WHAT OIL AND GAS PRACTITIONERS NEED TO KNOW ABOUT THE APPLICATION OF THE DISCOVERY RULE AND THE FRAUDULENT CONCEALMENT DOCTRINE IN THE OIL PATCH

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I. Introduction and Summary

Typically, a cause of action accrues, and statutes of limitations begin to run, when facts come into existence authorizing a claimant to seek a judicial remedy.\(^1\) Two notable exceptions to that general rule are the discovery rule and the fraudulent concealment doctrine, which plaintiffs cling to in order to prevent their late-filed claims from being dismissed as time-barred.

Beginning with its 1998 decision in *HECI Exploration Co. v. Neel*,\(^2\) however, the Supreme Court of Texas\(^3\) has repeatedly narrowed the circumstances in which claimants in oil and gas disputes can invoke the discovery rule or the fraudulent concealment doctrine to defer the accrual date and/or to toll limitations. Describing these concepts as “very limited” exceptions to statutes of limitations,\(^4\) the Court in *HECI* and subsequent decisions has repeatedly rejected oil and gas plaintiffs’ attempts to rely on these exceptions by focusing its inquiry on the availability of information that would have enabled plaintiffs, had they exercised reasonable diligence, to determine within the limitations period that they had been injured.

In 2008 and 2011, the Court issued three opinions – *Kerlin v. Sauceda*, *Shell Oil v. Ross* and *BP America Production Co. v. Marshall* – demonstrating that it absolutely meant what it had earlier indicated in *HECI*. In all three cases, the plaintiffs argued they had reasonably relied on misrepresentations by the defendants. Nevertheless, the Court held as a matter of law that neither the discovery rule nor the fraudulent concealment doctrine applied because the plaintiffs were sophisticated in oil and gas and there was information available from public and private sources that would have revealed the plaintiffs’ injuries had they exercised reasonable diligence.\(^5\)

In 2015, the Court issued two more decisions on this issue – *Hooks v. Samson*\(^6\) and *Cosgrove v. Cade*.\(^7\) *Hooks* appeared to provide oil and gas plaintiffs with some measure of hope that the discovery rule and the fraudulent concealment doctrine are still alive and well; the Court held it could not determine as a matter of law that the plaintiff would have discovered his injury within the limitations period by exercising reasonable diligence, because the public filings cited by the defendant were themselves tainted with fraud. Six months later in *Cosgrove*, however, the Court determined that as a matter of law the discovery rule did not apply to the plaintiffs’ deed

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3. Note that all references to “the Supreme Court” or “the Court” herein refer to the Texas Supreme Court.
7. Cosgrove v. Cade, 468 S.W.3d 32 (Tex. 2015), reh'g denied (Sept. 11, 2015).
reformation claim. Thus, once again, the Court confirmed the extremely high standard that oil and gas plaintiffs will face when trying to avail themselves of the discovery rule or the fraudulent concealment doctrine.

Based on the Court’s recent opinions in *Ross, Marshall,* and *Cosgrove,* there is clear momentum against the application of the discovery rule or the fraudulent concealment doctrine in Texas oil and gas disputes. This is especially true where the plaintiff is a sophisticated member of the oil and gas industry and where information available from public and/or private sources is accessible to the plaintiff, and would, if discovered, reveal the plaintiff’s alleged injury. While the *Hooks* decision demonstrates that there is at least one circumstance in which these exceptions to the running of statutes of limitations will apply in the context of oil and gas disputes, even the language in the *Hooks* opinion strongly indicates that the tide is generally against the application of the discovery rule and/or fraudulent concealment doctrine in the oil and gas context.

II. The Purpose of Statutes of Limitations, and Its Two Primary Exceptions

A. Statutes of limitations typically begin to run when a cause of action accrues.

In 1996, the Court issued two critically important statute of limitations decisions—*Computer Associates Int’l, Inc. v. Altai* and *S.V. v. R.V.*\(^8\) Although these were not oil and gases, they set the tone for what was to come in oil and gas disputes over the next twenty years. In these decisions, the Court emphasized the primary rationale for implementing statutes of limitations:

Limitations statutes afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. The purpose of a statute of limitations is to establish a point of repose and to terminate stale claims.\(^9\)

With this purpose in mind, Texas courts have held that the statute of limitations for a given cause of action will typically begin to run at the time the cause of action accrues,\(^{10}\) *i.e.*, 

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\(^{8}\) *Computer Associates Int'l, Inc. v. Altai,* 918 S.W.2d 453 (Tex. 1996); *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996).

\(^{9}\) *S.V.*, 933 S.W.2d at 3; *see also Altai,* 918 S.W.2d at 455 (emphasizing that statutes of limitations are intended to compel plaintiffs to assert their claims “within a reasonable period while the evidence is fresh in the minds of the parties and witnesses”).

\(^{10}\) *S.V.*, 933 S.W.2d at 4.
when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.  

B. **The Discovery Rule defers the accrual of a cause of action until the plaintiff knows or should have known of his cause of action.**

The discovery rule is “a very limited exception to statutes of limitation” that defers the “accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to a cause of action.” In the landmark case of *S.V. v. R.V.*, the Court clarified that for the discovery rule to apply, the plaintiff must prove both of the following elements:

1. The nature of the plaintiff’s injury is inherently undiscoverable, and
2. The evidence of injury is objectively verifiable.

Also in *S.V.*, the Court specified that “[t]o be “inherently undiscoverable,” an injury need not be absolutely impossible to discover … [n]or does it mean merely that a particular plaintiff did not discover his injury within the prescribed period of limitations.” Rather, “[a]n injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence.” This last sentence contains two critically important principles relative to how the Court would apply the discovery rule in future oil and gas disputes:

- First, the discovery rule is applied categorically to classes of injuries, and does not focus on the plaintiff’s causes of action.  
- Second, and as will be demonstrated throughout this paper, plaintiffs will be held to a very high standard when it comes to the due diligence that they should have exercised in order to determine if they have suffered an injury.

It is also important to note the discovery rule does not toll limitations until the plaintiff discovers all of the elements of a cause of action. Rather, “[k]nowledge of injury initiates the

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11 *Id.* (citing *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994)); see also *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 202 (Tex. 2011) (“Causes of action accrue and statutes of limitations begin to run when facts come into existence that authorize a claimant to seek a judicial remedy.”).

12 *Shell Oil Co. v. Ross*, 356 S.W.3d 924, 929 (Tex. 2011) (citation omitted).

13 *HECI*, 982 S.W.2d at 886.


15 *S.V.*, 933 S.W.2d at 7.

16 *Id.* (emphasis added).

17 *Altai*, 918 S.W.2d at 456-57.
accrual of the cause of action and triggers the putative claimant’s duty to exercise reasonable diligence to investigate the problem, even if the claimant does not know the specific cause of the injury or the full extent of it.”

