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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NOS. A-1374-79
A-1395-79
A-1432-79
A-1446-79
A-1545-79

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff-Appellant,

vs.

VENTRON CORPORATION, et al.,

Defendants-Appellants.

ROVIC CONSTRUCTION CO.,INC., etc.,

Plaintiff-Intervenor

vs.

VENTRON CORPORATION, et al.,

Defendants-Appellants

MOBIL OIL CORP.,et al.,

Plaintiff-Appellants,

vs.

STATE OF NEW JERSEY,et al.,

Defendants-Respondents

Civil Action

ON APPEAL FROM THE SUPERIOR COURT CHANCERY DIVISION, BERGEN COUNTY

SAT BELOW:

Hon. Sherwin D. Lester

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APPELLATE DIVISION
SEP 25 1980
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Elizabeth McLaughlin
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ANSWERING BRIEF OF DEFENDANTS - CROSS-APPELLANTS
ROBERT M. AND RITA W. WOLF

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COUNTERSTATEMENT OF THE PROCEDURAL POSTURE OF THE CASE AS IT AFFECTS THE WOLFS

This brief is submitted on behalf of Robert W. Wolf and Rita Wolf, his wife, who were defendants, cross-claimants, and counter-claimants in the court below. The Wolfs are before this Court as respondents and cross-appellants.

The Wolfs are the vendees to whom Wood Ridge Chemical Corporation deeded its seven-acre tract on May 20, 1974. Robert W. Wolf was a real estate broker and developer who purchased the tract to raze its buildings and to erect new structures suitable for commercial or industrial use. Rita Wolf did not take any active part in the transactions which are the subject matter of this law suit (Ja153).

In the court below, the State demanded injunctive relief and damages against all of the defendants, including the Wolfs, to effect or pay for the cure of the mercury pollution on their land (Ja193). The Wolfs crossclaimed against Ventron Corporation, formerly the parent corporation of their vendor and now its successor by merger, seeking damages based upon, among other things, Ventron's fraudulent non-disclosure of the massive contamination with which the land was saturated (Ja41; Ja157). The Wolfs' co-defendants crossclaimed against them for indemnification and contribution (Ja31; Ja99), and the Wolfs counterclaimed against the State for its failure to remedy the pollution of their property (Ja213).

Pursuant to the Chancery Division's pretrial order of July 7, 1977, the trial of the Wolfs' crossclaim against Ventron Corporation was bifurcated (Ja149-15). The liability vel non of Ventron Corporation for failure to disclose the gross mercury contamination of the land was tried together with all of the other issues affecting the various other parties to the suit; but determination of the amount of damages which would have to be paid if Ventron was liable to the Wolfs upon their crossclaim was deferred to a separate, later trial which has not yet taken place.

The judgment of the Chancery Division adjudicated that there was no cause for action against the Wolfs in favor either of the State or of their co-defendants and that Ventron Corporation was liable to the Wolfs upon their crossclaim (Ja373-7; Ja378-11). The Wolfs are before this Court as respondents to the other parties' attacks upon those rulings in the Wolfs' favor.

However, paragraph 9 of the judgment below, which entered judgment "as to liability only in favor of the defendants Robert and Rita Wolf and against the defendant Ventron Corporation on the crossclaim by the defendants Robert and Rita Wolf ..." adds the qualification, "as limited by the opinion herein." (Emphasis added) (Ja378-11 to 20). The opinion* declares that

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* The Court issued two opinions, the second (Vel-Da-1) a revision of the first (Ja289). The second opinion corrects, among other things, an erroneous dating of an event pertinent to the Wolf's crossclaim (Vel-Da79-19 to Vel-Da82-7); see Ja345-42. Consequently references to the Court's Opinion will be to the revised version.

although the Wolfs may recover "the actual cost of the containment system and other costs incurred in abating the pollution to the satisfaction of the EPA, including the added costs of the containment system and other cost incurred by Rovic," nonetheless the Wolfs may not recover "damages in the nature of potential loss of profits on or based on the diminution in value or due to possible restrictions or liens on the land." (Vel-Da63-23 to Vel-Da64-8). The Wolfs have cross-appealed from the judgment insofar as it incorporates those limitations on the measure of their damages (Ja409).

COUNTER-STATEMENT OF FACTS
MATERIAL TO THE WOLFS

There are 126 tons of mercury on the seven acres of the Wolfs' property. There are more than 160 tons of mercury on the 33 acres of the adjacent Velsicol property (S-22 at 65-73). Even Ventron's trial expert agreed that there was no place in the world, apart from a mercury mine, with a greater density of mercury per acre (8/23/78 Stopford T39-21 to T40-3).

Mercury from the Wood Ridge Chemical Company site has spread throughout the central section of the Hackensack Meadowlands District, an area of between two and three thousand acres in extent. (8/17/78 McCormick T26-18 to T27-12; Exh. S-20 at 16). The Hackensack Meadowlands District is more severely contaminated by mercury than any other known area of the world (S-20 at 37).

