No. 05-1076

IN THE SUPREME COURT OF TEXAS

EXXON CORPORATION, *et al.*,
Petitioners,

v.

EMERALD OIL & GAS COMPANY, L.P., and
LAURIE T. MIESCH, *et al.*,
Respondents.

On Petition for Review from the
Thirteen court of appeals, Corpus Christi, Texas

AMICUS CURIAE BRIEF OF THE TEXAS LAND AND MINERAL OWNERS' ASSOCIATION IN OPPOSITION TO THE PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Texas Land and Mineral Owners' Association submits this brief as friend of the Court, pursuant to Texas Rule of Appellate Procedure 11, and would show as follows:

INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Texas Land and Mineral Owners' Association (''TLMA''), an association of landowners and mineral owners in Texas founded to advocate for protection of Texas' land and water resources, to assure accuracy in the payment of oil and gas royalties, and to advocate for issues of interest to landowners and mineral owners in Texas. TLMA has 1,200 members, all of whom are landowners and/or mineral owners in Texas. For more about TLMA, see www.tlma.org. The fees of the undersigned attorneys for preparation of this brief will be paid by TLMA.

STATEMENT OF FACTS

TLMA adopts and incorporates by reference the Statement of Facts contained in Respondents' Response to Petition for Review.

ISSUES PRESENTED FOR REVIEW

The issue in this case that is of interest to TLMA is whether the discovery rule should apply to the Plaintiffs' claim of waste caused by the lessee's intentional, concealed plugging of wells in order to prevent later reentry.

SUMMARY OF THE ARGUMENT

This case involves facts virtually unprecedented in Texas caselaw. The jury found that Exxon Corporation intentionally and systematically sabotaged[1] a number of oil wells to prevent a later operator from reentering those wells. The trial court and the court of appeals both applied this Court's precedent and determined that the discovery rule applied to the royalty owners' cause of action for waste based on those facts. Those determinations were correct. While certainly objectively verifiable, such intentional sabotage is inherently undiscoverable. Once the wells are sealed, the royalty owner has no reason to suspect the operator's misconduct and no way of detecting the sabotage until reentry is attempted. Unlike the injuries at issue in the two cases cited by Exxon, intentional well sabotage cannot be discovered from reviewing public records or by requesting information from the operator or third parties.

The royalty owners' injury is analogous to a foreign object left in a patient's body after surgery or a botched vasectomy – all are undiscoverable after the initial operation or well plugging is completed. Of course, both surgery patients and royalty owners could detect their injuries as they occur by arranging for an expert

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[1] Exxon's Petition for Review criticizes the court of appeals for referring to Exxon's method of plugging the O'Connor wells as "sabotage." (Petition for Review p. 5, fn.11) One definition of "sabotage" from the American Heritage Dictionary is "treacherous action to defeat or hinder a cause or an endeavor; deliberate subversion" The jury found that Exxon failed to plug the wells as a prudent operator, that such action resulted in waste, and that Exxon acted with malice, defined in the charge as "conduct that is specifically intended by Exxon to cause substantial injury to" Plaintiffs". TLMI believes that the word "sabotage" fairly describes Exxon's actions as found by the jury.

to monitor, respectively, their surgeries and well pluggings. While this Court has placed no such burden on surgery patients, Exxon urges the Court to grant review and place that onerous burden on royalty owners. There is no legal precedent for doing so. Just as a surgery patient is entitled to assume a doctor will competently perform a medical procedure, a royalty owner is entitled to assume that an operator will not intentionally sabotage its own wells.

Exxon makes the usual argument that if this Court does not grant review and reverse the decisions of the lower courts regarding the application of the discovery rule, "it will open a new frontier of litigation by a never-ending class of plaintiffs." (Petition for Review p. 1). If this Court denies review, two things will happen: (1) Exxon will have to pay the damages assessed by the jury for its egregiously culpable conduct; (2) any royalty owner in the future who sues an operator for intentionally sabotaging wells will be able to cite a court of appeals decision in support of an argument that the discovery rule applies to toll limitations. Nothing more. TMLA respectfblly suggests that the jurisprudence of the State is better served if the Court denies review and reserves its limited time and resources to a case that presents issues of wider application and greater importance to the people of Texas.