C. The Fraudulent Concealment Doctrine tolls the applicable statute of limitations until the fraud has or should have been discovered.

Fraudulent concealment is an “equitable doctrine that … tolls limitations ‘because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run.’” Under this “fact-specific” doctrine, the plaintiff “must establish an underlying wrong, and demonstrate that ‘the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.’” This requires either active suppression of the truth or the failure to disclose when there is a duty to speak. If the plaintiff satisfies these elements, the running of limitations will be tolled, but only “until the fraud is discovered or could have been discovered with reasonable diligence.” As mentioned above in connection with the discovery rule, and as will be made clear below, in the context of oil and gas disputes, the Court has spent the last eighteen years defining what is meant by “reasonable diligence.” And what it means, apparently, is that sophisticated oil and gas plaintiffs are going to be expected to review any and all publicly and privately available information to which they might have access and which would reveal their alleged injury. This started in earnest in the Court’s 1998 decision in HECI Exploration Co. v. Neel.

III. Royalty Owners Are on Notice of Available Information Regarding Alleged Injuries


In HECI, royalty owners, the Neels, sued their lessee, HECI, for breach of an implied covenant to notify the royalty owner of the need to sue a neighboring operator for damage caused to a common reservoir. In 1988, HECI sued the operator of an adjoining lease, AOP, claiming

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19 Emerald Oil, 348 S.W.3d at 209.

20 Shell Oil v. Ross, 356 S.W.3d at 927 (citing S.V., 933 S.W.2d at 6).

21 Marshall, 342 S.W.3d at 67 (citing Earle v. Ratliff, 998 S.W.2d 882, 888 (Tex. 1999)).


24 See Dick Watt, Ben Elmore & Robert C. Campbell, The Texas Supreme Court and the Evolution of the Discovery Rule and Fraudulent Concealment Doctrines in Oil and Gas Cases, 7 TEX. J. OIL GAS & ENERGY L. 389 (2012) (referring to the HECI decision as “ground zero” for the Court’s jurisprudence on this issue).

that AOP had damaged the common reservoir underlying the two subject leases. HECI and AOP subsequently settled and filed a release of judgment in Fayette County in September 1989. The Neels did not learn of the HECI-AOP suit until May 1993. In December 1993 (more than four years after HECI and AOP had filed the release of judgment), the Neels sued HECI for breach of the lease, breach of an implied covenant to inform the Neels of AOP’s conduct and the damages associated therewith, negligent misrepresentation, and unjust enrichment.

The trial court granted summary judgment, but the court of appeals reversed, holding that “HECI had not conclusively established that the Neels knew or in the exercise of reasonable diligence should have known of their injury.”

The Supreme Court of Texas overturned this decision and held as a matter of law that the discovery rule did not apply and that the Neels’ claims were time-barred. More specifically, the Court asked “whether the failure of HECI to notify the Neels is the type of injury that is inherently undiscoverable” and determined “that it is not.” In reaching this conclusion, the Court made two very important statements that signaled very emphatically where the Court was going with this issue:

- “As owners of an interest in the mineral estate, the Neels had some obligation to exercise reasonable diligence in protecting their interests. This includes exercising reasonable diligence in determining whether adjoining operators have inflicted damage. Royalty owners cannot be oblivious to the existence of other operators in the area or the existence of a common reservoir.”

- “As demonstrated in this case, the information that the Railroad Commission maintains regarding fields in which there is competing production indicates that injury to a common reservoir by an adjoining operator is not inherently undiscoverable.”

While the Court would not agree with HECI “that all records maintained at the Railroad Commission constitute constructive notice to royalty owners of their content, as is the case with recorded instruments in a grantee’s chain of title,” the Court nevertheless found that “filings and other materials available from the Railroad Commission are a ready source of information, and a cause of action for failure to provide that same information is not inherently undiscoverable.”

26 HECI, 982 S.W.2d at 885.
27 Id. at 886.
28 Id.
29 Id. at 887.
30 Id. at 886.
31 Id. at 887.
Also important is how the Court responded to one of the Neels’ primary arguments: that they were entitled to rely on HECI to safeguard their interests. The Court responded that even if it were true that the Neels were entitled to rely on its operator, “any failure of [HECI] to monitor activities of an operator in a common reservoir or to notify royalty owners of a cause of action against those operators is not an inherently undiscoverable breach.”

B. Wagner & Brown, Ltd. v. Horwood (August 31, 2001)

Three years after it decided HECI, the Court was faced with another dispute in which plaintiffs sought the application of the discovery rule to save a claim related to royalty underpayments. In this instance, however, the defendant was not claiming that the plaintiffs could have discovered their injury by reviewing publicly-available information. Instead, the defendant/lessee claimed that the necessary information was available from the lessee and from other private entities. Nevertheless, the Court agreed with the lessee that, as a matter of law, the discovery rule should not apply to the plaintiffs’ claims.

Wagner & Brown, Ltd. (“W&B”) leased and operated oil and gas interests in which Lonnie Horwood and David Glass owned a one-eighth royalty interest on the amount realized from the sale of gas at the wells. Wagner & Brown sold the gas to two purchasers, but by virtue of an agreement that its general partner, Canyon Energy, Inc. (“Canyon”) had entered into with the purchasers, W&B delivered the gas to a central gathering and processing facility, where the gas was in turn delivered to the purchasers. Under the relevant agreements, the purchasers paid gathering and compression charges to Canyon and deducted these charges from the amount they paid W&B for the gas.

Pursuant to the terms of the leases, W&B paid the plaintiffs’ royalty based on the reduced price, i.e., after deduction of gathering and compression charges. In 1982-84, the royalty statements reflected a compression charge between $0.25-$0.30/mcf of gas sold. In 1982, Glass hired a consultant to review these charges, and in 1983 the consultant determined the charges were excessive; however, Glass took no action at that time. Instead, in 1985, he called W&B to ask about the charges and was told that the charges were $0.12/mcf.

Horwood and Glass filed suit against W&B in 1996, alleging unjust enrichment and breach of the lease on the grounds that the compression charges were inappropriately high and that W&B paid those charges to its affiliate Canyon in order to reduce the amount of royalty that it was obligated to pay the plaintiffs. W&B moved for summary judgment on the grounds that the plaintiffs’ claims were time-barred. The plaintiffs responded that the discovery rule and the fraudulent concealment doctrine deferred accrual of their claims. The trial court granted summary judgment in W&B’s favor, but the court of appeals reversed on the grounds that the discovery rule applied.

Upon review, the Court stated that “we determine whether an injury is inherently undiscoverable on a categorical basis because such an approach ‘brings predictability and

32 Id. (emphasis added).
consistency to the jurisprudence.” Citing HECI, the Court clearly indicated that its focus when making this determination would be on whether the plaintiff could have discovered his injury by exercising reasonable diligence:

Accordingly, the question here is not whether Horwood and Glass detected the alleged improper charges and resulting underpayment within the limitations period. Rather, we must decide whether theirs is the type of injury that generally is discoverable by the exercise of reasonable diligence.”

