No. 13-03-00258-CV

IN THE

THIRTEENTH COURT OF APPEALS

CORPUS CHRISTI, TEXAS

SYLVIA MENCHACA BALLI AGUILERA, ET AL.,

Appellants-Cross Appellees

VS.

THE JOHN G. and MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Appellee-Cross Appellant

MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Appellants/Cross Appellees, Sylvia Menchaca Balli Aguilera, et al ("Balli") file this their MOTION FOR REHEARING pursuant to Texas Rule of Appellate Procedure, Rule 49.1 and respectfully request this honorable Court to withdraw its March 24, 2005 Opinion and Judgment and to issue a new opinion and judgment consistent with the arguments contained herein. In support of this request, Balli shows the court the following:

1. This is an appeal from a final judgment signed on January 31, 2003 in Cause No. 1261 by the 105th Judicial District Court of Kenedy County, Texas.

2. This honorable Court issued its opinion and judgment in this case on March

24, 2005 after briefing and oral argument.

I. ISSUES PRESENTED

A. If the 1804 Document is admitted into evidence, the legal effect was a present conveyance according to KMF's own expert.

B. Richard Santos did not provide a legal opinion on the legal effect of the 1804 Document.

C. The exclusion of the 1804 Document did cause the rendition of an improper judgment as to the 24,996.9 acres comprising the so-called "mud flats".

II. STATEMENT OF FACTS

The uncontradicted evidence is that the 1804 Document is on authentic paper (CR 6425, CR 6346, and CR 6350-51), with authentic seals (CR 6346, CR 6351-52), written in the style and language of the period (CR 6351), in ink which cannot conclusively be ruled out as ink of the period (CR 6425-26) and that *copia* were usually unsigned. (RR Vol. 3, p. 35). Further, Santos testified based on his experience and the physical signs that the 1804 Document was filed of record and ripped from the record book. (RR Vol. 3, pp. 33-35).

On the other hand, KMF's experts' opinions as to why the 1804 Document could not be a conveyance of 25 sitios of land were erroneous. Baade admits that this is a private sale and not a public sale and that the 4 sitio limit on sales did not apply. (CR 6341, 6342, 6345 and 6346). Baade claims that the 1804 Document could be a *copia* except that it is not signed. Santos testified that *copia* were not signed. Baade admitted that he was not an ancient document expert. (CR 6346).

The "mud flats" are not included in the 1907 Patent from the State of Texas. KMF's predecessors did not claim the "mud flats". (CR 5046-5049, Affidavit of Armstrong; CR 5051, 5052, and 5056, Affidavit of Weiss; CR 5060, 5065, and 5066, Affidavit of Lothrop; CR 5068, 5071 Affidavit of Ellis). All of KMF's summary judgment evidence on the issue of adverse possession refers to 58,939.5 acres and not 83,836.40 acres. *Id.* KMF's own expert in this case, Professor Baade, states that KMF did not claim the "mud flats" based on adverse possession. (CR 6371).

III. ARGUMENT AND AUTHORITIES

A. Once admitted, the 1804 Document conveys title.

The trial court committed an abuse of discretion because the legal effect of the 1804 Document and its admissibility, is controlled by Texas law as recited at length below in *Smith v. Townsend* (Dallam, 569), 1844 WL 3902, (Tex.Rep.Sup.1844) and *Sullivan v. Dimmitt*, 34 Tex. 114, 116 (Tex. 1870). The legal effect of the 1804 Document, once admitted, under Texas law is a transfer of title to Jose Manuel Balli. Under the *Standard of Review* specified in this Court's March 24, 2005 Opinion, exclusion of the 1804 Document, which did transfer title because it must be deemed to have been recorded for summary judgment purposes, caused the rendition of an improper judgment.

