TO THE HONORABLE SUPREME COURT OF TEXAS:

Sylvia Menchaca Balli Aguilera, et al. ("Balli") file this their Petition for Review requesting this honorable Court to reverse the summary judgment against them and to remand this case to the court of appeals with instructions to remand to the trial court for trial.

OVERVIEW OF THE CASE

This is a summary judgment case involving the claims of over 700 descendants of Jose Manuel Balli to the Spanish land grant La Barreta, which was patented by the State of Texas to Jose Francisco Balli and his heirs and legal assigns in 1907. The original grant contained 25 *sitios* of land.[1] However, Balli only asserts title to the portion of La Barreta claimed by KMF, which includes, but is not limited to the 25,000 acres of "mud flats" that were the subject of *Kenedy Memorial Foundation v Dewhurst,* 90 S.W.3d 268 (Tex.2002).

As evidence of title, Balli produced an 1804 Instrument memorializing the conveyance of La Barreta by Jose Francisco Balli to his brother, Manuel Balli, on March 23, 1804. (App. Tab 5, English translation and typewritten Spanish reproduction and App. Tab 6, a photographic reproduction of this fragile Instrument).

KMF filed a traditional motion for summary judgment and a no evidence motion for summary judgment. Balli filed a motion for partial summary judgment on KMF's claim for attorneys' fees that was affirmed on appeal. (App. Tab 3, 162 S.W.3d at 698). The decision

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[1] A sitio is a league or labor. A league or labor contains 4,605.5 acres. Lange and Leopold, "Land Titles and Title Examination", 2d Edition, West, 1992, §292; on the other hand, the General Land Office assigns 4,428 acres to a sitio or league.

by the lower courts to grant and affirm KMF's motions for summary judgment by excluding Balli's expert testimony and the 1804 Instrument was an abuse of discretion and caused the rendition of an improper judgment.

Balli was wrongfully denied their right to a jury trial because the lower courts erroneously allowed and relied on foreign law testimony from KMF's experts on issues of Texas law in direct conflict with prior rulings by this Court. The lower courts further caused the rendition of an improper judgment by relying upon Texas Rules of Evidence, Rule 104, Rule 203 and Rule 702, rather than Rule 704. (App. Tab 1, 2 and 3).

Until this Court decided *Kenedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268 (Tex.2002), the title to the mud flats was open to question and neither KMF nor any of its predecessors in title perfected adverse possession of the mud flats. Thus, exclusion of the 1804 Instrument, the critical link in the title chain, resulted in the rendition of an improper judgment and wrongfully denied the Ballis their right to a jury trial as a matter of law.

STATEMENT OF FACTS

A. La Barreta

In 1802, the King of Spain began the process of granting La Barreta to Jose Francisco Balli in recognition of his meritorious services and donation of land to the colonists of Reynosa following a great flood on the Rio Grande River. See *MacKay v. Armstrong*, 19

S.W. 463, 464 (Tex.1892)[2] and (CR 6392). The Spanish grant was made in 1804 and the official colonial survey was made in 1809. (CR 1602-03, 1635-44). Any uncertainty as to validity of this grant or its size was put to rest in 1907 when the State of Texas issued a Patent to Jose Francisco Balli and his heirs and legal assigns comprising 124,297 acres. (CR 1665). The mudflats are not included in this Patent.[3]

Balli claims title to the portion of La Barreta held by KMF, including but not limited to the mud flats. KMF states that the mudflats comprise 25,570.49 acres. (CR 159). However, KMF never fenced, cultivated, grazed or otherwise exercised dominion over the mud flats and title in the mud flats is still in Balli.[4] *Kenedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268 (Tex.2002). KMF's expert, Professor Hans Baade, concedes that KMF did not claim the mud flats by adverse possession. (CR 6371).

B. The significance of the 1804 Instrument

KMF retained a title attorney to deraign title. (CR 6448-6453). Balli retained a title

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[2] *MacKay v. Armstrong* involved a claim by MacKay for the lands comprising La Barreta. MacKay contended that La Barreta had never been granted by the sovereign and that these lands were "vacant" and subject to his appropriation.

[3] (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).