The Court’s analysis started from the premise that “a royalty owner should exercise due diligence to determine whether charges made against royalty payments are proper and reasonable.” Examining its holding in the HECI decision, the Court noted that it held in the 1998 decision that “the injury underlying the Neels’ failure-to-notify claim – damage to the common reservoir – was discoverable” because there were “several sources of information about the existence of a common reservoir and operations in it [that] were available to the royalty owners, including Railroad Commission and lessee records.”

Similarly, according to the Court, Horwood and Glass could have looked to multiple sources for the type of information that would have enabled them to determine that W&B had injured them by charging higher compression charges than appropriate, including the following:

- W&B (the lessee);
- Canyon (the affiliate of W&B that owned and operated the compression facility);
- The gas purchasers (although they were not in privity of contract with the plaintiff royalty owners);
- Several other sources of information available to Horwood and Glass from which they could have discovered the propriety of post-production charges (the Court did not specify in its opinion what these sources were).

Because the plaintiffs could have obtained the information they needed to determine that W&B had made inappropriate deductions, the Court determined that the alleged injuries were not inherently undiscoverable. Bolstering this holding was the fact that Glass had hired a consultant in 1982 to investigate the fees charged, and that the consultant used the statements and other information to determine that Glass had been overcharged. Even though the W&B

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34 Id. at 735.
35 Id.
36 Id. at 736.
37 Id. at 735-36.
38 Id. at 737.
39 Id.
representative allegedly provided Glass with false information about the charges in 1985, the Court nevertheless held that W&B’s misrepresentation was irrelevant in determining whether the alleged injury was of a class that’s inherently undiscoverable.\textsuperscript{40}

Notably, the plaintiffs attempted to distinguish their case from \textit{HECI} by arguing that \textit{HECI}’s holding was based on information available in \textit{public} records, and that none of the above-described sources involved materials that were in the “public record.” The Court quickly dismissed that notion, retorting that “we did not imply … that an injury is inherently undiscoverable if it cannot be detected by examining public records.”\textsuperscript{41} The Court then reminded the plaintiffs that the \textit{HECI} opinion also pointed to the lessee as a source of information that made the alleged injury not inherently undiscoverable.\textsuperscript{42}

Finally, the plaintiffs made an equitable argument that it was not fair to make royalty owners bear the burden of discovering these types of injuries. The Court rejected this assertion, and cautioned royalty owners that they will be treated as sophisticated business people who can \textit{and should} monitor their investments and interests, which the plaintiffs in fact did when they hired the consultant in 1982 to investigate this matter.\textsuperscript{43}

\textbf{IV. Sophisticated Plaintiffs Can’t Reasonably Rely on Defendants’ Misrepresentations if Accurate Information is Otherwise Available}

\textbf{A. Kerlin v. Sauceda (October 10, 2008)}\textsuperscript{44}

This case involved a complicated set of events and facts related to the ownership of Padre Island, and included allegations that the defendant blatantly misrepresented certain relevant facts to the plaintiffs in order to conceal his wrongdoing to their detriment for years. Nevertheless, the Court rejected the plaintiffs’ claims as time-barred, demonstrating the Court’s extreme reluctance to apply the fraudulent concealment doctrine in the context of late-filed oil and gas claims.

The plaintiffs were members of the Balli family, which at one time had staked a claim to ownership of Padre Island. In 1937, Gilbert Kerlin and his uncle uncovered information that led them to believe that the Ballis may still have a claim that they owned the island. In light of that information, Kerlin contacted Balli family members in an attempt to obtain deeds from them to whatever they owned in Padre Island. Ultimately, Kerlin obtained eleven general warranty deeds from members of the Balli family, and each of those deeds reserved 1/64th of 1/8th royalty in each grantor.

In 1940, with the Balli deeds in hand, Kerlin became involved in litigation against other parties who also claimed title to the island. The result of this litigation was a settlement by

\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.} at 736-37.
\textsuperscript{43} \textit{Id.} at 737.
\textsuperscript{44} \textit{Kerlin v. Sauceda}, 263 S.W.3d 920 (Tex. 2008).
which Kerlin received mineral interests in 1,000 acres of Padre Island and fee simple title to 20,000 acres of land in the southern division of the island. Kerlin then executed reconveyance deeds to the Ballis, but never informed them of those deeds or of the litigation. Nor did Kerlin ever record or deliver the deeds. Kerlin even met with one of the Ballis around this time; but Kerlin never mentioned any of these events to the family member. Thereafter, the following occurred:

- In 1953, the patriarch of the Balli family contacted Kerlin about Kerlin’s interest in the island, and Kerlin twice responded that he had received no title under the Ballis’ deeds.

- In 1961, Kerlin sold his 20,000 acres for $3.4 million.

- In 1985, one of the Balli family members contacted Kerlin to inquire about the mineral interests reserved in the Balli deeds, and Kerlin told her the deeds were invalid.

Finally, in February 1993, the Ballis sued Kerlin and his attorney for breach of contract, breach of fiduciary duty, fraud, and conspiracy to commit fraud and breach of fiduciary duty. Kerlin raised several affirmative defenses, including that the claims were time-barred. After a two-month trial, the jury found, among other things, that the deeds reserved a 1/64 of a 1/8 royalty interest in the Ballis’ favor, and that the claims were not time-barred because Kerlin had fraudulently concealed the facts and circumstances of the settlement and fraudulently concealed that he was receiving royalty payments that belonged to the Ballis. The court of appeals affirmed these findings by the trial court.

The Supreme Court disagreed, however, holding that “the Ballis could have timely discovered the existence of their claims through the exercise of reasonable diligence.” Describing HECI’s discussion of the discovery rule as “instructive in this case,” the Court reminded its readers that “royalty owners are not entitled to ‘make[] no inquiry for years on end,’ and then sue for contractual breaches that could have been discovered within the limitations period through the exercise of reasonable diligence.” In this case, the Court found that the Ballis could have discovered their claim by virtue of the publicly-available documents showing that Kerlin had settled the earlier litigation and had received more than 20,000 acres in fee simple and 1,000 mineral acres. Further, the Court noted that although the deeds contained a royalty reservation, the Ballis never received any royalty payments. According to the Court, that also should have put the Ballis on notice of a potential injury.

Then, in 2011, the Court issued two opinions that built on HECI, Wagner & Brown, and Kerlin in a manner that left little doubt about the Court’s extreme reluctance to permit oil and gas plaintiffs to avail themselves of the discovery rule and/or the fraudulent concealment doctrine.

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45 Id. at 925.