This honorable Panel cites to *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, (Tex.2002); *North American Refractory Co. v. Easter*, 988 S.W.2d 904, (Tex.App.-Corpus Christi,1999, pet. denied); and *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex.1992) for the

legal principles that the trial court has broad discretion and that this Panel must uphold the trial court's evidentiary rulings if there is any legitimate basis for the ruling. To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error probably caused the rendition of an improper judgment. Tex.R.App. P. 44.1(a); *McCraw v. Maris,* 828 S.W.2d 756, 757 (Tex.1992). When the issue is exclusion of evidence, the reviewing court must review the entire record to determine if error occurred. *Id.* at 758.

Upon a review of the entire record, it is clear that Santos only testified on matters within his qualifications, i.e. the authenticity of ancient Spanish colonial and Mexican documents, the nomenclature used by the ancient Spanish colonial and Mexican authorities, and the locations or repositories of ancient Spanish colonial and Mexican legal documents. Santos was qualified from his training, employment, education and experience to address these issues. Santos was also qualified to testify as to the physical manifestations of the 1804 Document, i.e. the tear marks on the margin, and what, from his experience, those physical manifestations meant. There is no disconnect or "too great an analytical gap" between the data and Santos' opinions that the 1804 Document was ripped or torn out of a bound volume. *Kerr-McGee Corp. v. Helton,* 133 S.W.3d 245, 254 (Tex.2004). KMF's experts provide the evidence as to the legal effect under Spanish colonial law and Mexican law when a document is recorded, and in the alternative, *Smith v. Townsend*, (Dallam, 569),1844 WL 3902, (Tex.Rep.Sup.1844) provides the legal effect under Texas law applying Spanish colonial law

and Mexican law of a recorded *protocol* or *copia*.

The law in Texas was set forth in *Smith v. Townsend, Id.* In that case, Chief Justice Hemphill set forth the law in Texas on Spanish colonial and Mexican copies of a public act of sale of real property. The Court explained and held as follows:

> In Book 3, tit. 7, of the Institutes of Aro and Manuel, p. 299, it is laid down that a "public instrument is divided into three classes: the original draft, register or *protocol*– the original– and the copy. The register is the original draft or writing, which is delivered and remains in possession of the escribano, which we also call *protocol*, by which doubts are determined that may be offered with respect to the instruments which are copied from it. The deed which is immediately copied from the protocol is the original, which causes faith, inasmuch as it is authorized by the public escribano before whom it passed, or by him to whom the *protocols* of the latter have passed; but if another escribano copies it, with the authority of the judge and citation of the party, it is valid."
>
> In 3 Partidas, tit. 19, law 9, notaries are required to have a book to serve as a register, in which they must write the minutes of every act required by the contracting parties; from which they draw up the public act itself and deliver it to the person entitled thereto. In a note to this law a decree is referred to from which doubtless may be deducted the practice of executing notarial instruments, as known to this country under its former laws and governments. **In this decree, dated in 1503, notaries were required to draw up on their registers the original act in full**, and not by notes or minutes. A copy is then furnished the party to serve him, instead of the act itself, which was formerly made out from such notes. (Febro.Lib.Escrie, ch. 16, Nos. 3 and 9).(emphasis added).
>
> From the authorities and laws to which we have referred, as well as from the facts proven in this case, we conclude that copies of notarial acts were (at the time of the execution of this instrument) regarded in contemplation of law as originals, that they were the only evidence of titles which the party interested was entitled to retain in his possession and that they are properly admissible for all purposes which, by the introduction of the originals themselves, could be effected.

Balli's expert, Santos, testified that the 1804 Document was authentic and had been

recorded. In the summary judgment context, once these two requirements are met, the Court must accept admit the 1804 Document into evidence. Once admitted, the 1804 Document creates a fact issue as to whether title to La Barreta is in KMF or Balli.

The authority for the legal effect of admission into evidence of the 1804 Document comes from Texas law and not from the testimony of an expert witness. The *Smith v. Townsend* opinion is the final authority of Texas law on the **effect** of the 1804 Document under Spanish law as applied by the Republic of Texas and the State of Texas. Balli did not provide expert witness testimony on this subject because none is needed and such testimony on Texas law would not be admissible. An expert may not give an opinion regarding a question of Texas law, because such issues are not for the factfinder to determine. *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex. App.–Corpus Christi 1991, writ denied).; *Rio Grande Valley Gas Co. et al. v. The City of Edinburg, Texas,* 59 S.W.3d 199, 211, 212 (Tex. Civ. App.–Corpus Christi 2000).

