This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
BP America Production Company, Atlantic Richfield Company and Vastar Resources, Inc.
v.
Stanley G. Marshall, Jr., Robert Ray Marshall, Catherine Irene Marshall f/k/a Catherine I.M. Hashmi, and Margaret Ann Marshall f/k/a Margaret A.M. Jeffus, by and through David Jeffus, as independent executor of the estate of Margaret Marshall.
No. 09-0399.

December 7, 2010.

Appearances:

Thomas R. Philips of Baker Botts, LLP, for petitioner.
Pamela Stanton Baron, for petitioner.
Tim Patton of Timothy Patton, PC, for respondents.
David M. Gunn of Beck, Redden & Secrest, LLP, for respondents.

Before:

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

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in the first matter, 09-0399, BP America v. Marshall.

MARSHAL: May it please the Court. Mr. Philips and Ms. Baron will present argument for the Petitioner. Petitioner has reserved six minutes for rebuttal. Mr. Philips will open with the first seven minutes. Mr. Philips and Ms. Baron will both present rebuttal.

ORAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS PHILLIPS: May it please this honorable Court. These two cases being argued together

today reveal the difficulties that arise in the law when courts honor stale claims, particularly those from the oil patch. In this case, the Court of Appeals upheld a jury verdict that ARCO, BP America's predecessor, committed fraud by making statements in 1981 that caused the Plaintiffs, the Marshalls, to believe that a lease was still in force on their mineral interests underlying a large ranch in Webb and Zapata counties when, in fact, that lease had, by that time, terminated for lack of production. In this Court, BP will focus on four errors that the Court of Appeals made in our half of the case. First, we urge that the Marshall's claim against us was time barred as a matter of law. Second, that there was no evidence that any of BP's statements amounted to fraud. Third, that in any event there was no evidence of fraud damages and, fourth, further in the alternative that the award of a future accounting against BP was clearly erroneous. I will attempt to address as many of these grounds as I can. First, the claim is clearly barred by limitations having been brought more than 20 years after ARCO made it's allegedly fraudulent statements to the Marshalls back in June of 1981. Under our law, the only way the Marshalls can defeat this defense of limitations is by showing that they acted with reasonable diligence to discover and protect their rights. Well, what did the Marshalls know? As of June, 1981, they knew that the primary term of their five-year lease to ARCO had expired the previous July, July of 1980 and that ARCO could only keep that lease in effect by undertaking continuous operations with no cessation of more than 60 days. The Marshalls also knew that ARCO had drilled only one well on this lease. It was spudded about two weeks before the primary term of the lease was to expire. They knew that that well had taken nine months to complete and rework whereas the average well out in this area of the state was about three months to complete. So what did the Marshalls do with the primary term of the lease over, we're in overtime as it were, what did they do to protect their interest and get their mineral interest in this ranch back if, indeed, their lease had expired. Well, for almost a year, they did nothing. Then on June 25, one of the Marshalls called ARCO and had a three to five-minute talk with one of ARCO's representatives who four days later sent a three-page letter outlining what ARCO had done on the lease and that's in this bench book at tab 4. That's all they did. Based on the one conversation and reading the one letter, they sat back.

JUSTICE DAVID M. MEDINA: Why isn't that enough? Why must they do something more than rely upon the party who they're dealing with to tell them the truth when every statement or all the information that's pertinent for them to make a decision, why must they do more?

ATTORNEY THOMAS PHILLIPS: Well, first, I'll get to the point in a minute, but nothing ARCO said was a lie or incorrect and it's not a fraud for various reasons, but let's assume it was, why they must do more is this Court's jurisprudence that a claimant wants to assert a stale claim must exercise reasonable, to exercise that claim, you've got to use reasonable diligence to discover it. For instance, in Hickey Exploration v. Neil, you held that the Neils were put on notice by the fact that there were other operators in the area and by the fact that the reservoir underlying their interest was a common reservoir with other leases and they were on notice of that so that they were supposed to know that their lease was being drained even though weren't geologists and they couldn't go a mile under the surface and presumably they couldn't even directly get into behind locked gates and look at what the other drillers had done.

JUSTICE PAUL W. GREEN: So assuming the actions taken by Ms. Vaquillas and ARCO at the time was with fraudulent intent? It's your argument that still and in the face of that that Marshall was under some duty to conduct a reasonable inquiry?

ATTORNEY THOMAS PHILLIPS: Yes and that's what this Court unanimously held last year in Kerland v. Sauceda, that in the face of Mr. Kerlin's repeated flat out lies to the Sauceda's that they didn't have a royalty interest that the Saucedas were required to go look through the mineral deeds in the county courthouse and discover that, indeed, they did have a royalty interest and they could not lay back for 30 to 40 years and then bring suit for fraud.

JUSTICE PAUL W. GREEN: So every royalty owner can no longer under your reading of Sauceda can no longer rely upon the representations of the operator?