46 Id. at 925-26.

47 Id. at 926.
B. BP America Production Co. v. Marshall (May 13, 2011)\textsuperscript{48}

In Marshall, the Court reversed the lower courts’ judgments and poured out the plaintiffs’ claims that were based on the defendants’ alleged fraud. The Marshall holding is as follows:

We hold that because the Marshalls’ injury was not inherently undiscoverable and BP’s fraudulent representations about its good faith efforts to develop the well could have been discovered with reasonable diligence before limitations expired, neither the discovery rule nor fraudulent concealment extended limitations … [and] the Marshalls’ fraud claims against BP were time-barred.\textsuperscript{49}

BP’s lease from the Marshalls had a standard 60-day savings clause providing that the lease would continue past the expiration date so long as BP was engaged in good-faith drilling or reworking operations designed to produce paying quantities of oil or gas with no cessation of operations for more than 60 days. The primary term of the lease was set to expire on July 11, 1980. Two weeks before the expiration date, BP drilled a well and continued to work on the well for the rest of the year. Because they had not seen any production from the well after the lease expiration date, the Marshalls contacted BP, who informed the Marshalls that BP had kept the lease alive through continuous operations. Based on BP’s response, the Marshalls did not investigate further.

In March 1981, BP sold the lease to Sanchez-O’Brien Oil & Gas (“Sanchez”). On that same day, BP decided to plug the well. Sanchez drilled its first well in April 1981; the well was productive, and it was undisputed that there were continuous operations on the lease from that point forward.

In 2001, the Marshalls sued BP for fraud and sought a declaration that the lease with BP had terminated in early January 1981 because BP had abandoned any real efforts to rework the well and did not expect it to produce in paying quantities, but concealed this fact and continued operations in bad faith until it could sell the lease to Sanchez. The Marshalls further argued that the statute of limitations on their fraud claims should be tolled until June 2000, which is when BP released internal documents about the well which would have allowed the Marshalls to discover the alleged fraud. The trial court found in favor of the Marshalls and granted a declaration that the lease had terminated and the interest had reverted to the Marshalls. On appeal, the court of appeals upheld the trial court’s verdict, and held that the discovery rule defeated BP’s limitations defense.

The Court rejected the application of the discovery rule to the Marshalls’ fraud claim. According to the Court, information that would have revealed the Marshalls’ alleged injury was available from the same sources recognized in HECI and Wagner & Brown, including publicly available filings with the Texas Railroad Commission (the “Railroad Commission”). More specifically, a well log and plugging report that had been filed with the Railroad Commission


\textsuperscript{49}Id. at 63.
and that were available to the Marshalls “were alone sufficient to discover … that BP’s efforts to obtain production at shallow intervals after other intervals proved unsuccessful were not in good faith.”

So, even though the Marshalls and their expert did not actually discover the injury until reviewing internal BP documents that had previously been concealed, because Railroad Commission filings also revealed the injury, as a matter of law the Marshalls could not avail themselves of the benefit of the discovery rule.

The Court also rejected the Marshalls’ fraudulent concealment argument. The Marshalls alleged that for purposes of fraudulent concealment, “only a reasonably diligent inquiry is required, and that they reasonably relied on representations in [BP’s] letter that operations continued in good faith.” The Court rejected this, noting that “to obtain the benefit of tolling based on fraudulent representations, the Marshalls had to establish that their reliance on the information BP provided was reasonable, and reliance is not reasonable when information revealing the truth could have been discovered within the limitations period.” In this case, the well log and the plugging report would have revealed that BP conducted operations at an interval incapable of production.

The Court once again reiterated its instruction that “reasonable diligence obliges owners of property interests to make themselves aware of pertinent information available in the public record.” In other words, “the Marshalls were obliged to perform additional investigation … by reviewing information available in the public record.” Had they performed this reasonable diligence, “the Marshalls would have been able to discover BP’s fraud through the use of reasonable diligence.” The Court bolstered its holding by pointing out that the Marshall family member who dealt with BP “was a sophisticated lessor who subscribed to industry publications, worked as a driller when he was younger, and thus understood the oil and gas industry.”

C. Shell Oil v. Ross (December 16, 2011)

Like the plaintiffs in Marshall, the Rosses sought to extend the limitations period based on the notion that they had reasonably relied on false representations made by the defendant. But, as it did in Marshall just a few months, the Court rejected this assertion, holding that, had the plaintiffs’ exercised reasonable diligence, they would have uncovered publicly-available

50 Id. at 66-67.
51 Id. at 67.
52 Id. at 68.
53 Id. at 69.
54 Id. at 67.
55 Id. at 67-68 (emphasis added).
56 Id. at 69.
57 Id.
58 Shell Oil v. Ross, 356 S.W.3d 924 (Tex. 2011).
The Rosses leased certain mineral rights to Shell. Shell was obligated to pay royalty based on third-party sales prices, but between 1994 and 1997, Shell paid royalty based on a mistaken, arbitrary price. Additionally, Shell contributed part of the leased area to two pooled units and, from 1988 to 1994, paid royalty for wells in the pooled units (the “Unit Wells”) based on a weighted average method that the Rosses did not believe complied with the lease.

The Rosses sued Shell in 2002 for breach of contract, unjust enrichment, and fraud, and asserted that the fraudulent concealment doctrine and the discovery rule should toll limitations because of Shell’s alleged misrepresentations to cover up its underpayment scheme. More specifically, the Rosses, like the Marshalls before them, claimed that “reasonable reliance on fraudulent representations negates any duty to investigate,” and “that they reasonably relied on check stubs that Shell enclosed with its monthly royalty statements since misrepresenting the price would be a violation of the Natural Resources Code.”

In rejecting the Rosses’ arguments concerning fraudulent concealment, the Court noted that fraudulent concealment “only tolls the statute of limitations until ‘the fraud is discovered or could have been discovered with reasonable diligence,’” and that “[r]easonable diligence requires that owners of property interests make themselves aware of relevant information available in the public record.” This is particularly true when the claimants have been “put on notice of the alleged harm.”

In this case, “the Rosses were put on notice that Shell was underpaying royalty … [based on] the large difference in the prices paid to the Rosses on the Unit Wells and the Lease Wells.” As such, the Rosses were obligated to make themselves aware of relevant information in the public record, and according to the Court, “[r]eadily accessible and publicly available information could have led the Rosses to discover that Shell was underpaying royalty before the limitations period expired.” This information consisted of the following:

- The El Paso Permian Basin Index price, which is readily accessible to the public, and reflects an average price for gas that was consistently higher than the price reflected on the check stubs from Shell.

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59 Note that the wells outside the pooled units are referred to as the “Lease Wells.”

