade, etc. Isn't there a policy behind this diligence requirement before you can overcome the oldness of the lawsuit?

ATTORNEY MARK L. PERLMUTTER: Well certainly, Your Honor, there's a reason for the diligence requirement, but what I'm suggesting to the Court is that there are plenty of reasons why diligence in this case, given the finding of fraudulent concealment, additional diligence is not required.

JUSTICE NATHAN L. HECHT: If there were--

ATTORNEY MARK L. PERLMUTTER: The case says, I'm sorry, Your Honor. The case that the, that Chief Justice suggests, the 40-year-old case, what I'm suggesting is that this Court hold that once a fraudulent representation is made, there's no duty of inquiry until additional evidence comes to the surface that would trigger that duty of inquiry and that would call into question that fraudulent representation. Now I can't imagine something going on 40 years without that additional efforts coming into play and that's exactly what happened in Kerlin where arguably fraudulent representations were made, I'm not even sure they were in that case, but arguably fraudulent representations were made and other information came to light, public records, all kinds of public records came to light within that 40 years so that case should have been filed a lot earlier, but this is different.

JUSTICE NATHAN L. HECHT: If there were any, if the only claim were for the weighted average problem, would there be evidence of fraudulent concealment here?

ATTORNEY MARK L. PERLMUTTER: Yes, Your Honor, there would be evidence of fraudulent concealment.

JUSTICE NATHAN L. HECHT: And how's that if it looks like just a legal disagreement about the meaning of the lease?

ATTORNEY MARK L. PERLMUTTER: Yea, it's not just a legal disagreement, Your Honor, because what was going is there's, what Shell actually did in this case was not a traditional weighted average approach, the way a weighted average approach is supposed to work. What Shell actually did was sold all the gas that was allocable to their track and then paid royalties on this dummied-up weighted average approach as if they had, as if they had sold gas, the other parties to the unit had sold gas and the prices were average. That's not what happened. Shell got 100% of what it sold and, in addition to that, you have a situation in which you got a very clear lease. If you look at, on our exhibits, Exhibit E, if you look, I'm sorry, Exhibit D, the last page we've blown up paragraph 13. If you look at that, it's very clear that there's no weighted average. The production allocated shall be considered for all purposes, including the payment or delivery of royalty to be the entire production of unitized minerals from the portion of the land covered here by it. That is all the minerals from the tracked allocation is what is included for the payment of royalty. There's no suggestion at all that there's a weighted average allowed. So it's the clarity.

JUSTICE NATHAN L. HECHT: So be it, so I understand your position, if you're real wrong on the legal construction of the lease that could be fraud?

ATTORNEY MARK L. PERLMUTTER: Not fraud, Your Honor, not fraud. That can be knowing that you're wrong and knowing that you're wrong is an element of fraudulent concealment. I'm not suggesting it's an element of fraud. It's saying that if you know you're wrong and then you take action to cover that up, that's fraudulent concealment and there are cases that we cited to explain the difference between those two concepts in our brief, Your Honor.

JUSTICE EVA M. GUZMAN: Can you be wrong and it simply be a matter of accounting or software or maybe a dispute on how the contract terms require things to be calculated and why should the general rule be that if there's something wrong about the way you paid out those royalties and you don't correct it automatically, somehow that's fraudulent concealment?

ATTORNEY MARK L. PERLMUTTER: But, Your Honor, one of your problems is you've got the pattern of wrongdoing in this case. You've got three different schemes that they were applying, all of which happened to result in lower royalties for the royalty owner. That I suggest to the Court is not an accident.

JUSTICE EVA M. GUZMAN: No, but they can't be three different ways to breach the contract. I mean why do we classify these alleged, and they are wrong calculations as a scheme? What turns them into a scheme or a pattern?

ATTORNEY MARK L. PERLMUTTER: Well what makes them is a scheme is that they're widespread. I mean we know that the arbitrary price scheme occurred for at least 10 other royalty owners. We know that, we believe, well we don't know that the weighted average scheme that they used for this client applied to anybody else. And I want to finish answering Justice Hecht's question on that. The other evidence is on page 56 where we talk to, of the record where we talk to Mr. Garrison and he says, what I asked him is how do you get the oil and gas on the proceeds lease? He says depending upon all the provisions of the lease and the arrangements, proceeds leases are generally paid on what's received. And I say on what Shell actually sells the gas for, correct? He says on whatever the company actually sells the gas for on the proceeds and I say yes, sir, and he says on their, on its receipts. He's not talking about any weighted average business there at the time of the deposition. We think the weighted average calculation was something they came up with in retrospect to justify the calculation that actually appeared on there. But at the time of his deposition, he wasn't talking about that. So we think there's plenty evidence that each of those, each of those schemes, oh and by the way, the scheme where they were basing the royalties on the transfer price, that one. That one was an absolute sham, if you look at the facts -

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JUSTICE NATHAN L. HECHT: But it was all over the state wasn't it, class actions?