KMF's experts, Baade and McKnight, conclude that since the 1804 Document is not recorded it cannot be a transfer of title. (CR 6536). Since this Court must conclude that the 1804 Document was recorded, transfer of title is for the jury, not for the Court to decide.

Baade also relies on *Paschal v. Perez*, 7 Tex. 348, 361-366 (1851) for the proposition that the 1804 Document cannot be admitted into evidence in this case because it was not recorded. (CR 5092). However, *Paschal v. Perez* is not applicable because *Paschal v. Perez* concerned a grant not approved by the *intendant* as required by Spanish law. The *expediente*

referred to in this case by Baade (CR 5088, 5096) and relied upon by the Texas Supreme Court in *MacKay v. Armstrong*, 19 S.W. 463, 464 (Tex.1892) and (CR 6392) conclusively demonstrates that the *intendant* approved the donation of the 25 sitios to Jose Francisco Balli.

Thus, under either Texas law or the KMF experts' opinions, the admissibility of the 1804 Document, **alone**, has the effect of transferring title to La Barreta from Jose Francisco Balli to Jose Manuel Balli. The 1804 Document is written in authentic ink on authentic paper in the style and vernacular of the period. The 1804 Document is sealed with official seals, was recorded, and bears indicia of being removed from a bound, recorded volume. All of these facts and intendments must be accepted as true. Since the 1804 Document was authentic and was recorded, both under Texas law and the opinions of the KMF experts, the 1804 Document was effective to transfer title. Thus, the Court's conclusion that Balli failed to produce any summary judgment evidence establishing the validity and legal effect of the 1804 Document must be corrected.

If the meaning and effect of the admission of the 1804 Document is merely a memorialization of a verbal sale of land, it is still effective. Verbal sales of land occurring before the Republic are recognized in Texas. These sales, even of wild lands where possession is not delivered or established, are valid. *Sullivan v. Dimmitt*, 34 Tex. 114, 116 (Tex. 1870). KMF has never disputed Balli's authority or argument on this subject. The *Sullivan v. Dimmitt* court holds at 116 that:

"4. That a bona fide verbal or parol sale of land in Texas, made in 1834,

> **conveyed a good title, has been too often decided to be now questioned.**
> **5. Respecting verbal sales of land, the general rule of the civil law required that delivery of the possession must accompany the sale, as evidence of ownership and to prevent fraud; but this rule assumed that the seller was in the actual possession of the property at the time of the sale, and it was not applicable to wild lands held by title only and without actual possession, as were most of the lands in Texas in 1834...**
> 7. Held, therefore, that a verbal sale of wild and unoccupied land in Texas, in 1834, might be a good and valid sale, notwithstanding that no actual delivery of possession either accompanied or followed the sale. (Emphasis added).

Thus, Jose Francisco Balli could verbally transfer La Barreta to Jose Manuel Balli in 1804 even though Jose Francisco Balli was not put into possession of La Baretta until 1809.

Neither KMF nor this Court have disputed the fact that the 1804 Document passes the ancient document tests prescribed by the Texas Rules of Evidence, Rule 803 (16) and (15). Thus, the trial court should have admitted the 1804 Document into evidence. Its genuineness was a fact issue to be decided by the jury and not the trial court in a summary judgment proceeding.