60 Id. at 927.

61 Id. at 927-28.

62 Id. at 928 (quoting Emerald, 928 S.W.3d at 207).

63 Id. at 928.

64 Id. at 928-29.

65 Id. at 929.
• A pooling and unitization agreement, which covered part of the lands under the Rosses’ lease, and required Shell to pay the Rosses and the State equal royalties (note, however, that General Land Office records would have revealed that the royalty payments to the State were routinely higher than those paid to the Rosses).66

The Court also rejected the Rosses’ assertion that the discovery rule should apply. After reminding the reader that the discovery rule only applies if the injury is inherently undiscoverable, the Court noted that an injury is inherently undiscoverable if it is “unlikely to be discovered within the prescribed limitations period despite due diligence.”67 The Court then noted that “the Rosses could have timely discovered the underpayments through the exercise of due diligence,” as described above.68

Importantly, it should be noted that during the relevant period, the Ross family member who administered the lease “was a lawyer who had done oil and gas work, and thus understood the oil and gas industry.”69 Although the Court did not expressly rely on this fact for its decision, the Court’s later statement in Hooks (discussed below) indicates that this was a factor.

V. In 2015, the Court Opened the Door Slightly, But Only Slightly

As a result of Marshall and Ross, by the end of 2011, the Court had left its followers with the distinct impression that the discovery rule and the fraudulent concealment doctrine may not ever be applied again in the context of oil and gas disputes. In early 2015, however, the Court seemingly provided oil and gas plaintiffs a bit of a reprieve in its Hooks v. Samson opinion, refusing to find, as a matter of law, that a plaintiff royalty owner should have discovered his injury through a review of public filings because those filings themselves were tainted with fraud. However, by the middle of the year, in its Cosgrove v. Cade decision, the Court had retreated in the “the exceptions don’t really apply in oil and gas cases” camp.

A. Hooks v. Samson (January 30, 2015)70

Hooks, a mineral owner who was also an oil and gas attorney, had leased his minerals to Samson Lone Star LLC (“Samson”). The subject lease prohibited pooling and contained certain offset obligations requiring Samson to either drill an offset well, pay Hooks compensatory royalties, or release the offset acreage if a gas well was completed within 1,320 feet of Hooks’ lease line.

In 2000, Samson drilled a well within the 1,320-foot protected zone, which bottomed around 1,186 feet from Hooks’ lease. Instead of complying with the lease’s offset obligations,

66 Id. at 926, 929.
67 Id. at 929-930.
68 Id. at 930.
69 Id. at 927.
70 Hooks v. Samson, 457 S.W.3d 52 (Tex. 2015), reh’g denied (May 1, 2015).
however, Samson requested that Hooks amend his lease to pool into a unit with the newly-drilled well. Along with its pooling request, Samson provided Hooks with a plat that incorrectly indicated that the new well’s bottom hole was outside of the protected zone. Samson similarly filed this incorrect plat with the Railroad Commission. Earlier documents filed with the Railroad Commission accurately showed the well’s bottom hole location to be within 1,320 feet of Hooks’ lease. In any event, Hooks agreed to the pooling request and amended the lease to allow for same.

In 2007, Hooks sued Samson for fraudulent inducement, claiming that Samson deprived him of compensatory royalties by misrepresenting the well’s bottom-hole location and fraudulently inducing Hooks to amend the lease. The trial court found in Hooks’ favor and awarded Hooks more than $21 million in damages; the court of appeals, however, held that the fraud claim was time-barred.

At the Supreme Court, Samson pointed to the Marshall and Ross decisions and argued that Hooks, if he had exercised reasonable diligence, should have discovered by 2001 the publicly-available older directional survey and plat that were on file with the Railroad Commission and that correctly identified the bottom hole location of the well. Surprisingly, at least in light of the Marshall and Ross decisions, the Court rejected this argument and held that “when the defendant's fraudulent misrepresentations extend to the Railroad Commission record itself, earlier inconsistent filings cannot be used to establish, as a matter of law, that reasonable diligence was not exercised. Under these circumstances, reasonable diligence remains a fact question.”71

The Court noted “an important distinction” between Marshall and Ross, on one hand, and the instant case on the other hand: those were cases in which the public record was not “tainted by fraud,” unlike the public filings by Samson.72 Moreover, Hooks argued that it would be difficult, and would take an expert, to compare the older survey and plat to the newer versions and try to pinpoint the bottom hole location. As a result, the Court explained that it could not say “as a matter of law, [that] Hooks should have discovered the accurate information when the more recent filing falsely conveyed that that the well had been completed outside the protected zone.”73 For that reason, the Court remanded the case to the court of appeals for consideration of the question of when Hooks, by the exercise of reasonable diligence, should have discovered Samson’s fraud.

B. Cosgrove v. Cade (June 26, 2015)74

Six months later, in Cosgrove v. Cade, the Court came back around to its strong stance against applying the discovery rule in the oil and gas context. The Cades, as grantors, sued their

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71 457 S.W.3d at 61.

72 Id. at 59. Important for future cases is how the Court described the Marshall and Ross cases: in both instances, the Court went out of its way to note that the plaintiffs were sophisticated in the oil and gas industry.

73 Id. at 59-60.

74 Cosgrove v. Cade, 468 S.W.3d 32 (Tex. 2015), reh’g denied (Sept. 11, 2015).
grantee Barbara Cosgrove several years after the Cades sold their property to Cosgrove intending to reserve the mineral rights to themselves, but failed to do so in the deed. The Cades sought a reformation of the deed to reflect the mineral reservation, and asked the Court to apply the discovery rule to save their otherwise late-filed claims. More specifically, though, the Court was asked to decide two specific issues in this regard: (a) whether plainly obvious and material omissions in an unambiguous deed charge parties with irrebuttable notice for limitations purposes, and (b) whether Property Code § 13.002 provides all persons, including grantors, with notice of the deed’s contents. The Court held in the affirmative on both counts.

In 2006, the Cades sold Cosgrove two acres of land pursuant to a trust document that stated “Sellers to retain all mineral rights.” However, the notarized deed, which was signed by all parties and recorded in October 2006, transferred the land in fee simple. A separate form closing document entitled “Acceptance of Title and Closing Agreements” required each party to “fully cooperate, adjust, and correct any errors or omissions and…execute any and all documents needed or necessary to comply with all provisions of the above mentioned real estate contract.” The undisputed evidence demonstrated that the deed mistakenly, but unambiguously, failed to reserve mineral rights.

Prior to the 2006 transaction, the Cades had leased their mineral estate to Dale Resources; Chesapeake Energy later became the operator of the lease. In October 2010, Chesapeake sent the Cades a letter notifying them of their rights as royalty owners. In December 2010, after Michael Cade reached out to Chesapeake inquiring about his royalty payments, a Chesapeake representative informed the Cades that there was a “problem” with the deed’s mineral reservation. A few days later, the Cades sent Cosgrove a letter demanding a correction deed. Upon receipt of this letter, Cosgrove refused to execute the deed, reasoning that any potential claims were barred by the applicable statutes of limitations.