ATTORNEY THOMAS PHILLIPS: They can rely on it for four years and if, but if they're under, if they have suspicion which you clearly would here. I mean this lease was nearly a year over. There was only one well that was being drilled or worked on. They had some duty to do something more than to come back in after 20 years because when you allow a claim after 20 years, it creates the kind of problems you'll see in the Wagner-Vaquillas, half of this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: There are always problems when you rely on the discovery rule, though. It extends limitations, I mean that's the point of it, correct?

ATTORNEY THOMAS PHILLIPS: It is, but the discovery rule clearly does not apply in this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask on tab 4, the letter, did I understand you to say that this is accurate?

ATTORNEY THOMAS PHILLIPS: Those statements --

CHIEF JUSTICE WALLACE B. JEFFERSON: Everything in this letter is accurate?

ATTORNEY THOMAS PHILLIPS: I believe the record will show that there's no statement in here that is not true. The Marshalls' complaint is that this is selective and that had they known more information, it would have put them on notice to make further inquiry, but this Court has rejected that notion that fraud includes a duty once you've said something to say everything. That's Restatement 551 for the Marshalls.

JUSTICE DALE WAINWRIGHT: The Marshalls put a little finer point on their argument. Their arguments that statements in this letter even if they are all true provide a picture of what's going on in that oil patch that was not accurate. So even though everything here is true, there's a duty to provide other information, which was that Walker Well #1 was a dry hole and was never going to produce.

ATTORNEY THOMAS PHILLIPS: That's in here. It's absolutely in this letter that that's a dry hole and that now Sanchez- O'Brien has spudded a well, that's the last sentence and it turned out eventually to be a producer.

JUSTICE DAVID M. MEDINA: Why shouldn't the Court adopt a restatement?

ATTORNEY THOMAS PHILLIPS: Well I'm not saying the Court should never adopt that restatement. If it's a very simple proposition that one thing was said and that leaves a demonstrably false impression if you knew one other fact, but this is a very complicated situation. The Court of Appeals spends more than two pages from 447 to 449 of Southwestern 3rd, explaining what it thinks BP could have said that would have led the Marshalls to make further inquiry and I invite you to read that part of the case very closely because many of those statements don't mean anything to me even after thinking fairly hard about this case and then the Court summarized with this statement of the law, the Court of Appeals on page 449 said, "the evidence shows that if all the relevant information had been fully and accurately disclosed, the Marshalls would have been prompted to further investigate." I submit that's an unworkable standard for people who are not in a confidential or fiduciary relationship and really if you read this for guidance as someone in a commercial enterprise, if you read this case to know how much you should say in answer to an inquiry to someone you're doing business with, you're left with an inevitable conclusion I should either say nothing at all or else I'm going to have a jury trial in 10 years and I'll find out.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Philips.

ATTORNEY THOMAS PHILLIPS: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Ms. Baron.

ATTORNEY PAMELA STANTON BARON: May it please the Court. I'm here for Wagner on the Wagner-Vaquillas part of this case. It's really a separate appeal. It involves limitations and trespass to try title. The jury found that Wagner had acquired limitations title to the Vaquillas lease under the three, five and ten-year adverse possession statutes. The Court of Appeals reversed saying the issue should never have gone to the jury because fraudulent conduct on the part of BP two decades earlier had prevented Vaquillas from knowing that the lease had terminated. The Court of Appeals' decision threatens the settlement repose of title and it's wrong for four reasons. First, as this Court has recognized, a record title owner's ignorance of what it owns is not the bar to limitations. It's not what you think you own. It's what you actually own. Second, Wagner repudiated what Vaquillas actually owned, that Vaquillas unleased co-tenants right to possess the minerals. For 19 years, Wagner claimed the exclusive right to all the minerals and not just a co-tenant share.

JUSTICE DAVID M. MEDINA: How does a bona fide purchaser play into all of this argument here?