ARGUMENT

A. This Court's Precedent.

Over the years this Court has had occasion to address the application of the discovery rule to a wide variety of injuries. While these decisions were based on the particular characteristics of each type of injury, in 1996 the Court issued two decisions in which it attempted to bring coherence to its body of discovery rule jurisprudence by articulating a two-part test to determine the application of the discovery rule to any particular "category" of injury. In Computer Associates International Inc. v. Altai, Inc., 918 S.W.2d 453,455 (Tex. 1996) and *S.V.* v. R. *V.*, 933 S.W.2d 1, 5-6 (Tex. 1996), the Court held that in order to be subject to the discovery rule, the nature of any injury must be "inherently undiscoverable" and the injury itself must be "objectively verifiable."

Since 1996, the Court has had occasion to apply this two-part test to two injuries associated with oil and gas production. In *HECI* Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998), a royalty-interest owner sued its lessee for failing to notify the plaintiff that the lessee had sued and obtained a judgment and recovery against an adjacent well operator for damage to a common reservoir caused by over-production. The Court held that the discovery rule did not apply to toll limitations because the underlying injury at issue, over-production and resulting damage to the common reservoir, was not inherently undiscoverable. The Court

reasoned that the royalty owners could see wells operating adjacent to their property and could obtain information regarding whether those wells were over-producing and therefore potentially damaging a common reservoir. *Id.* at 886-887. Such information was available from two sources: (1) from public records filed with the Texas Railroad Commission; and (2) by asking the royalty owner's own lessee who was itself not overproducing or damaging the reservoir. *Id.* at 886. The Court noted that the lessee had in fact provided all information the royalty owner had requested. *Id.*

In *Wagner & Brown, Ltd.* v. *Horwood,* 58 S.W.3d *732* (Tex. 2001), gas royalty owners sued their lessee to recover for improper gas gathering and compression charges which had resulted in reduced royalty payments. The Court held that the discovery rule did not apply because the plaintiffs injuries were not inherently undiscoverable. The Court observed that the plaintiffs could have obtained information regarding the correct gathering and compression charges from the lessee and from several third-parties and noted that when the plaintiffs became suspicious about the charges appearing on their statements, they had hired an investigator who was able to tell them the charges were excessive. *Id.* at *734, 736-737.*

B. The Decisions Below Do Not Conflict With This Court's Decisions.

The lower courts in this case concluded that an operator's intentional sabotage of its own wells during plugging is inherently undiscoverable. The principal thrust of Exxon's petition for review is that these holdings conflict with this Court's holdings in HECI and ***Horwood.*** They do not.

The key considerations underlying the holdings in both HECI and ***Horwood*** are entirely missing in this case. In both cases the plaintiff royalty owners had objective indications that an injury might exist and at least two ready sources of information sufficient to discover that injury. Here, royalty owners would have no reason to suspect that an operator would sabotage its own wells during the plugging process and, even if they did, would have no access to even one source of information available after the wells are plugged that would allow the royalty owner to discover that sabotage. An operator would not be expected to report such intentional wrongdoing to the Railroad Commission or to any other public body and would certainly not be expected to truthfully confess such wrongdoing to the royalty owner, even if the royalty owner had any reason to ask such a question. The facts in this case, summarized by the court of appeals at 180 S.W.3d at 312, bear out these common sense conclusions. (Exxon filed false well plugging reports with the Railroad Commission and refused to turn over well plugging information when asked). Moreover, there appears to be some basis for concluding that the

well sabotage in this case was carried out by rogue employees of Exxon. *See* Response to Petition for Review, pp. 2-5. Under such circumstances, it is even more unlikely that the well sabotage would be uncovered by reviewing public records or by simply asking the operator.

The injury at issue in this case is directly analogous to the injury at issue in two medical malpractice cases in which the Court ruled that the discovery rule does apply. In *Gaddis* v. *Smith*, 417 S.W.2d 577, 580 (Tex. 1967), a surgical sponge had been left in a patient and was not discovered until four years later when the plaintiff developed severe abdominal pain. *Id.* at 578. Relying on reasoning equally applicable to this case, the Court ruled that the discovery rule applied to toll limitations because the nature of the injury was inherently undiscoverable:

> All of the procedures for placing objects in and removing them from the body are in the control of the surgeon. It is a virtual certainty that the patient has no knowledge on the day following the surgery – nor for a long time thereafter – that a foreign object was left in the incision.