The Cades brought suit in February 2011, seeking, among other things, a declaratory judgment to reform the deed. Cosgrove counterclaimed for a declaratory judgment that the Cades’ claims were time-barred. On summary judgment, the trial court sided with Cosgrove, finding that the Cades’ claims were precluded by the applicable statutes of limitations. The court of appeals, however, reversed, holding that the discovery rule delayed the accrual of limitations on the Cades’ deed reformation claim.

75 Id. at 34.
76 Id. at 35.
77 Id.
78 Id. (The Cades’ tortious-interference claim was controlled by a two-year statute of limitations; their remaining claims, including the deed-reformation claim, were governed by a four-year statute of limitations.)
79 Id.
80 Id. at 36.
The Court disagreed, holding that a “plainly evident omission on an unambiguous deed’s face is not a type of injury for which the discovery rule is available.”81 The Court came to this conclusion, in part, because of the Court’s finding that “[p]lainly obvious and material omissions in an unambiguous deed charge parties with irrebuttable notice for limitations purposes.”82 The Court described such an injury as “inheren tly discoverable” and commented that “the conspicuousness of the mistake shatters any argument to the contrary.”83 As such, limitations runs from the day the deed was executed.

The Court also looked to Property Code § 13.002 to support its holding that the discovery rule does not apply to the Cades’ alleged injury. Property Code § 13.002 states in relevant part: “An instrument that is properly recorded in the proper county … is notice to all persons of the existence of the instrument…”84 With this in mind, the Court held that this section of the Property Code put “all persons,” including grantors, on notice of the contents of all such properly recorded instruments.85 As a result, Property Code § 13.002 “establishes a lack of diligence in the discovery of a mistaken omission in an unambiguous deed as a matter of law.”86 Importantly, although the Court declined in one breath to “impose an affirmative duty to search the public record,” in the next breath the Court seemed to do just that, emphasizing its previous guidance that “mineral interest owners bear a high duty of due diligence to protect their mineral interests” which “sometimes includes the duty to monitor public records.”87

Although Cosgrove did not involve allegations of fraud, the Cosgrove Court cited to its Hooks decision to affirm two “particularly relevant statements” in the plain-omission setting:

(1) reasonable diligence includes examining “readily available information in the public record,” and (2) “reasonable diligence should lead to information in the public record.” It follows that if HECI imposes an obligation on mineral interest owners “to exercise reasonable diligence in protecting their interests,” and Hooks recognizes that “reasonable diligence should examine readily available information in the public record,” then the Cades cannot claim they acted with reasonable diligence when they failed to notice a plain mistake when executing their deed, and the deed

81 Id.
82 Id. at 34.
83 Id. at 38.
84 Id. at 34.
85 Id. at 38 (explaining that “[t]he Cades’ assertion that section 13.002 only provides them with notice of the deed’s existence and not the deed’s contents defies common sense and clashes with our precedent[,]”)
86 Id.
87 Id.
was readily available for inspection in public records for the remainder of the limitations period.  

The Court next considered what was left of the Cades’ remaining claims—breach of contract, fee forfeiture, theft and tortious interference—after disposing of their deed reformation claim. Because those claims were dependent upon the Cades’ ability to reform the deed, and “because the discovery rule does not apply to, and limitations [began] to run against, an action involving a plain omission from an unambiguous deed from the date of execution,” the Cades’ remaining claims were also barred. 

In sharp contrast to the dissenting opinion, the majority then held that a claim for breach of contract accrues when the contract is breached, and that the relevant breach occurred upon execution of the deed. The Court rejected the Cades’ argument that the breach occurred when Cosgrove later refused to execute a correction deed “because the Cades [were] charged with notice of the contents of their deed upon execution.” Therefore, the Court explained, “limitations had expired, and the Cades could claim no right to Cosgrove’s property” when they sent the demand letter over four years later. According to the Court:

The Cades were charged with notice—as a matter of law and upon execution of the deed—that the deed failed to retain their mineral rights. Allowing them to slumber on this knowledge, for years or decades or generations, before seeking a corrected deed is not a luxury we have recognized, and would render meaningless parties’ recognized duty to exercise diligence in examining their mineral rights. To be “charged” with notice—as the law mandates—means there are consequences for failure to act on that notice. Hence, we disagree with the dissent insofar as it contends the Cades' contract claim for refusal to correct the deed is subject to a different limitations period. As a matter of law, the Cades were on notice at the time of execution of a fundamental and obvious error in the deed. They could have declined to close the deal until the deed was corrected. Or they could have closed, demanded immediate correction, and then treated any refusal as a breach of contract. Therefore, under either a contract theory or a deed-reformation

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88 Id. at 39 (citing Hooks v. Samson, 457 S.W.3d at 60).

89 Id. at 39.

90 See id. at 44-45 (Boyd, J., dissenting) (arguing that the Cades’ execution of the mistaken deed “could not and did not cause or constitute Ms. Cosgrove’s breach of the closing agreement…[and therefore, the breach of contract claim] accrued later, when Ms. Cosgrove breached the contract by refusing to perform as she had promised.”)

91 Id. at 39.

92 Id.

93 Id.
theory, both of which have a four-year statute of limitations, the limitations period began to run at the execution of the deed.\(^{94}\)

In conclusion, the majority explained that mineral interest owners’ subjective beliefs about the contents of unambiguous deeds are irrelevant to courts’ consideration of whether limitations is tolled.\(^{95}\) Because the mistaken omission in the Cades’ deed was inherently discoverable and objectively verifiable, the Cades could not, as a matter of law, avail themselves of the discovery rule to revive their untimely claims.\(^{96}\)

VI. In 2015, Texas Appellate Cases Continued the Trend Against Applying the Discovery Rule and Fraudulent Concealment Doctrine in Oil and Gas Disputes

To further assess the trends in Texas law with respect to the applicability of these exceptions in oil and gas disputes, we have surveyed the court of appeals opinions issued in 2015 that referenced the discovery rule and/or fraudulent concealment doctrine, or cited one or more of the foregoing Supreme Court opinions. Below is a sampling of what we found. As you will see, and not surprisingly, the trends are not positive for oil and gas plaintiffs.

A. Moczygemba v. Moczygemba (San Antonio Court of Appeals, February 28, 2015)\(^{97}\)

In Moczygemba, the plaintiff sued her two sons for breach of fiduciary duty after she learned that her sale of real property to her sons did not include a reservation of the mineral rights in her favor. The sale occurred more than a decade before she filed suit. The San Antonio Court of Appeals affirmed the trial court’s summary judgment, refusing as a matter of law to apply the discovery rule and dismissing the claims as time-barred. Interestingly, and as will be discussed in detail below, the court of appeals relied not on the “inherently undiscoverable” prong of the discovery rule, but instead relied on the lesser-used “objectively verifiable” prong.