[4] William Lothrop Affidavit and maps - **5059;** Affidavit of Lynwood Weiss - Statement concerning fences - **5051**; Maddox's footsteps traced on bank of Laguna Madre in patent- **4819;** Statement that lands claimed have been fenced for over 100 years - **134**; Statement that lands claimed have been fenced for over 100 years - **164;** Statement that lands claimed have been fenced for over 100 years - **211**:Statement that lands claimed have been fenced for over 100 years - Testimony of John G. Kenedy - **1796**; Statement that lands claimed have been fenced for over 100 years - Affidavit of John G. Kenedy - **1899 and 1910;**

attorney to deraign title. (CR 6364-6367). KMF's title attorney disregards the 1804 Instrument on the advise of another KMF expert. (CR 6449, 6450). Balli's title attorney accepts the 1804 Instrument and deraigns title to La Barreta in Balli. If, as the trial court held, the 1804 Instrument is invalid then title descends from Jose Francisco Balli to KMF. On the other hand, if the 1804 Instrument is valid then title was transferred from Jose Francisco Balli to Jose Manuel Balli and thence through testate and intestate succession to Balli. (CR 6270-6276).

C. 1804 Instrument

All parties agree that the pivotal document in this appeal is the 1804 Instrument. (CR 6013 and translations CR 6005-6007 and CR 6369)(App. Tab 6). The 1804 Instrument has been described as a *copia*, as a *compulso*, as a *protocolo* and as a *testimonio*. According to KMF's expert, Professor Baade, a *copia* is a copy of a deed or *testimonio* prepared by hand at or about the time of the preparation of the deed or *testimonio*. (RR Vol. 3, pp. 34-36). According to Balli's expert, the 1804 Instrument is the official governmental copy removed either from the Reynosa archives or the Ciudad Victoria archives. (RR Vol. 3, pp. 33-35). The official copy, *protocolo*, was not signed by the grantor. *Smith v. Townsend,* Dallam 569, 1844 WL 3902 (Tex.Rep.Sup.). The 1804 Instrument is not signed by the grantor.

D. The 1804 Instrument is authentic

According to KMF's expert witness, Karen Pavelka, the paper upon which the 1804 Instrument is written is authentic paper dating from the late 18th century and the early 19th

century. (CR 6425; Baade at CR 6346; and Santos at CR 6350-51). Baade testified that official documents had to be on "papel sellado" (sealed paper) and that the 1804 Instrument was on "papel sellado". (CR 6346). According to Pavelka, the ink used in writing the 1804 Instrument dates from that period. The 1804 Instrument is sealed with the authentic official seals of that time period. *Id.* It is sealed on two separate dates, *viz.*, 1803 and 1806; the year of manufacture and the year of recordation. (CR 6351-52). The style of writing, the abbreviations and the dialect used are consistent with other documents of this time period and locale. (CR 6351).

E. The 1804 Instrument was filed in the real property records in Reynosa

The 1804 Instrument was filed in the real property records of Reynosa because the tear marks on the edge of the Instrument indicate it was removed from a bound volume. (CR 6351 and RR Vol. 3, p. 45-46). There are notches in the left side of the paper that are evidence of where the Instrument was stitched and sewn into the official record book. See App. Tab 6. The official seals are correct for the time and the text is consistent with the other records filed in Reynosa in that period. (RR Vol. 3, p. 45-46). Further, as found by *Smith v. Townsend*, *supra*, the practice in Mexico was for the notary to keep the *protocolo* or official copy of the deed, the original or *testimonio* having been delivered to the grantee. (CR 6342, 6354; RR Vol. 3, pp 34-36, 48-49). The original or *testimonio* of this transfer of La Barreta is lost or destroyed. The 1804 Instrument is all that remains.

F. Qualifications of Richard Santos

Richard Santos has vast experience with ancient Spanish and Mexican Instruments. (RR Vol. 3, pp. 19-21). Santos was the archivist of the approximately 5000 Spanish and Mexican documents maintained in the Bexar County, Texas Historical Archives. *Id.* As part of his employment, Santos translated every document in the collection from Spanish to English. (RR Vol. 3, pp.21-22). Santos estimates that 75 percent of the documents he translated concerned land transfers. *Id.* Santos also performed services for the Bexar County Clerk, the Texas State Archives, St. Mary's University, Texas State Library, Pan American Institute and the Vatican. (RR Vol. 3, pp. 22-23). The State of Texas employed Santos as a translator in *Atchley v. Superior Oil Co.*, 482 S.W.2d 883 (Tex.Civ.App.-- Beaumont, 1972, ref. n.r.e.) and *State v. Superior Oil Co.*, 526 S.W.2d 581 (Tex.Civ.App.–Corpus Christi, 1975, ref. n.r.e.). (RR Vol. 3, pp. 25-26). In order to properly interpret and translate these land transfer Instruments, Santos has read and owns copies of the *Codigo Espanol*, *Law of the Indies, Juridico Indiana*, *Siete Partidas*, and other laws and decrees from the Spanish Colonial Period. (RR Vol. 3, pp. 30-31).