ATTORNEY PAMELA STANTON BARON: Well I think that it bears the fact that it shows that Wagner did not participate in any fraud. The bona fide purchaser finding is contrary to the Court of Appeals' finding that fraud somehow affected the running of limitations in this case. These courts' decisions on bona fide purchaser made clear that your sole remedy is against the fraud feasor which is what we're arguing in our case, but the Court doesn't really need to reach the bona fide purchaser because I think this case should be decided on the adverse possession issues. Turning to our other two points, there's no such thing as fraud by privity. Fraudulent concealment by predecessor does not toll limitations against a successor who has no knowledge of and does not participate in the fraud and as I just told Justice Medina, it's undisputed here that Wagner did not participate in the fraud. And fourth, there's really no reason to disrupt the settlement and repose of titles by creating a fraud remedy. Vaqillas had one. It was adequate. They sued the fraud feasor. They settled, dismissed that claim with prejudice and they've been made whole. I'm going to focus on repudiation and fraud by privity. Turning into repudiation, it's important to bear in mind if a co-tenant comes on to the land, drills a well and says nothing, he's presumed to be there in furtherance of his rightful share. But if a co-tenant comes on the land, drills a well and says I get all of it. I have the exclusive right and you have no right to the proceeds, then that's a repudiation. Here, Wagner didn't come on the property silently. It didn't claim just a co-tenant share. For 19 years, it said we have the exclusive right to drill, produce, possess the minerals to the exclusion of Vaquillas and Vaquillas knew this. We have a handout. It's a green sheet called Wagner Chronology and it highlights some of the affirmative actions that Vaquillas took that recognized the claim to the lease and they sort of fall into three categories. First, their actions that recognize the lease. They sued to enforce the lease. They signed division orders ratifying and confirming the lease and as this Court knows, the claim to hold a lease is the mineral equivalent of a fence with a locked gate. The lessor has no right to come on to the property to drill, possess or explore for the minerals. The lessee has the exclusive right to the minerals during the term of the lease. Second, it shows that Wagner tendered and VAquillas accepted royalty every month for 19 years. In Vaquillas expert testified that the checks clearly showed a royalty interest of 4.23% and not a co-tenant share of 25.39% that Vaquillas would be entitled to as an unleased co-tenant.

JUSTICE DEBRA H. LEHRMANN: Okay, are you saying that that was explicit on the checks that that was a royalty interest?

ATTORNEY PAMELA STANTON BARON: Check skirt do give information about production and the percent that's being paid and their expert testified that the check did clearly show a royalty interest, plus they certified their interest in the division order. They said our interest in these wells is a royalty interest and is 4.2317%. We would assert that the payment of royalty instead of a co-tenant share was an act hostile to their unleased co-tenant interest.

CHIEF JUSTICE WALLACE B. JEFFERSON: Ask you just a quick question on adverse possession. Do you say it's possible to adversely possess a mineral lease in this situation?

ATTORNEY PAMELA STANTON BARON: That's what this Court held in Pool, absolutely.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, didn't we make a lot of distinctions in Pool between regular leases and co-tenancies. There's a paragraph that note on page 194 where we said many times a party, distinguishing that the parties to the leases here were not co-tenants. There was no co-tenancy and we emphasized that several times.

ATTORNEY PAMELA STANTON BARON: Right and I think that made the Court's job a little bit easier in Pool, but Pool applied the exact same repudiation standard. It applied the standard that was announced in Moore v. Knight and Morris v. Thatcher and Tex-Wis v. Johnson and that's a repudiation standard that applies both to co-tenants and also to holdovers after tender of a deed or holdovers after expiration of a lease. All require repudiation and the Court in Pool did recognize that if you claim a lease, you are claiming all of the minerals which is an action hostile to the other interest owners' interest in the property. The Court also recognized that paying royalty when they were entitled to the whole thing was also a repudiation. So I'd say the Court didn't have, there were some things that were different because it was a co-tenant. For example, a co-tenant can come on the land and drill the well and if that's all they're doing, that's not a repudiation. But if you're claiming the exclusive right to the minerals, that's a far different case and that's the case we have here. The third thing this handout shows is that Vaquillas filed its own documents in the deed records that recognized it had a royalty interest that recognized the lease and it also shows how at the time these were filed and basically what their documents in the deed reference to is they transferred the mineral interests from Vaquillas' Ranch, the original lessor, to the two partnerships that are the current plaintiff holders of the mineral interests in this lawsuit. At the time those various deeds were filed, the assignments from Sanchez-O'Brien to ARCO from ARCO to Fina from Fina to Wagner were all in the deed records. They all very clearly identified that they were claiming the lease between Vaquillas and ARCO. It gave the date. It also gave the deed record sites, where the various leases were reported.

JUSTICE PAUL W. GREEN: Do you think that there are a lot of other examples of this scenario happening around the state?

ATTORNEY PAMELA STANTON BARON: I think there will be and I think the Court has seen a number of cases where titles that have been secure for decades or centuries are being challenged based on claims of fraud or bill of review type actions. You saw it in Frost National Bank v. Fernandez and Kerlin v. Sauceda and King Ranch v. Chapman.

JUSTICE PAUL W. GREEN: It just seems to me that if you're right that it would be pretty easy for some company out there to start making royalty payments in a co-tenant situation however prevalent that may be just to see what happens and maybe they can get away with it for awhile.

ATTORNEY PAMELA STANTON BARON: Well, I doubt that they can, but I think they would also have to do more. They'd have to claim we own the entire lease.

JUSTICE PAUL W. GREEN: And then after a period of years, they could because of course the royalty owner's getting all this so-called royalty owner is getting all this payment and things are looking good and then all of a sudden 10 years later, they say oh by the way, we own your share of the property now.

ATTORNEY PAMELA STANTON BARON: Well, again, I think that goes you have to pay attention to you rights. You have to read the check skirt. I don't think that's a difficult thing to require somebody to do when the checks come every month in the mail plus as Vaquillas said we we hired a petroleum engineer every year to review the production records so that we could pay our own taxes so they were looking at this very closely.