When the plaintiff, Mary Moczygemba, was 74 years old, she had concerns about her failing farm and ranch business. After expressing those concerns to her sons, they offered to purchase the land in order to help her “[never] pay another bill.” Subsequently, the parties entered into four deeds, which were prepared by an attorney in one son’s law office, which transferred ownership in fee simple. The four deeds were dated between June and December 2000. Mary testified that, although she never discussed mineral ownership with her sons, she “thought the minerals would remain with her,” and “was adamant that [her sons] should have told her that she was conveying her mineral interest with the surface estate.”\(^{98}\)

\(^{94}\) Id. at 39-40 (emphasis added).

\(^{95}\) Id. at 41.

\(^{96}\) Id.

\(^{97}\) Moczygemba v. Moczygemba, 466 S.W.3d 212 (Tex. App.—San Antonio 2015, pet. filed).

\(^{98}\) Id. at 213-14.
Mary filed suit in 2012, alleging that she did not discover until late 2009 or early 2010 that she had conveyed the mineral interests to her sons along with the surface estate. In response, the sons filed a motion for summary judgment arguing that they owed no informal fiduciary duty to their mother, but, even if they had, Mary’s claims were barred by the four-year statute of limitations. The trial court denied the motion for summary judgment with regard to the sons’ fiduciary duty argument, but agreed with the sons on their limitations defense and granted summary judgment.

On appeal, the sons argued that the discovery rule was inapplicable because (1) Mary’s injury, the allegedly wrongful transfer of the mineral interests, was not inherently undiscoverable, “and was in fact easily discoverable if she had simply read the deeds;” and (2) the evidence of Mary’s injury was not objectively verifiable. The court of appeals agreed on the latter point, holding that the sons “have met their summary judgment burden of showing that there is no objectively verifiable evidence of Mary’s injury.”

Before beginning its analysis, the court cited Shell Oil v. Ross for the proposition that the “discovery rule is ‘a very limited exception in statutes of limitations’ and cited BP America v. Marshall for the proposition that the discovery rule applies only when the plaintiff can prove both that the nature of the alleged injury is inherently undiscoverable and that the evidence of injury is objectively verifiable.

In analyzing the discovery rule’s “objectively verifiable” prong, the court of appeals considered Texas Supreme Court precedent outside the oil and gas context, most likely because that prong had not yet been the focus of the Court’s jurisprudence on this issue. One such case was Gaddis v. Smith, a medical malpractice case where direct, physical evidence demonstrated that a sponge was left inside the plaintiff’s body. The court of appeals rejected Mary’s comparison to Gaddis and her argument that the mere fact that her mineral interests were transferred for a below-market price demonstrated her injury:

The evidence in this case consists of deposition testimony, which is not objectively verifiable evidence, and copies of the actual deeds showing a transfer of the mineral estate from Mary to Tommy and Harry, respectively. While the deeds are evidence that

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99 Id.
100 Id. at 215.
101 Id. at 217.
102 Id. Note that in footnote 2, the Court stated: “Because we conclude that there is no objectively verifiable evidence of Mary’s injury, we need not reach Mary’s other issues of whether the nature of her injury was inherently undiscoverable and whether Mary knew or should have known of her claims more than four years before she filed suit.”
103 Id. at 216.
104 417 S.W.2d 577 (Tex. 1967).
105 See Moczygemba, 466 S.W.3d 2 at 216-17.
Mary’s mineral interests passed to her sons, they are not evidence that the mineral interests were wrongfully transferred to her sons. Mary urges that this case is like *Gaddis* and the mere fact that her mineral interests were transferred shows she was injured; that is, she argues that no one would have chosen to transfer the mineral estate below market value. However … Mary herself testified that she wanted to transfer her property to her sons at a price lower than market value because they were her sons and they were helping her.106

Because there was no objectively verifiable evidence showing that the transfer of the mineral rights was wrongful, such as a letter or other contemporaneous document reflecting the parties’ intentions, the court of appeals held that the discovery rule could not apply to save Mary’s untimely claims, including for breach of fiduciary duty.107

**B. *Huggins v. Royalty Clearinghouse, Ltd.* (July 31, 2015)108**

*Huggins* is a federal District Court case applying Texas law to a deed reformation claim. Not surprisingly, the court (Judge Sam Sparks) looked to the Texas Supreme Court’s recent decision in *Cosgrove*, and based on *Cosgrove*, held that the grantor’s injury from alleged errors in a deed was not inherently discoverable and the discovery rule did not apply.

In December 2007, Huggins executed a “mineral and royalty deed” in favor of defendant Royalty Clearinghouse, Ltd. (“RCH”). The deed purported to convey to RCH all of Huggins’ interest in the oil, gas and other minerals, and associated royalties produced from “[a]ll of the lots, tracts, or parcels of land owned by Grantor in the Alfred Kennon Survey, A–32, Burleson County, Texas[.]” This included all of Huggins’s royalties associated with production on three units in which his leases were included.109

In March 2008, the then-operator of the units sent Huggins and RCH a transfer order that erroneously indicated Huggins had transferred only half, not all, of his royalty interest via the deed; both Huggins and RCH executed and returned the transfer order to EnerVest, and subsequently each began receiving half-interest royalty payments associated with production from the units.110 Starting in September 2008, and periodically over the next several years, RCH sent demand letters to Huggins requesting reimbursement of the half-interest royalty payments that Huggins had received, but Huggins never reimbursed RCH for those royalties. Apparently frustrated with the progress it was making, RCH actually offered to purchase Huggins’ one-half royalty interest in one of the units in August 2013 and again in September 2014, apparently to no

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106 *Id.* at 218-19.
107 *Id.* at 218.
109 *Id.* at *1-2.
110 *Id.* at 2.
avail. Finally, in September and October 2014, respectively, RCH and Huggins each leased their interests in the first two units to an exploration company.

On November 21, 2014, Huggins filed suit, seeking to have the deed voided, or in the alternative, reformed in his favor due to mutual mistake.\textsuperscript{111} RCH moved for summary judgment on the grounds that the reformation claim was barred by limitations, and Huggins responded that the discovery rule applies to save his claim. Judge Sparks held that “Huggins is incorrect.”\textsuperscript{112}

Huggins argued that his injury was inherently undiscoverable because RCH (1) executed the operator’s transfer order without change, (2) received royalties on the half-interest reflected in the transfer order, and (3) sent letters offering to purchase “Huggins’s” royalty interest in the third unit.\textsuperscript{113} Judge Sparks held that “[n]one of these reasons are relevant to the undiscoverability inquiry, as none concerns the inherent undiscoverability of the alleged injury; rather, all trend toward the type of case-by-case inquiry proscribed by Texas law in the undiscoverability context.”\textsuperscript{114} In other words, while these types of case-specific considerations may have been relevant in the context of fraudulent concealment, which is a fact-specific doctrine, they are not relevant in the context of the discovery rule.