Id. at 580. The same is true of the injury caused by an operator's intentional sabotaging of a well during plugging to prevent reentry, as is the additional basis for the Court's decision in *Gaddis* — that the type of injury at issue, because it is objectively verifiable, "is not particularly susceptible to fraudulent prosecution." *Id.* at 581.

In *Hays* v. *Hall*, 488 S.W.2d 412 (Tex. 1973), a husband sued his surgeon almost three years after his vasectomy when he discovered his wife was pregnant. The Court held that the discovery rule tolled limitations for the same reasons discussed in *Gaddis* and because any other result would deny legal remedy to the husband before he could know that he was injured, "a result so absurd and unjust" it "ought not be possible." *Id.* at 414.

Exxon argues that royalty owners could detect injury from intentional misconduct in the plugging of wells by monitoring the plugging of every well in which they have an interest. No such burden has ever been placed on a surgery patient, and Exxon offers no rationale or authority for creating such a tremendously expensive requirement for royalty owners. Royalty owners should be able to assume that their operators will not maliciously vandalize their own wells.

TLMA recognizes that, after HECI and Wagner & Brown, royalty owners must be expected to exercise diligence to investigate when presented with facts that may give rise to a claim against their lessee. But the level of diligence that would be imposed on royalty owners if Exxon's view of this Court's precedent were to prevail would greatly exceed anything this Court has previously required; and this Court's effort to carefully craft a balance between the benefits of the discovery rule and the policy underlying statutes of limitation would be destroyed. If Exxon is correct, operators can intentionally sabotage their wells when plugging

them with impunity, as long as their royalty owner does not discover the damage within two years.

The court of appeals' analysis of the directive provided by this Court in HECI is the same as that of Professors Ernest Smith and Jacqueline Weaver in their influential Oil and Gas Law treatise:

> First, was information available that should have alerted the plaintiffs to inquire of a possible injury? .... [If there was such information, then] the next level of analysis is whether investigation of the operator's conduct would [reveal the existence or nature of any potential injury.] ... [I]f there is nothing to alert a party to a potential injury and no public records or other information revealing the injury, the injury is inherently undiscoverable and the discovery rule should apply.

E. Smith & J. Weaver, Texas Law of Oil and Gas § 2.7(B) (2nd ed. 2005), pp. 2-112 – 2-113. Until a sufficient number of wells had been reentered to reveal Exxon's systematic sabotage, no information was available to the Plaintiffs to alert them to inquire about a possible injury. Under Professors Smith and Weaver's analysis, the discovery rule should apply to Plaintiffs' claims.

C. This Case Presents A Very Narrow Issue of Limited Importance to Texas Jurisprudence.

Plaintiffs are not arguing in this case that Exxon negligently plugged the wells in an imprudent manner. This case involves an intentional act or series of acts, intended to prevent Plaintiffs or any third party from ever using the abandoned well bores to extract additional oil or gas. The "category" of claims to

which the discovery rule should apply is therefore a narrow one – cases of intentional plugging of wells in a manner so as to prevent re-entry and thereby cause waste of natural resources. If Plaintiffs' claims in this case are not subject to the discovery rule, then there are no conceivable cases that can be brought by royalty owners against their lessees to which the discovery rule would apply. Exxon's fears that application of the discovery rule in this case will lead to a flood of litigation are unfounded.

TLMI believes that this case involves no new issues of importance to the jurisprudence of this State. The facts in this case, although important to the parties, are unusual and unlikely to be repeated. Contrary to Exxon's claims, the court of appeals' decision is consistent with this Court's limitations jurisprudence, and will not "open the door for a limitless class of plaintiffs" or "open a new frontier of litigation by a never-ending class of plaintiffs." (Petition for Review, p. 1).

PRAYER

TLMA respectfully prays that Exxon's Petition for Review be denied.

Respectfully submitted,

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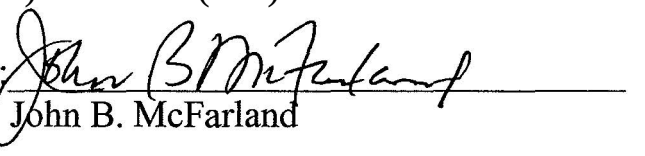
By: 
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I certify that on May 16, 2006, a true and correct copy of the foregoing was served as indicated below:

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