JUSTICE PAUL W. GREEN: Every mineral owner has to have an expert on call to review all thee things when they get a check the mail.

ATTORNEY PAMELA STANTON BARON: No, you just have to see what the percentage is on there and there's a big difference between 4.23 and 25.39%.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions?

ATTORNEY PAMELA STANTON BARON: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument now from the Respondents.

MARSHAL: May it please the Court. Mr. Patton and Mr. Gunn will present argument for the Respondents. Mr. Patton will open with the first ten minutes.

ORAL ARGUMENT OF TIM PATTON ON BEHALF OF THE RESPONDENT

ATTORNEY TIM PATTON: May it please the Court. Tim Patton for the Marshall family.

JUSTICE DEBRA H. LEHRMANN: May I ask you, is this payment of a royalty a hostile act?

ATTORNEY TIM PATTON: I think under the case law, it is.

JUSTICE DEBRA H. LEHRMANN: And so how do you explain that? How do you deal with that?

ATTORNEY TIM PATTON: I think that Wagner's main petition and its main point in their petition.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY TIM PATTON: And it's based on the numerous cases they filed. It is a signal to the person getting paid royalties, they are not getting paid as a mineral interest owner. They're getting paid as a royalty owner with no right to possess the property.

JUSTICE DEBRA H. LEHRMANN: Exactly.

ATTORNEY TIM PATTON: I'm going to address limitations first within my time because that's the point that BP's counsel addressed. Their limitations argument totally ignores the stand or review and omits any reference to the evidence supporting the jury's finding that the Marshalls could not in the exercise of reasonable diligence have discovered the lease termination of the fraud until June of 2000. They did not mention in their brief or address today there was testimony from two experts only one of whom was employed by the Marshalls, that the Marshalls not just the Marshalls, but a specialized oil and gas expert could not have discovered the lease termination or the fraud until June of 2000 when BP produced confidential documents in discovery. These are documents that are stamped in big letters confidential and it was only when an expert was able to look at those documents and then compare them to matters on file with the Railroad Commission that he could determine that the lease had, in fact, terminated and that BP had fraudulently concealed the termination of that lease.

JUSTICE DAVID M. MEDINA: Well do the Marshalls or any other party situated have a duty to do more than what your client did, perhaps go to the Railroad Commission, perhaps have further inquiry?

ATTORNEY TIM PATTON: Well had they gone to the Railroad Commission, there was nothing on file with the Railroad Commission that would have alerted them to the lease termination of the fraud because again it was only until 2000 when an expert was able to compare confidential BP documents against the Railroad

Commission filings that anyone was able to determine that the lease had terminated. Also --

JUSTICE DALE WAINWRIGHT: Those two experts, Graham and Macicek, am I pronouncing that right?

ATTORNEY TIM PATTON: No, that's a different expert on liability and damages. It's a Wagner expert.

JUSTICE DALE WAINWRIGHT: Who was the other expert then?

ATTORNEY TIM PATTON: It's a Wagner expert. I don't remember his name. It's in our brief, but the Wagner expert, likewise, testified that even an expert couldn't have known about the lease termination until 2000.

JUSTICE DALE WAINWRIGHT: BP says the June letter tells them that, that the Walker Well #1 was dead.

ATTORNEY TIM PATTON: Well, an interesting point about that letter in terms of the evidence not mentioned in their brief, there is testimony from a BP expert, which is cited and quoted in our brief where the BP expert testified that there was nothing in that letter that would have alerted the Marshalls to the lease having terminated. BP's own expert said that the Marshalls were entitled to take that letter at face value. The idea, the premise that this is just another lawsuit where a royalty owner has slept on his or her rights for 20 years is fundamentally flawed. This is not a case where a royalty owner sued. This is a case where a mineral interest owner sued. In 1981, the Marshalls asked BP about the status of their lease. BP lied to them in 1981 and then BP was off the lease in 1981. BP's out of the picture.

JUSTICE PHIL JOHNSON: Counsel, BP lied to them exactly how?

ATTORNEY TIM PATTON: I think a half truth is a lie.

JUSTICE PHIL JOHNSON: Okay, so your position is the letter. Is there anything other than the letter?

ATTORNEY TIM PATTON: Yes, I think that in the phone call as the Court of Appeals recognized that the statement that Mr. Young made to Stanley Marshall that there was no cessation of operations for a 60-day period, I think that's a factual misrepresentation.

JUSTICE PHIL JOHNSON: Okay, so that phone conversation is as it is in the record and this letter then is the lie?

ATTORNEY TIM PATTON: Oh I think the phone conversation is also a lie.

JUSTICE PHIL JOHNSON: That's what I said, the phone conversation and the letter is the lie.

ATTORNEY TIM PATTON: Yes.

JUSTICE PHIL JOHNSON: Anything else?