> We also hold that the Mineral Grant, being a deed more than 30 years old, is entitled to be admitted as an ancient document, ***not to prove alone within itself its genuineness but to go before the jury as some evidence in order that they may pass upon the issue as to its genuineness.***"

Viersen v. Bucher, 342 S. W. 2d. 203, 208 (Tex. Civ. App. - 1960 no writ hist.) (Emphasis added)

> "But it may be said that the erasure throws suspicion upon the memorandum or indorsement. This, instead of being a suspicious circumstance, might be considered confirmatory of its genuineness, for it might be supposed to be natural that Selkirk, when he returned the certificate or warrant to Wilkinson, should have attempted to erase the notes he had placed on it? ***But, if this is a suspicious circumstance, it is to be passed on by the jury, for it is held by our supreme court that when an ancient***

> ***document is attacked, and there is a conflict of evidence about any of its essentials, it is proper for the court, under proper instructions, to submit the issue to the jury.*** *Pasture Co. v. Preston*, 65 Tex. 448; *Warren v. Frederichs*, 76 Tex. 652, 13 S. W. Rep. 643; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. Rep. 1049.

Holt et al v Maverick, 23 S.W. 751, 753 (Tex. Civ. App. 1893) (Emphasis added).

The trial court erroneously found that the 1804 Document was not a conveyance. Under the general principle of law, once admitted, the statements contained in an ancient document come into evidence as of the facts recited. *Zobel v. Slim*, 576 S.W.2d 362, 365 (Tex. 1978). If, as it must be assumed, the 1804 Document was recorded, then according to KMF's experts, the 1804 Document does act as a conveyance and the trial court erred.

KMF's expert's translation of the 1804 Document omits significant portions of the instrument as originally written in Spanish and leads Baade to the conclusion that present words of grant are absent. (Compare CR 6564 with CR 6005 - 6007). However the translation by Santos of the 1804 Document shows a present conveyance of the land by Jose Francisco Balli to Jose Manuel Balli.

> ..."Having said this, he stated that he is willingly passing and transferring the land to this already mentioned brother Don Manuel Balli all his right, possessions, land titles and properties along with all rights within the law, as if he himself as giving possession in person to him, his children, heirs and successors.... CR 6636.

As an ancient document, the 1804 Document is to be treated by the trial court as:

> "Under a well-recognized exception to the hearsay rule, the recitals in an ancient document are admissible as evidence of the facts recited, provided that the instrument is over thirty years old, comes from proper custody, and is not suspicious in appearance. *Magee v. Paul*, 110 Tex. 470, 221 S.W. 254 (1920); *Bendy v. W. T. Carter & Bros.*, 269 S.W. 1037 (Tex.Com.App.1925, jdgmt adopted); *Moore v. Horn*,

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> 359 S.W.2d 947 (Tex.Civ.App. Beaumont 1962, ref'd n. r. e.); C. McCormick & R. Ray, Texas Practice: Evidence ss 1372-1375 (1956).

Zobel v. Slim, 576 S.W.2d 362, 365 (Tex. 1978).

> It is of course recognized that, by exception to the hearsay rule, the recitals in the two ancient documents are admissible as evidence of the facts recited. *Magee v. Paul*, 110 Tex. 470, 478, 221 S.W. 254; *Bendy v. W. T. Carter & Bros.*, Tex.Com.App., 269 S.W. 1037; *Moses v. Chapman*, Tex.Civ.App., 280 S.W. 911; McCormick and Ray's Texas Law of Evidence, Sections 612-617, pp. 771-779.

Bruni v. Vidaurri, 166 S.W.2d 81, 90 (Tex. 1942).

Balli contends that the effect of the 1804 Document is controlled by Texas law as recited in *Smith v. Townsend* and *Sullivan v. Dimmitt*, and in the alternative, the effect under Spanish colonial law would be a transfer of title because this Court must conclude for summary judgment purposes that the 1804 Document was recorded. The 1804 Document is an unsigned *protocol* which has been ripped from a recorded volume maintained by one of the document repositories specified under Spanish colonial law. *Smith v. Townsend, supra*. Therefore, Balli requests this Court to reissue its Opinion to clarify this matter.

B. Richard Santos did not provide an opinion on the legal effect of Spanish colonial law or Mexican law as to the legal effect of the 1804 Document.