In deciding as a matter of law that the discovery rule was not applicable, Judge Sparks relied on the Cosgrove opinion’s statement that a “plainly evident omission on an unambiguous deed’s face is not a type of injury for which the discovery rule is available.”\textsuperscript{115} Because Huggins agreed in his deposition that the deed unambiguously expressed an intent to convey all of his mineral interests, his alleged injury fell into the category of injury that Cosgrove had declared off limits to the discovery rule. As a result, Judge Sparks held that the reformation claim was barred as a matter of law by the statute of limitations.

C. Ranchero Esperanza, Ltd. v. Marathon Oil Co. (July 24, 2015)\textsuperscript{116}

The final case worth mentioning is Ranchero Esperanza, out of the El Paso Court of Appeals. Although this opinion does not cite any of the recent Texas Supreme Court opinions concerning the discovery rule or the fraudulent concealment doctrine in the oil and gas context, it reflects the principles that are so clearly stated in those opinions and the trends that have sprung from those cases.

Ranchero Esperanza involved claims for negligence, trespass, and nuisance in connection with leakage of salt water from a well that had been plugged for several years. The plaintiff landowner discovered the leakage on July 28, 2008 and filed suit on July 27, 2010. The evidence

\textsuperscript{111} Id. at *3.
\textsuperscript{112} Id. at 6.
\textsuperscript{113} Id.
\textsuperscript{114} Id. (emphasis included).
\textsuperscript{115} Id. (citing Cosgrove, 468 S.W.3d at 3).
\textsuperscript{116} 08-14-00152-CV, 2015 WL 4504947 (Tex. App.—El Paso July 24, 2015, no pet.)
showed, however, that the operator had discovered the leak on July 20, 2008, and the landowner’s representative who observed the leakage on July 28, 2008 testified that had he focused his attention on the part of the ranch where the subject well was located, he likely would have discovered the leak on or around July 20, 2008.

The trial court denied Marathon’s motion for summary judgment on limitations grounds, but the court of appeals reversed and rendered, holding that “the type of injury alleged in this case – surface damages arising from salt water emerging from an oil well – is not inherently undiscoverable.” In reaching this conclusion, the court of appeals invoked the importance of due diligence if a plaintiff wants to be able to toll limitations:

Further, diligence is required by the owner of the surface as to the operation of oil and gas leases on its land. ‘Inherently undiscoverable encompasses the requirement that the existence of the injury is not ordinarily discoverable, except though due diligence has been used’ … Even on a large ranch, a diligent landowner keeping an eye on the oil and gas activities occurring on his land, could have discovered surface damages arising from salt water emerging from a well, within two years of its appearance on the surface.\(^\text{117}\)

VII. Takeaways and Conclusions

Based on the cases described above, the following is abundantly clear with respect to the Court’s discovery rule and fraudulent concealment doctrine jurisprudence in the oil and gas context:

- For an oil and gas plaintiff who seeks to avail himself or herself of the discovery rule and/or the fraudulent concealment doctrine in order to survive past summary judgment, the plaintiff will need to demonstrate that, through the exercise of reasonable diligence, he or she still would not have identified the injury until after the limitations period expired.

- “Reasonable diligence” will include monitoring publicly-available and accessible records, including those on file with the Texas Railroad Commission and the General Land Office, among others.

- “Reasonable diligence” will also include seeking pertinent information from non-public sources, including the operator and/or other parties; note however, that a plaintiff cannot blindly trust the defendant’s representations because, as described in Kerlin, Marshall and Ross, public records may contradict those representations.

- A plaintiff who is sophisticated in the oil and gas industry (particularly if the plaintiff is an attorney familiar with oil and gas law), will be held to a higher standard than non-sophisticated plaintiffs; moreover, to qualify as “sophisticated”

\(^{117}\) Id. at *9.
in this context, the plaintiff may only need to be shown to be a mineral/royalty owner.

- As of now, the only situation wherein an oil and gas plaintiff **might** be able to get to a jury on the question of whether he or she exercised reasonable diligence is that which is described in *Hooks*; in other words, the plaintiff must prove that whatever’s available in the public record is *itself* tainted with fraud.

- Although the discovery rule and the fraudulent concealment doctrine have at times been treated as two separate exceptions, they have largely been collapsed into one inquiry in the recent jurisprudence: if the plaintiff had exercised reasonable diligence, would he or she have discovered the alleged injury prior to expiration of the applicable limitations period?

- Even if the defendant fraudulently conceals pertinent information from the plaintiff and the plaintiff relies on the defendant’s false misrepresentations or fraudulent omissions, he or she still may not be able to avail himself or herself of the fraudulent concealment doctrine if it can be shown that the plaintiff could have discovered the injury through other means, such as a review of public records.

But certainly some questions still remain unanswered. For instance:

- What if a plaintiff exercises a significant amount of due diligence but doesn’t locate the relevant information? Will this factor into a court’s decision about whether the discovery rule applies? Or will courts continue to focus on the “inherently discoverable” prong and the category of the plaintiff’s alleged injury?

- What if the private sources that the plaintiff is obliged to contact in order to do his or her due diligence, such as lessors or operators, won’t provide the plaintiff with pertinent, accurate information? Or, more importantly, what if they provide the plaintiff with false information that public records are not available to verify? Might the discovery rule and/or fraudulent concealment doctrine save untimely claims in that circumstance?

- In *Cosgrove v. Cade*, the Court stated: “We do not impose an affirmative duty to search the public record.”118 In its very next breath, though, the Court wrote that “We have stressed in other property-related cases that the duty of diligence sometimes includes the duty to monitor public records.”119 So does an oil and gas plaintiff have an affirmative duty to monitor public filings or not?

- How sophisticated must a plaintiff be before he or she is charged with a heightened level of diligence? Sophistication and familiarity with the oil and gas

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118 *Cosgrove*, 468 S.W.3d at 38.

119 *Id.*
industry seemed to be a big factor in *Marshall* and *Ross*. However, the *Hooks* Court didn’t really describe the plaintiff’s level of sophistication. Nor did *Cosgrove* focus on the Cades’ level of sophistication (despite the fact that the Cades knew enough to call Chesapeake about royalty payment issues).

- The Court in *Hooks* said “that not all Railroad Commission records create constructive notice.”\(^{120}\) Which Railroad Commission filings, if any, do not create constructive notice?

- What kind of oil and gas claims might not involve information in the public records, such that reasonable diligence would not uncover information about your client’s alleged injury?

- What other claims or injuries will the standards outlined in the Court’s recent discovery rule and/or fraudulent concealment doctrine jurisprudence apply to? Breach of joint operating agreements? Breach of a participation agreement?

In light of these takeaways and questions, and the Court’s continued focus on the “reasonable diligence” element of these exceptions, it seems safe to say that plaintiffs will continue to look for ways to apply these exceptions in order to save their claims, but the odds are definitely stacked against them.

\(^{120}\) *Hooks*, 457 S.W.3d at 60.