ATTORNEY TIM PATTON: No, I think that's it. I think we rest our fraud case on the phone conversation and the letter.

JUSTICE DAVID M. MEDINA: And that's what the jury based their decision on?

ATTORNEY TIM PATTON: Yes, it's a broad form fraud submission which includes both affirmative misrep resentations and representations by basically half truths.

JUSTICE DAVID M. MEDINA: You said half truths. Is your position that the Court should adopt a restate

ment?

ATTORNEY TIM PATTON: I think the Court should, but I don't think it necessarily needs to adopt the entire restatement. I think if this Court as we say in our brief doesn't adopt at least a principle that a half truth, a statement that is intentionally misleading because it leaves out critical information and it's intended to give a false impression, I think this would be the only state in the union where half truths are not actionable and whether you call it adopting Section 552 or not, absolutely the law should be that intentional half truths that are designed to mislead somebody should be actionable fraud.

JUSTICE NATHAN L. HECHT: It's just hard to see how that works in the real world because I was just thinking of like a building contract and the owner doesn't go out, doesn't watch the contract, the building being built. He just waits until the end of it and then he goes out and asks the contractor did you build this according to the plans and the contractor said yes, I think I did and then 10 years later, 20 years later, he discovers that something was left out or something was wrong or something was not done according to plans and he sues for fraud. It just seems like it turns everything into fraud.

ATTORNEY TIM PATTON: Well, I think the hypothetical you just gave is a little different because it's more of a contort type of --

JUSTICE NATHAN L. HECHT: Why? Because it seems to me you're asking the same thing. Were you always trying to get production out of this well? Well, you know, there's a lawsuit about that and reasonable minds can differ and you go back and forth and maybe a jury's going to ultimately answer it, but it just seems to me like if you say to somebody are you in the right and not in the wrong, he's going to answer yes, I'm in the right and how's that fraudulent?

ATTORNEY TIM PATTON: That might not be, but that is a world of difference between sending somebody a three-page letter where you itemize 40 separate dates and in those 40 separate dates, much of the time you leave out critical information which had you provided that information, you would have alerted the recipient of that letter to a problem.

JUSTICE DALE WAINWRIGHT: Itemize that critical information left out.

ATTORNEY TIM PATTON: Among the information is that as of September 22, 1980, BP, then ARCO, had completely given up on the lower Wilcox. The only level, the only area in which they thought there was any production, their entire budget was devoted to the lower Wilcox. There was nothing there.

JUSTICE DALE WAINWRIGHT: As of September, 1980?

ATTORNEY TIM PATTON: September 22, 1980, I'm doing it from memory.

JUSTICE DALE WAINWRIGHT: Didn't the primary term of the lease end July, 1980?

ATTORNEY TIM PATTON: Yes. The lease would have terminated on July 12. So on September 22, they reached the total depth, lower Wilcox and there's nothing there. The entire budget, that was their really only objective. They know the reason they drew the well, drilled the well was not there.

JUSTICE DALE WAINWRIGHT: So it was within the 60 days?

ATTORNEY TIM PATTON: Yes. So then they go back up to the middle Wilcox to investigate a show and as of December 22 they conclude there's nothing there. Their own documents conclude as of December 22 there's nothing in the middle Wilcox.

JUSTICE DAVID M. MEDINA: What's your position on this future accounting award?

ATTORNEY TIM PATTON: I'm not sure whether I should finish answering your.

JUSTICE DAVID M. MEDINA: I'm sorry. I thought you finished Justice Wainwright's.

ATTORNEY TIM PATTON: Um, so the next critical date is December 22 and then the next critical date is January 16 where that's the Blood Oak memo where BP says we're giving up on the well. There's nothing here. We don't want to spend any more money and they said well we got to do something so let's keep reworking in the well, which is not good faith operations, which they do for months. So by really by either September 22, December 22, but certainly by January 16, they're done with any remotely good faith operations.

JUSTICE DALE WAINWRIGHT: Don't you also argue that reworking a well is not sufficient to extend a lease, that it has to be producing in commercial quantities?

ATTORNEY TIM PATTON: All the experts agreed, including BP, BP's experts and the jury was instructed that it really needs to be more than reworking. It needs to be the actions of a reasonably prudent operator acting in good faith with efforts designed to product gas in paying quantities, which there is nothing BP did after December 28 that was designed to produce in paying quantities.

JUSTICE DEBRA H. LEHRMANN: Could you please address Justice Medina's question about the accounting?

ATTORNEY TIM PATTON: I would like to because I suspect that's the reason, the main reason we're here. I'm a little concerned, I just want to point out. I don't want to step on Mr. Gunn's time, but I'm happy to do it so I'm hoping you will give him more time because we're not aligned.

CHIEF JUSTICE WALLACE B. JEFFERSON: You're taking a lot of time up just working through Mr. Gunn.

ATTORNEY TIM PATTON: I'm trying to be nice here.

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the answer to perpetuity on that account?