Based on his experience with Spanish and Mexican land records in the Bexar County archives, Santos concludes that the 1804 Instrument is the government copy filed in the *protocolos* of the archives in Reynosa or Ciudad Victoria and that the 1804 Instrument was removed by someone from the *protocolos* on file. (RR Vol. 3, pp. 33-35; CR 6209-10). The government copy was not signed. The original was signed and given to the vendee. Any other copies were then made and would normally bear a legend indicating that the copy was

a true and accurate copy made by an identified person on a particular date. *Id.* KMF's expert admits that the *testimonio*, the original Instrument of conveyance, would not be recorded, but would be given to the purchaser. (CR 6342). The *protocolo* was kept with the official records or the notary. *Smith v. Townsend,* Dallam 569, 1844 WL 3902 (Tex.Rep.Sup.).

G. Testimony and opinions of Baade and McKnight

The testimony of KMF's expert, Baade is erroneous and includes a translation of the 1804 Instrument in his report, which is inaccurate and omits material terms from the 1804 Instrument. (Compare CR 6564 with CR 6005-07 also found at App. Tab 5). KMF's experts, Baade and McKnight, both conclude that since the 1804 Instrument in issue is not recorded it cannot be a transfer of title. (CR 6536). However, since this Court must accept the intendment that the 1804 Instrument was recorded, the conclusion is the opposite.[5]

SUMMARY OF ARGUMENT

The lower courts erred by excluding Balli's expert testimony and by disregarding it in their rulings on KMF's motions for summary judgment. Balli's expert, Richard Santos, was qualified to testify concerning the authenticity of the 1804 Instrument and other ancient documents. His experience as an archivist for Bexar County and employment as a translator for the State of Texas clearly establish his abilities and qualifications. His opinion was that the 1804 Instrument: (1) was on papel sellado; (2) bore original seals; (3) was written in ink

[5] It is worthy to note that verbal or parole sales of unoccupied land before 1836 are recognized as valid and enforceable in Texas. *Sullivan v. Dimmitt*, 34 Tex. 114, 116 (Tex. 1870).

from the period; (4) was written in the style and vernacular of the period; (5) was subscribed before an *alcalde* and witnesses; (6) was bound in a book; (7) was the official copy of the transfer; and (8) was removed from said book by ripping or tearing. These opinions are not legal opinions and the *validity* or *effect* of the 1804 Instrument were not the subject of his opinions. Rather, the *validity* and *effect* of the 1804 Instrument are governed by Texas case law once items (1) through (7) were demonstrated and it is admitted into evidence.

Beginning with the Republic, this Court has held in a series of opinions that the original of an official act before a notary or *alcalde* is entitled to admission in evidence provided the same was recorded. *Smith v. Townsend*, Dallam 569, 1844 WL 3902 (Tex.Rep.Sup.); *Paschal v. Perez*, 7 Tex.348 (1851). KMF's experts do not dispute this rule.

In a summary judgment proceeding, the court must review the evidence in the light most favorable to the non-movant and all intendments must be made in the non-movants' favor. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156-57 (Tex.2004). Here, the Court must admit the testimony of Santos and consider the 1804 Instrument as authentic, recorded in a bound volume and subsequently removed from the bound volume. The 1804 Instrument must be admitted into evidence. It is for the jury and not the judge to decide the genuineness of the document which determines the *validity* and *effect* of the 1804 Instrument of conveyance. *Beaumont Pasture Co. v. Preston & Smith*, 65 Tex. 448 (1886). In addition, because this Court has decided the requisites for the admission of a *protocolo* and the effect of a *protocolo*, the trial court committed reversible error by relying on evidence of foreign

jurisdiction's law pursuant to Tex.R.Evid., Rule 203, in direct conflict with both Tex.R.Evid., Rule 704 and established precedent by this honorable Court.

The 1804 Instrument is admissible as an Ancient Document. It is more than 20 years old. Tex.R.Evid., Rule 803(16). The 1804 Instrument did not have to be found in an official records depository for Texas or Mexico to meet the custody requirement for admission of an Ancient Document. Texas case law specifically recognizes that, in many instances, the possession of an ancient document by the persons or family with whom it is concerned says more about the validity of the document and its custody than if it were to come from the possession of a disinterested third party. *Brown v. Simpson's Heirs*, 2 S. W. 644, 653 (Tex. 1887). Finally, the free from suspicion requirement means that the document is free from suspicion *on its face*. All other facts and circumstances, e.g. time and manner of production, are fact issues to be looked at by a jury, i.e. genuineness. *Woodward v. Keck*, 97 S.W. 852, 854 (Tex.Civ.App.–1906, n.w.h.).