This honorable Panel quotes from Mr. Santos' *Daubert/Robinson* hearing testimony as follows:

> It is my professional opinion that it (1804 Document) is the government copy that should have been filed in the *protocols* of the archive of Reynosa. Somehow or another somebody took it out. (parenthetical added to aid understanding).

Mr. Santos disavows giving a legal opinion and merely states that he is of the opinion

based upon the paper, ink, seals, language, style of writing and other physical manifestations that the 1804 Document is authentic and was recorded and then removed from the record book. Mr. Santos does not testify about its legal effect. This honorable Panel intimates that Balli offered this testimony not only on authenticity but also to prove validity and legal effect Balli offered this testimony **only** for authenticity as shown by Santos' testimony. The law of Texas and KMF's own experts provide the evidence of legal effect. See Section A *supra*.

The tear marks on the margin of the 1804 Document are a clear indication that it was removed from a bound volume. Santos' opinion that the 1804 Document was recorded in a bound volume and then removed is not too great of an analytical gap to exclude his opinion. *Kerr-McGee Corp. v. Helton*, *supra*.

C. The exclusion of the 1804 Document did cause the rendition of an improper judgment as to the 24,996.9 acres comprising the so-called "mud flats".

Assuming for argument that KMF prevails on its adverse possession claim, Balli asserts that KMF can only claim the tract comprising 58,939.5 acres and not the 83,836.40 acres at issue in *Kenedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268 (Tex.2002). KMF's maps and summary judgment evidence are limited to the tract comprising 58,939.5 acres. Adverse possession extends only to those lands.

KMF accepts the plat of the La Barreta grant made in 1907. The original plat or map is substantially replicated in the map prepared by Lothrop in 1985. Pages **0022254** and **0022260** (CR 5065A and CR 5066A). The original plat and Lothrop's map set the boundary

of the La Barreta grant west of the "mud flats". The "mud flats" are not included in the 1907 Patent from the State of Texas. KMF's predecessors did not claim the "mud flats". (CR 5046-5049, Affidavit of Armstrong; CR 5051, 5052, and 5056, Affidavit of Weiss; CR 5060, 5065, and 5066, Affidavit of Lothrop; CR 5068, 5071 Affidavit of Ellis). All of KMF's summary judgment evidence on the issue of adverse possession refers to 58,939.5 acres and not 83,836.40 acres. *Id.* KMF's own expert in this case, Professor Baade, states that KMF did not claim the "mud flats" based on adverse possession. (CR 6371).

Until August 2002, during the pendency of this litigation, KMF and its predecessors only possessed a claim to the "mud flats" and did not physically control, cultivate, graze or fence the "mud flats". *See Sun Oil Co. v. Humble Oil & Refining Co.*, 88 F.Supp, 658,659 (S.D.Tex.1950) aff'd in part and rev'd in part, *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191,194 (5th Cir.1951). These federal court decisions ruled against KMF's ownership of the "mud flats". There could be no adverse possession in the face of the competing claims between KMF and the State because (i) possession was not exclusive and (ii) a private party cannot ripen title against the State because there is no Statute of Limitations.

In August 2002, the Texas Supreme Court decided *Kenedy Memorial Foundation v. Dewhurst, supra.* In this decision, the Texas Supreme Court held, in effect, that the western bank of the Intracoastal Canal was the eastern boundary line of the La Barreta grant irrespective of the 1907 Patent boundary line (which was not discussed in this decision). The

western bank is the point of mean higher high tide and thus the boundary. Assuming arguendo that KMF adversely possessed some or all of the land west of the easternmost 1907 patent boundary line, exclusion of the 1804 Document caused the rendition of an improper judgment because KMF failed to introduce any evidence whatsoever that it ever adversely possessed the "mud flats" from Balli. KMF's own proof is that taxes were paid on only 58,939.5 acres. (CR 5051, 5052, and 5056, Affidavit of Weiss). KMF's own proof also admits that only 58,939.5 acres were rendered for tax. *Id.*