ATTORNEY TIM PATTON: Very briefly, I think the future accounting is appropriate under the very cases cited in BP's brief and in the brief filed by the Texas Oil and Gas Association. Those cases recognize that when a case is so complex that an adequate legal remedy cannot be fashioned, it's appropriate to utilize the equitable remedy of accounting and here we have uncontroverted testimony from an expert witness who said because there were so many variables existing at the time of trial. For example, there's we don't know how many wells are going to be drilled on the lease. We don't know whether they're going to be productive. We don't know what the price of gas is. We cannot accurately predict the future damages of the markets. And [inaudible] --

JUSTICE DEBRA H. LEHRMANN: Okay, and is BP in a position to be able to do that now?

ATTORNEY TIM PATTON: Well what this case raises the question of is if you commit fraud and you indisputably cause somebody future damages, do you get off the hook for those future damages because it's going to be difficult from an accounting perspective to calculate those damages?

JUSTICE DEBRA H. LEHRMANN: [Inaudible] we add difficult or tell me how that's going to happen.

ATTORNEY TIM PATTON: Well BP, I think, exaggerates how difficult it's going to be. As a practical matter, the production records from every well, the sales record from every well are available. The only what difficult area will be the expenses required to generate the production. So, again, BP's position is because they don't have access to those records. They get to walk away from all the damages caused by the fraud and the trial court ex-

ercises discretion to say no, BP, you don't get to walk away from the damages you caused by the fraud. We're going to make you account for it and there's a number of ways you could have them accounting. You could appoint a master. You could appoint an auditor, but, again, the question before this Court is do you let someone walk away from future damages they indisputably caused?

JUSTICE DEBRA H. LEHRMANN: What effect does that have on Wagner?

ATTORNEY TIM PATTON: On Wagner?

JUSTICE DEBRA H. LEHRMANN: Yes.

ATTORNEY TIM PATTON: On the Wagner appeal, I don't think it has any effect. We actually agree with the Wagners. They acquired the title by adverse possession. We lost it by adverse possession and our remedy is against BP, but the future accounting remedy is really not involved in the Wagner-Vaquillas appeal.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Patton. Mr. Gunn.

ATTORNEY TIM PATTON: Thank you.

ATTORNEY DAVID GUNN: To make BP's third point, at three levels of court, BP and I have been arguing that these two appeals, these two cases give you one choice between two worlds and you got to choose what's the right remedy for fraud? Is it a property rules remedy or is a punitive damage remedy? It's like when we heard the word contort, we're dealing with propatort here. Property or tort because in Wagner's world, fraud is not challenged, fraudulent concealment's not challenged. It's a question of what's the remedy and if you squeeze one end of the toothpaste tube, they will say it can't be title. Then it must be damages that's where the Marshalls and our people diverge about the remedy. They want to swing at the piñata for punitive damages. They didn't get it, but that was the goal. We say that's not what's going on at all. BP and I say adverse possession doesn't work that way. It's not a tort. It is a theory with two elements and I ask you to write your opinion very simply and dispose of this case on this one ground, the whole thing, all four parties. You should say adverse possession has two elements. There's the adversity part, the ouster part and there's a clock part, accrual. It's not challenged that fraudulent concealment stops the clock. Wagner doesn't challenge it. They don't challenge that there was fraudulent concealment. [Inaudible] the clock stopped, nobody lost title because of the underlying actions. There was no adverse possession against us. There was no adverse possession against the Marshalls and the case is over.

JUSTICE DAVID M. MEDINA: How does your swinging piñata come into this? I didn't catch that.

ATTORNEY DAVID GUNN: The punitive damages, the Marshalls made a tactical choice to take a swing for punitive damages and asked the jury. We didn't see that coming. As we were going through this case, we thought this was just a title case, but late in the day at the close of the evidence, they wanted to tee up a punitive damage question and they got it and at that point, two roads diverged in the woods and we just said, we just want our property back. That's all we want. They wanted punitives. Now the jury didn't award it, but that's what they wanted and that's the flood that's going to come if you adopt the world that Wagner and the Marshalls are trying to foist on you. You're going to see punitive damages asked for, tort damages in all of these cases and I say don't go for that flood. You notice that they don't stop the flood. They just reroute it and say well we don't want it to be a title remedy. We want it to be a damage remedy and go sue for damages. I say don't go there. I agree with BP. It cuts off causation in the BP cases. It cuts off loss of title in our case.

JUSTICE NATHAN L. HECHT: It seems to me there are two problems though with your position. I'm not sure the fraud would work generally, but maybe it does, but Wagner did not commit the fraud so why should they bear the burden then?

ATTORNEY DAVID GUNN: Because they stand in the shoes of the fraud feasor, like a bank robber's got a bag of money and he hires a contractor and said here, will you carry this to the hotel for me and I'll pay you. That's all that happened when --

JUSTICE NATHAN L. HECHT: Generally a BFP doesn't.

ATTORNEY DAVID GUNN: Oh, but they're not a BFP.