ARGUMENT

A. The trial court erred in striking the testimony of Richard Santos concerning 1804 Instrument.

The Final Summary Judgment (App. Tab 2) entered by the trial court provides:

> "...Plaintiff's Motion to Exclude the testimony of Defendants/Intervenors' expert witnesses, Richard Santos and Lynne Perez, as to legal issues is **GRANTED** and neither witness is qualified to offer opinions on any legal issues such as the validity or legal effect of the 1804 and 1949 Instruments in question herein;..." (CR 7071).

The standard for review of the trial court's decision is an abuse of discretion. *Exxon*

Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex.2002). Failing to apply the applicable standards with regard to expert witnesses is an abuse of discretion. *Id.* The qualifications of Richard Santos and his testimony/expert opinions submitted in connection with his testimony were **never offered into evidence as expert legal opinions**. Rather, Richard Santos' expert testimony was offered to assist the trier of fact in determining the factual authenticity of the 1804 Instrument. For this subject, Santos was qualified as an expert in the field and based upon his training, experience and writings, Santos was clearly qualified to testify on this subject.

Texas case law, in conjunction with Tex. R. Evid., Rule 702, generally requires:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline *Gammill et al. v. Jack Williams Chevrolet, Inc. et al.*, 972 S.W.2d 713, 725 (Tex.1997).

Mr. Santos' testimony is reliable and he testified as follows at the *Daubert* hearing:

> It is my professional opinion that it (1804 Instrument) 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).(RR Vol. 3, pp. 33-35; CR 6209-10).

This is not a legal opinion as to Spanish colonial or Mexican law. It is an opinion that the 1804 Instrument is a *protocolo,* which had been filed for record and then removed. This opinion should **not** have been stricken or disregarded. The quotation of Santos included at

162 S.W.3d at 693-94 does **not** express a legal opinion. Rather, the court of appeals erroneously interprets this as a legal opinion. The **legal effect** of the 1804 Instrument **is determined by Texas law**. The authenticity of the 1804 Instrument was established by Santos and the lower courts committed an abuse of discretion by excluding the 1804 Instrument and Santos' testimony regarding same.

B. Since it must be accepted that the 1804 Instrument was recorded, the effect of the 1804 Instrument is prescribed by Texas law and not by foreign law

Under the summary judgment standard of review, this Court must view the 1804 Instrument as a genuine *protocolo* which was recorded. As a recorded document affecting title to lands in Texas, the 1804 Instrument comes into evidence [*Smith v. Townsend*, Dallam 569, 1844 WL 3902 (Tex.Rep.Sup.); *Paschal v. Perez*, 7 Tex.348 (1851)], provided it meets the Ancient Document conditions [Rule 803 (16)], and it is the jury's province to determine whether the 1804 Instrument is genuine or suspicious [*Viersen v. Bucher*, 342 S. W. 2d. 203, 208 (Tex.Civ.App.--1960 no writ hist.); *Pasture Co. v. Preston*, 65 Tex. 448; *Warren v. Frederichs*, 76 Tex. 652, 13 S. W. Rep. 643; *Holt et al v Maverick*, 23 S.W. 751, 753 (Tex. Civ. App. 1893)].

Instead, the lower courts relied on both Tex.R.Evid., Rule 203, and on the KMF's expert testimony on a matter of Texas law. The trial court erroneously accepted evidence of foreign law on a matter previously decided by this Court, a matter which is now Texas law and **not** the law of a foreign jurisdiction. Under Tex.R.Evid., Rule 704, this action was

improper and an error of law. *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 690 (Tex.App. –Houston [14th Dist.] 1998, rehearing overruled); *United Way v. Helping Hands Lifeline Foundation, Inc.*, 949 S.W.2d 707, 713 (Tex.App.--San Antonio 1997, writ denied); *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex.App.--Corpus Christi 1991, writ denied). The legal effect of a recorded *protocol* is not a mixed question of law and fact to which an expert may address opinions on ultimate issues. *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 353 (Tex.App.–Dallas 2004, pet. filed). The trial court's reliance on Tex.R.Evid., Rule 203, was an abuse of discretion, wrongfully denied Balli their right to a jury trial, and resulted in an improper judgment as a matter of law.

C. The trial court erred in not admitting the 1804 Instrument into evidence as an Ancient Document under Tex.R.Evid. 803 (16)

The lower courts held that the 1804 Instrument was not admissible into evidence because it was unreliable, was not found where it should have been and the circumstances of its finding and production were suspicious (CR 6840, 6842) and 162 S.W.3d 694-95. The lower courts erred in their application of the case law governing the admission of a document as an Ancient Document as a matter of law.