ATTORNEY MARK L. PERLMUTTER: Well, but Your Honor, and some of those oil and gas companies were doing it.

JUSTICE NATHAN L. HECHT: There was a Federal class action wasn't there and I think--

ATTORNEY MARK L. PERLMUTTER: Some of them were doing it legitimately and some of them clearly weren't. Shell's, if you look at the facts in this case, was clearly a sham and it was just a dummied-up operation to do this. And, in fact, the fact that they disclose that in a letter, I suggest to the court is not that they were admitting anything, it's not that they were voluntarily admitting something. They got caught and so they had to do that to avoid further liability and that's what I think the jury found and believed when they found that Shell committed fraud in this case. The other thing I want to point out is even if there had been inquiry that had been made, first of all, Shell lied to us at the, on the royalty statement. They then lied in deposition both about the transfer, both about the arbitrary price and about the other price. Exhibit C, I'm sorry, Exhibit B has the testimony of where they, where they admit falsely testifying in deposition about the prices that were in the records.

JUSTICE DEBRA H. LEHRMANN: Well let me ask you about that. Let's say if they, if the inquiry would have been made and they had lied, how do you respond to BP, which says at that point in time, they had a duty to look for, to look at the public records and that kind of thing?

ATTORNEY MARK L. PERLMUTTER: Well there are several different distinctions between our case and the Marshall case. First of all, in the Marshall case, there was no legislative mandatory reporting requirement on the representations that had been made. No legislative policy to give effect to. Second, and in our case, there are no public records and I'll get to that when the court's ready, but there no public records where you could have found anything.

JUSTICE DEBRA H. LEHRMANN: Well that's my question. And in a response to what Ms. Yeates was talking about that there were public records that would reveal this. Could you respond to that?

ATTORNEY MARK L. PERLMUTTER: Mostly assuredly there were not, Your Honor. And the reason I say that is because, remember, we talked about the fact that Shell lied on their monthly statements. They then falsely represented what was in their records about what the gas sold for at their depositions both on the weighted average price. So if we had inquired about the weighted average price, as Justice Wainwright, I think it was Justice Wainwright, mentioned before, if we had inquired about the, about the weighted average price, we may well have gotten the same answer that we got at trial, which was oh well, we just paid on what El Paso Natural Gas paid us. Well, now we find out later that they're claiming that they paid on the blended average, the weighted average price. That was down the road. But then when we said well, when they, when we said well, we wouldn't have been able to find out if the GLO, and I made a mistake. I thought Mr. Garrison, on page 58 of the record, I thought Mr. Garrison had said, no, the only place to find the records was us, but actually when I went back and reread it after making the mistake in my, an early brief, I learned that, oh, he said the records were at the GLO. And so, and that was the first time that we had heard that, that the GLO actually had the records of what Shell got for the gas. And if you look, and this is really important information, Your Honor, if you look at Exhibit C1 and C2, first of all, there's two questions, one whether Garrison's testimony that the information at the GLO really was there and to be conclusive, that testimony has to be otherwise creditable and, remember, on page 127, 128, 141, 142, Garrison has been shown to have falsely testified about what's in the records twice before. So that testimony is not otherwise credible. So if the Court is going to find that we would have or should have found out what had happened, then we, then it's got to say that, well, we would have found this information at the GLO. And here's what we found out is actually at the GLO. I guess the Court could judicially notice that it was there if it was there, but we found out is it wasn't there. And the reason we found that

out is because we made an open-records request while this appeal was pending to the GLO to see exactly what they had and asked them produce what you've got that shows that Shell actually reported their gross proceeds to you. And Mr. Garrison at the trial claimed that Shell actually had the gross proceeds there; that was his claim. And looking at exhibit C1, what we got back was this table from the GLO, detailed table showing what they had from Shell. And in that detailed table, it wasn't broken down by well so, so what we were forced to do in order to try to make a comparison is take the volumes in that volume table and code number 24, which was sales and then compare those volumes to what Shell produced in discovery, which is Exhibit C2 and you'll see Exhibit 2 is labeled pages 181 through 184 and what it shows there is the monthly production and all we asked for was 95 because I knew I wouldn't have time to explain more than one year. But if you look at that chart, you see the lease number and all that and you see the price that Mr. Ross was actually paid on in the Royce MCF price. You see what the GLO was paid on and when you hear that it was dramatically higher, well notice that the GLO price was even below the ultimate Coral sales MCF price, that is the third-party sale price that Shell's affiliate sold to the public; that's the real one. The Coral sales price is what Shell actually got for the gas. That's the last column on Exhibit C2.