JUSTICE NATHAN L. HECHT: Well, there's argument about that.

ATTORNEY DAVID GUNN: Well, there should be no argument whatsoever for two reasons. It is wrong, factually, and it's irrelevant legally. Factually it is wrong. Look at the deeds. Look at the assignments. They are quit claims. Read Tom Philips' opinion for the court in Rogers v. Ricane from 1990 and lay the words of it next to the words of these assignments. The assignments all down the chain, these are quit claim deeds. You can't be a BFP in a quit claim, but more than that, it is irrelevant because think about it. You got to go back to the bundle of sticks. You're splitting the real property bundle of fee simple into two completely different sticks. The company side has got this lease hold stick. They're a BFP of that, but if you ask the question BFP of what? That answers it. Those of us, the Marshalls and I are on this side. We've got the possibility of reverter. We didn't sell anything to Wagner or anyone else. Our possibility reverter ripens and a fee simple title period. The bona fide purchaser status does not change the nature of the asset. It cuts off the right to rescind a voidable sale. But we don't have a sale between us and the other side. It's just automatic. It happens. So BFP goes absolutely nowhere. Now there is this equitable pull to it and I acknowledge that because frankly it gives me some discomfort. It's kind of like musical chairs. Wagner and I are not really guilty of much and when the music stops, there's only one chair and it's got to go to somebody. But that's why you just stick with traditional property rights' rules, just the privity of a state rule. Remember they wanted privity of a state for tacking purposes because they said well we stand in the shoes of our predecessor and they're in the shoes of their predecessor. It tacks all the way back and if I could stress this because I didn't stress it in the brief. Look at the farm out agreement, the contract and the relationship between ARCO and the first step down the title chain which was Sanchez O'Brien. That farm out agreement is just a contract and says this is the bank robber hypo I was talking about. It says if you will come in as a contractor and drill, if you'll go do something, I will assign you my interest, what I have and they did, they quit claimed it to them. They're no better off. Sanchez O'Brien is no better off than their predecessor in title. They step into the shoes. If the shoes are clean, they get clean shoes. If the shoes are dirty, they get dirty shoes. You take the bitter with the sweet.

JUSTICE NATHAN L. HECHT: Do you agree that the adversity part of the problem is the same as Pool, that the co-tenancy really doesn't matter?

ATTORNEY DAVID GUNN: It doesn't matter. You have to apply an ouster standard for [inaudible], but I ab solutely agree.

JUSTICE NATHAN L. HECHT: Because if you're getting a check for a sixth of what you're supposed to get, that's adverse.

ATTORNEY DAVID GUNN: It can be and I'm willing to for purposes of today, I don't need the adverse ouster side of the case to win. It is more controversial and I think without the fraud, without the context of our eyes being clouded by fraud, we would have a big problem sustaining our position there. I think it really comes down to the fraud, but we don't need that. The accrual argument is a one-issue ruling that ends this entire case for both sides and if I could close by just talking about Pool one second. Pool is controversial in oil and gas circles in the royalty owner camp. I'm proud of Pool. I stood here 8-1/2 years ago asking you on the day that Pool was argued, I was in the companion case asking you to adopt the rule that you adopted in Pool. I think it is sound and you should stand on it. You should embrace it. I think it applies and it stopped the flood. There's been no more flood. There was a problem of people going out trying to bust leases. Pool put an end to that, but that's all about

lease termination. That's not about fraud. What we have here between me and the Wagner folks is we have unchallenged findings of fraud. They haven't attacked any fact finding. Nothing in the verdict. We're just here saying, Your Honors, we're serving you a plate of undisputed facts, what's the legal effect and I'm asking you make the legal ruling. If there's fraud, there's got to be a remedy. Do we want to be a damage remedy or can we use a traditional property rights remedy. I say use the latter. If the Court has no further questions, I'm done.

CHIEF JUSTICE WALLACE B. JEFFERSON: It seems they don't. Thank you, Mr. Gunn.

ATTORNEY DAVID GUNN: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

REBUTTAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF PETITIONER

ATTORNEY THOMAS PHILLIPS: May it please the Court, first I would like to respond to Mr. Patton's argument that there was a fact question on whether or not as a matter of law you could tell from the public records back within four years of back before the limitations ran that BP's predecessor, ARCO, was not acting as a reasonably prudent operator. We believe clearly in the records there is. The plan's expert said that any prudent operator examining the log on the upper Wilcox would have known in August of 1980 while they were still drilling at the lower Wilcox, that, before they started drilling, that the upper Wilcox would not produce in paying quantities. He also said a reasonable and prudent operator looking at the log for the upper Wilcox would come to only one possible conclusion and that was that the upper Wilcox was going to be a dud. That log was in the Railroad Commission files in plenty of time in Austin. Taking with the Railroad Commission plugging report in Corpus Christi, you could tell on the public records that as of August, 1980, their expert said he would have been on notice that this was not a reasonably prudent operator. The evidence that Mr. Patton refers to in the record about well we had to get BP's internal files to know that there was a claim here. If you look at all those questions, they talk about good faith. Now our standard's kind of multi-faceted, it's a long standard, reasonably prudent operator acting in good faith to produce commercially payable quantities. But it's an objective standard and the questions that Mr. Patton says raise a fact issue about what the Marshalls could have known back in the early 80s, those are asking about good faith in a subjective way. What was in BP's mind? From the log records and the plugging report, could you tell what BP was thinking back in 1980? Well probably not, but could you tell that in your view of the case they weren't acting as a reasonably prudent operator? Yes, you could tell that.