First, any document or paper that has the proper evidentiary foundation can be admitted as an Ancient Document. "The admission of documents as ancient ones applies, not only to deeds, wills, and bonds, but also to receipts, letters, entries, and all other ancient writings." *Holt et al v. Maverick*, 23 S.W. 751, 752 (Tex.Civ.App.--1893).

Second, a document must meet three conditions to be admitted as an Ancient Document. There is no question in this case that the 1804 Instrument is more than 20 years old. Tex.R.Evid., Rule 803 (16). The custody requirement for an Ancient Document does not mean that the document must have been recorded in an official records depository for Texas or Mexico. *Woodward v. Keck*, 97 S.W. 852, 854 (Tex.Civ.App. 1906). KMF's expert opined that, even if genuine, the 1804 Instrument could not be admitted into evidence. (CR 6536). In fact, to the contrary, there is **no recordation requirement whatsoever** to be found in Texas case law with regard to **ancient documents.** Rather, as stated in *Woodward v. Keck*, 97 S.W. at 854:

> Proper custody of a document purporting to be ancient is required in order to give credit to its genuineness[6]. It is not that one place has more sacredness than another, but the fact of its coming from the place where it is natural and proper that it should be found is a circumstance tending to prove its genuineness...It is not required that the ancient document should be found in the best and most proper place, but the inquiry should be as to **whether it has been found in a place that is reasonable and natural under all the facts and circumstances of the particular case**. (Emphasis added).

The 1804 Instrument was produced by Balli. Texas case law specifically recognizes that, in many instances, the custodial deposition of an ancient document with the family with whom it is concerned says more about the validity of the document and its custody than if it were to come from the possession of a disinterested third party. *Brown v. Simpson's Heirs*, 2 S. W. 644, 653 (Tex.1887). That is, **the finding of a document in the possession of a**

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[6] Genuineness is a fact question for the jury to decide. *Id.* Balli was denied their right to have this question determined by a jury.

party casts sufficient threshold proof of the genuineness of the document to allow it to be admitted into evidence as an ancient document. *Emory v. Bailey*, 234 SW 660, 662 (Tex. - 1921). As held in *Holt et al v Maverick*, 23 S.W. 751, 753 (Tex. Civ. App. 1893):

> ... It has been held that a letter purporting to have been written more than 30 years ago is an ancient document, and, **being produced from the family papers of the person to whom it was addressed**, the writer and person to whom it was addressed being dead, it is presumed to have been written by the person by whom it purports to have been written... (Emphasis added).

In light of the foregoing, it would be anticipated that the document setting forth Appellants' title resided with family members. Based on the un-controverted evidence concerning the custody of the 1804 Instrument, said document came from familial custody. Rather than casting aspersions on the authenticity of the document, such custody, in fact and in law, affirms the genuineness of the document and entitles it to be admitted into evidence as an ancient document under the facts presented as a matter of law.

The lower courts found that the discovery of the 1804 Instrument and its production was suspicious. This is not the legal test for the admission of an ancient document into evidence. Rather, the test is whether or not the document at issue is free from anything suspicious **on its face** as set forth as follows:

> Since the original deed would have been admissible, on its production from proper custody, free from anything suspicious **on its face**, on proof of its existence for more than 30 years, we think no sufficient reason can be given for refusing to admit in like manner the certified copy, offered by plaintiffs in error.

Emory v. Bailey, 234 SW 660, 662 (Tex. 1921) (Emphasis added).

No evidence was introduced by Appellee which showed that the 1804 Instrument was anything other than what it purported to be; a contemporary account of the affirmance of a conveyance of La Barreta from Francisco Balli to his brother, Manuel Balli. There was nothing suspicious noted by the lower courts on the face of the 1804 Instrument.(CR 6840 -6844). 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. Here, the exclusion of the 1804 Instrument caused the rendition of an improper judgment. As agreed by all parties, the 1804 Instrument is the key document to Balli's claims.

CONCLUSION

This Court should grant Balli's Petition for Review because Balli's expert and the 1804 Instrument were erroneously excluded from evidence and Balli was denied their right to a jury trial. Further, this Court should grant Balli's Petition for Review because the court of appeals decision conflicts with the law of evidence that expert testimony is not permitted on issues of law and the lower courts here relied on such expert witness opinions.

WHEREFORE, Petitioners, Sylvia Menchaca Balli Aguilera, et. al, pray that this Court grant their Petition for Review, reverse the judgment of the 13th Court of Appeals and remand this case for a jury trial.