JUSTICE PHIL JOHNSON: Counsel, excuse me, am I understanding correct? This was not, this is not in the record, trial record. This is just something you're, you generated, this shows the date of August 11th so this is not in the trial record, is that correct?

ATTORNEY MARK L. PERLMUTTER: That's correct, Your Honor, and the reason I'm suggesting the Court consider it is that what's in the trial record is inconclusive, but if this Court is going to say that we would have found this via judicial notice, judicially notices that these records are available at these other places, if the Court's going to decide that, it would be helpful to know what the adjudicated facts that are the, I mean the legislative facts that are the basis of that conclusion would be. And this is what they show and if you'll look at that last column on Exhibit C2 on the first page, you'll see that except for one case, the price that Shell reported in, as what it actually sold the gas for in Exhibit C1 was way below what the actual Coral sales price was. So Garrison lied when he said that oh yes, we gave them, we gave the GLO what we actually sold the gas for, that was also false we now find out. And so what I'm suggesting to this Court is that maybe there was a duty of inquiry. There's certainly no evidence in trial, much less what we know now that Shell ever would have told the truth about the weighted average price, about the arbitrary price or about the sham internal transaction price. What we do know is they were obligated to tell the truth on the original disclosures that they made under the Natural Resources Code and I'm going to suggest if this Court is to deny landowners as a matter of law, now I'm on Roman numeral II in my handout, deny landowners as a matter of law the right to rely on representation as mandated by the Natural Resources Code that's going to absolutely eviscerate any incentive not to lie on those statements. And second, it's going to defeat the legislative policy of mandated reporting and, third, it's going to violate this Court's longstanding policy to give estopple effect to fraudulent concealment. I know in the Marshall case, or at least I understand in the Marshall case that Justice Phillips when asked well, what is the effect of fraudulent concealment essentially, well and he said something about well you could make, you could sue somebody for fraud for four years based on a false fraudulent concealment representation. Well, that's actually not the law because there's no cause of action for the fraud itself. In other words, if you've got a breach of contract and somebody says okay, I'm not really breaching the contract and you rely on that, there's no cause of action for relying on it because your harm, your damage is caused by the breach itself not by the representation. And that's the holding of this case that I talk about here, Crawford v. Ace Sign, Inc. It was one of your cases per curiam opinion in 1996. So there's no basis whatsoever for deterring fraudulent representations unless you allow someone to rely on a statement that constitutes fraudulent concealment.

JUSTICE PAUL W. GREEN: Mr. Perlmutter, maybe it's just now sinking in, but are you, are you, going back to the Garrison testimony, are you suggesting that the testimony in the record, we're supposed to conclude that he lied because on the basis of records that you're bringing to the Court now?

ATTORNEY MARK L. PERLMUTTER: No. Well in the last case, yes, in the last case, yes or that because we know he lied based on the record for at least two different occasions if you look at 127, 128, 141, and 142, he

misrepresented what the records said about the arbitrary price scheme. He misrepresented what the record said about the weighted average claim and then he made a third representation about what would be at the GLO. We know that the first two representations were false because he actually admitted that.

JUSTICE PAUL W. GREEN: So you're asking up to conclude then that he lied the third time because of what you brought?

ATTORNEY MARK L. PERLMUTTER: Well I'm suggesting, Your Honor, that, not, I'm suggesting you conclude that he lied the third time based on the fact that, or that the jury was justified in concluding that we were diligent because his testimony that the records existed at the GLO was not conclusive. That's, that's the point I'm trying to make. Okay, so that's based on the record. But on the other hand, if this Court's going to go beyond the record and say well we know as a Court that these records exist at the Railroad Commission or these records exist at the GLO, I'm suggesting to you before you do that, consider what we now know to be the fact there. Is that clear?

JUSTICE PHIL JOHNSON: When did you furnish these records to the opposing party in this case?

ATTORNEY MARK L. PERLMUTTER: Well I got my exhibit reproduced at 8:00, 8:15 this morning and furnished those to opposing counsel before argument, first thing this morning.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

ATTORNEY MARK L. PERLMUTTER: Thank you, Your Honor.