A common requirement of all of the periods of limitation for adverse possession in Texas is the satisfaction of two elements: notice to the owner and the intent of the adverse possessor. All of KMF's summary judgment evidence evinces an intent to claim 59,935.5 acres and no more. This summary judgment evidence cannot be cured by *Dewhurst v. Kennedy Memorial Foundation.* Now that title is quieted in KMF, adverse possession commences on the day following the issuance of the Supreme Court's mandate in *Dewhurst.*

First, the possession, in order to give notice to the record owner, must be the actual appropriation of the land to some purpose to which it is adapted. *Hardy v. Bumpstead*, 41 S.W.2d 226 (Tex.Comm'n App. 1931, judgmt adopted). The actual possession contemplated has been defined by one court as "an actual residence on the land, or such cultivation, use, or enjoyment of the same, by visible, notorious acts of ownership as would give notice to the owner and others of the adverse possession of the land." *Kimbro v. Hamilton*, 28 Tex. 561, 565 (1866). It should be noted that cultivating, using or enjoying the land is deemed a

general requirement under the concept of "adverse possession" even though the words "cultivating, using or enjoying" are specifically used in only the five-year and ten-year statutes. Tex.Civ.Prac.&Rem.Code, §§ 16.025, 16.026. Mere possession without actual and visible appropriation to some purpose, i.e., without cultivation, use or enjoyment, is not sufficient to give the required notice. Therefore, it is not sufficient merely to fence or mark the land, *Hankins v. Dilley*, 206 S.W. 549 (Tex.Civ. App.–Amarillo 1918, no writ), or merely to pay taxes on the land, *McBurney v. Knox*, 259 S.W. 667 (Tex.Civ.App.--Beaumont 1924), aff'd 273 S.W. 819 (Tex.Comm'n App. 1925, judgmt adopted), or merely to graze the land without fencing it or to graze land that has been only casually or incidentally fenced. *Orsborn v. Deep Rock Oil Corp.*, 153 Tex. 281, 267 S.W.2d 781 (1954); *Rhodes v. Cahill*, 802 S.W.2d 643, 646 (Tex. 1990).

The 24,996.9 acres depicted on the two Lothrop maps, **0022254** and **0022260** (CR 5065A and CR 5066A) was always contested acreage between KMF and the State of Texas. This 24,996.9 acres of mud flats was never possessed by KMF or its predecessors. They never fenced it or ran cattle on it.

It is only since the decision in *Kenedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268 (Tex.2002) that the State of Texas' claim has been adversely adjudicated and that KMF has claimed this 24,996.9 acres as its own without competing claims. Thus, KMF may have adversely possessed 58,939.5 acres of La Barreta, but KMF certainly did not adversely possess the remaining 24,996.9 acres of the mud flats. KMF's proof now specifies that the

waters of the Laguna Madre form a natural barrier on the east side of the claimed land, but once again, this new claim flies in the face of the historical claims. Since this matter is in litigation, Balli has brought suit within the time limits prescribed by Tex.Civ.Prac.&Rem. Code §§16.025, 16.026, 16.027, and 16.028. That is, it is only since August 2002 that the La Barreta grant extends to the Intracoastal Waterway. Before that time, KMF never adversely possessed the "mud flats" and there were competing claims to the "mud flats".

Balli claims that the 1804 Document conveys title to the La Barreta grant to them. This grant, according to *Dewhurst*, now includes the 24,996.9 acres of land comprising the "mud flats". The "mud flats" were never adversely possessed by KMF. Title to the 24, 996.9 acres resides in Balli.

IV. CONCLUSION

Santos did not render any impermissible legal opinions. Santos testified to the authenticity of the 1804 Document. The issues of genuineness and authenticity are for the jury. The legal effect of the 1804 Document, once admitted, is established by Texas law. No evidence or testimony is needed to demonstrate the legal effect of the 1804 Document. Finally, KMF never claimed the "mud flats" and cannot ripen title by adverse possession of land never claimed. Balli requests this honorable Court to reconsider its March 24, 2005 Opinion, to issue a new Opinion and to remand this matter to the trial court for the requested jury trial.