JUSTICE DALE WAINWRIGHT: The jury found to the contrary.

ATTORNEY THOMAS PHILLIPS: And we say there's no evidence.

JUSTICE DALE WAINWRIGHT: The Marshalls claim you haven't attacked that jury finding.

ATTORNEY THOMAS PHILLIPS: Well that's just wrong. I mean we attacked the finding by numbers and we talked about no evidence that would toll limitations throughout all the briefs.

JUSTICE DALE WAINWRIGHT: I'm sorry, Counsel, what do you mean you attacked the finding by numbers?

ATTORNEY THOMAS PHILLIPS: We said there's no evidence to support findings number 5 and 7. That's in the Appellant's brief and the Court of Appeals and throughout our briefing, we talk about there's no evidence that they were acting in a reasonable way with reasonable prudence so as to toll limitations, which is an attack on that finding.

JUSTICE DAVID M. MEDINA: Did you address this future accounting award? I remember that was one of

your four points. I don't remember you speaking about it.

ATTORNEY THOMAS PHILLIPS: Yes, first of all, we don't believe you get there because we believe that this is a co-tenant payment case and not a fraud damages case and that the Marshalls made a strategic decision as Mr. Gunn was discussing. They made a strategic decision to settle with the producers for either nothing, either give up against them or settle for less than the payments they were due and then try to get the balance of their damages in an actual damage award and they then went and asked for $120 million punitive damage award. Well, it broke down when the jury gave nothing in punitive damages. But even if you got there and said there were some damages for any reason against BP, the accounting is just, it can't be the right way to go because BP is not operating anything. It never produced a drop of oil or a cubic centimeter of gas and accounting remedy is not damages. It's asking somebody to give an account of what they received and BP received nothing.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Philips. Ms. Baron, you have three minutes.

ATTORNEY PAMELA STANTON BARON: The Vaquillas' says there's a choice between damages and title and they made that choice and they recovered damages from the fraud feasor in this case so they have made their choice. They say the clock stopped because of fraudulent concealment, but they obtained findings on fraudulent concealment only on the part of BP. You also have to look at what are we timing with this clock and if you look at the statute, it's not their fraud claim against BP that we're timing. If you read the adverse possession statutes, they say an action to recover land held in peaceful and adverse possession by another. So it's a trespasser try title claim is what we're looking at. They obtained no findings of fraudulent concealment on the trespasser try title claim and in terms of when does your trespasser try title claim occur? This Court answered that dispositively 150 years ago in Horton v. Crawford. It actually asks the question when does the cause of action accrue and the Court said unquestionably at the moment of possession under the circumstances set forth in the statute. What they're saying is --

JUSTICE NATHAN L. HECHT: There's no evidence that anything's different as to the Vaquillas rather than the Marshalls is it?

ATTORNEY PAMELA STANTON BARON: No.

JUSTICE NATHAN L. HECHT: And if the Marshalls didn't know then the Vaquillas didn't know.

ATTORNEY PAMELA STANTON BARON: Exactly. Yes. They say we didn't challenge the fraud finding so our findings of fraud and fraudulent concealment by BP not by Wagner, they say we stepped into their shoes in privity. We did not tack with them. You can't tack with somebody. The only way you can adversely possess minerals is to go out there, drill a well and start producing and ARCO and BP never did that. Finally, these aren't quit claim deeds. If you look at them, they're not a cut and run of whatever we own. You have to look and see whether they transferred title or whether they just say I give you whatever I've got. They identify the leases. They identify by block number, division number, grant number. They have plats, they have meets and bounds. They reserve certain rights to various parties and they have continuing obligations. It's not a cut and run quit claim deed and just fraudulent concealment just is not imputed to innocent third parties. It cited the Court it's universally recognized that only if you participate in or have knowledge of the fraud can your cause of action against you be told. It's in an estoppel issue where the fraud feasor can't take advantage of his own fraud to prevent, to insert limitations into the case. It's a particularly dangerous concept when you get into land titles. What they're saying is hidden fraud decades ago, centuries ago, stops the clock forever and that's what we're going to do. We're going to see more lawsuits seeking to divest title that's been settled for decades and even centuries. Thank you.

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

MARSHAL: All rise.

2010 WL 5090756 (Tex.)

END OF DOCUMENT