REBUTTAL ARGUMENT OF MARIE R. YEATES ON BEHALF OF PETITIONER

ATTORNEY MARIE R. YEATES: Thank you, Your Honor. I'd like to start with the so called statutory mandate. That's the Natural Resources Code requirement for what has to be in a royalty statement and it requires both that you state the price on which the royalties pay and the deductions and the Court dealt with that Natural Resources Code requirement in Horwood and said that there is a duty on the lessor royalty owner to check to see if the deductions are proper as they show up on that royalty statement. So if counsel were correct, Horwood wouldn't have been decided the way it was decided because Horwood was likewise dealing with the Natural Resources Code statutory requirement for what the lessee has to state in the royalty statement. Now with respect to the Justice Hecht's question about the weighted average. Your Honor, as we explain in our brief, the legal argument is that a unit, unitization has the effect of cross-conveyancing by all lessors in the unit to all lessees in the unit and that's why some courts have held that, and the cross-conveyance theory was adopted by this Court. It wasn't for royalty payment. It's in the Veal case from the 1940's and even Professor Smith had written an article and said you can pay royalty based on weighted average. Now he since changed his mind on that, but there was authority at the time that Shell did it for the proposition that that was an appropriate way to pay royalty on unit wells.

CHIEF JUSTICE WALLACE B. JEFFERSON: You agree that there's a case is it Puckett that is contrary?

ATTORNEY MARIE R. YEATES: That's exactly right, Your Honor. And that's why I put it to Your Honors as a legal dispute and even if Shell were incorrect in the time and we don't say that we were, but even if we were, there's no evidence that the plaintiff adduced to show that we knowingly committed that wrong or we were trying to conceal something. Now with respect to the transfer price being a sham, I want to make clear this is not a very long record. There is nothing in this record that says that's any evidence that Shell's transfer price was some kind of a sham. Shell wrote the letter in October of 1995 to say this is the way we've been doing it; we want to do it a different way now. The way we're going to do it is we're going to pay on the higher of the transfer price or the third- party price that our affiliate receives. Here's a check to make up the difference, but there's no evidence that Shell was saying we committed a wrong or that Shell's program was some kind of a sham.

With respect to these records that Counsel just gave me this morning, first of all, the exhibit he's pointing to is actually in the record, but he's modified it. This column that he's added on C2 is his information, which I'm not sure how he did it. But the point is that the documents that he's given, Your Honor, which I think are proved up by emails that are not appropriate for judicial notice, but in any event, if you look at the documents, they reflect exactly what I said to Your Honors. They reflect that the price on which Shell paid royalty to the state was consistently, he has records for '95 in the record of the appeal in PX11 and PX18 you'll see that it was for years and years that Shell was paying a price to the state, royalty on the price it was higher than Ross' royalty and the only thing I'm citing that for is to show that's another way that he should have been on notice to come ask Shell and that leads me to Justice Green's question about how can you decide that Mr. Garrison, our head of royalty relations, was lying? He's, when he keeps telling you that he lied at trial, what he's talking about is Mr. Garrison's first deposition that was taken before the documents had been gathered and Mr. Garrison thought that Shell had paid Ross according to the program that Shell adopted when it sent out that October 1995 letter. So when he gave the first deposition, he thought we were paying them based on the third-party price. And then they went back and collected the documents and we asked to have him sit for a new deposition because he had been mistaken and he came in on the second deposition and he said, no, wait a minute. I've collected the documents it turns out we paid him on some kind of price I can't explain. It's arbitrary, that's what we called it on appeal, but he admitted the error and corrected it. So here Counsel has beat that like a dead horse throughout this appeal, but I don't think it demonstrates that you could discount Mr. Garrison's testimony that Shell would have provided the information if asked, but let's say you could. Let's say you could just wipe Mr. Garrison's testimony out of the record. Then I think you're at City of Keller and the question is he had the burden of proof and did he prove that it would have been futile to ask Shell for the information, to inquire of Shell even if you could get rid of Mr. Garrison's testimony. He had the burden of proof. He needed to prove what Shell would have done and if he gets rid of Mr. Garrison's testimony, he still doesn't have evidence that Shell wouldn't have provided the information. In other words, negating Garrison's testimony is not evidence of the opposite. I think that's what City of Keller holds and he had the burden of proof. So we believe that this case is the counterpart to Horwood and that it's exactly as we presented that the Court could help the industry; that's why those amicus briefs have been filed here. The industry's concerned about the Plaintiffs in stale royalty cases using the fraudulent concealment doctrine to get around the body of law that Your Honors have written under the discovery rule. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Miss Yeates. The cause is submitted and the Court will take another brief recess.

MARSHAL: All rise.

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