Part of this mercury now deposited on the Wolf and Velsicol tracts and distributed throughout the Hackensack Meadowlands District flowed out into the environment with the effluent from the production processes of Wood Ridge Chemical Company and its predecessors (B-10; P-754; H-44; H-60; H-61F; N-10; 10/5/78 Faye T22-8 to T28-5; and Faye passim.) (Joseph Bernstein, Ventron's Director of Chemical Operations, testified that in 1969 he reduced the outflow of mercury by an amount of between 10,000 and 17,000 pounds a year (9/27/78 Bernstein T16-16 to T19-21).)

Part of the mercury was spewed out into the environment as dust (5/23/78 Joselow T204-10 to T208-8; T222-12 to T223-1; T228-20 to T230-8).

Part of the mercury which now contaminates the region escaped from the distillation processes in gaseous or liquid form (5/23/78 Joselow T211-21 to 24; 5/24/78 Joselow T47-4 to T49-17). Some of the mercury entered the environment when chemical reactions went out of control (5/23/78 Joselow T241-14 to T246-8). Some mercury escaped from spills of liquid and powder, from kettles overflowing when they were heated and from the product falling out of furnaces or retorts, leaving mercury in the form of dusts, powders, droplets, pools and vapor throughout the plant (5/23/78 Joselow T207-23 to T210-18; T220-1 to T223-1; and 5/23 and 5/24/78 Joselow T passim; 5/31/78 Pfiefer T80-9 to T84-2). So saturated was the site by mercury that in the period from 1953 to 1974, when a hole was dug for a fence

post or a ditch excavated to repair a waste line, liquid mercury would collect in the excavation (5/31/78 Pfeifer T84-17 to T87-14).

Some of the mercury which contaminated the region was purposely dumped (9/28/78 Bernstein T12-12 to T13-22; 9/26/78 Bernstein T13-24 to T14-3, T15-23 to T16-1, T28-2 to 4). Manufacturing residues containing large quantities of mercury were dumped onto the ground located outside the various buildings (5/23/78 Joselow T212-3 to T214-4; 5/31/78 Pfeifer T17-25 to T39-7). Process residues were used as fill, dumped first at a site immediately adjacent to the manufacturing buildings and then, as the capacity of each dump site was exhausted, deposited in sites successively further east (5/31/78 Pfeifer T30-4 to T38-10). In these dump sites, containers of all kinds which had once held mercury, mercury oxides and mercury-bearing scrap were also deposited (5/31/78 Pfeifer T39-22 to T51-5).

More than three quarters of the 33 acre Velsciol tract was used for dumping. The dump sites were located in three general areas. Wherever the surface cover was eroded, 55-gallon drums were exposed. Those drums were buried just below the surface, standing end to end in an orderly fashion (6/14/78 Reed T64-11 to 22; T67-5 to 11; T69-25 to T72-20; T79-5 to T81-15).

When the Federal and State regulatory agencies turned their attention to this vast efflux of mercury from the Wood Ridge Chemical Company, they first sought to diminish the amount

of mercury entering the effluent from the manufacturing processes. As the quantity of mercury discharged in the effluent was reduced in response to governmental pressure, the Federal Environmental Protection Agency noted that Ventron's liquid effluent appeared to accumulate mercury as it flowed from the purification system through the waste lines to the boundary of the Ventron property. Mercury seemed to be getting into the pipes. Soil saturated by mercury was recognized as a probable source. The EPA requested chemical analyses of the soil, studies to ascertain the feasibility of immobilizing mercury in the soil, and an undertaking by Ventron to pave its site (6/7/78 Tidwell T25-6 to T26-14, T28-16 to T29-24, T35-18 to T37-1, T42-6 to T44-25, T50-15 to T51-6, T97-2 to T98-4, T99-10 to T115-9; 6/8/78 Tidwell T39-18 to 23, T63-8 to T65-23, T73-24 to T74-7; Horner 6/8/78 T90-1 to T91-22, T92-21; 9/21/78 Bernstein T10-5 to T11-3, T36-14 to T39-19).

In ostensible compliance with the requests of the EPA for soil analysis, Ventron commissioned the Metcalf & Eddy report (H-49 and P-755; 9/21/78 Bernstein T16-7 to T18-4, T21-12 to 21, T23-22 to T28-19). Metcalf & Eddy was a Boston-based firm of engineering consultants (9/25/78 Bernstein T20-18 to 20, T22-3 to 4). That firm retained a New Jersey company, Craig Testing Laboratories, to drill 17 holes at the Wood Ridge site and collect the earthen cores and groundwater from the holes (9/25/78 Bernstein T22-13 to T23-20). Metcalf & Eddy itself performed the analyses. Significantly, the Craig report shows

that the core holes from which samples were taken for analysis were between five and seven feet in depth, but the soil found between the surface and a depth of three feet was disregarded and only the soil found at depths of between three and five feet or between five and seven feet was analyzed for mercury. (As might be expected, chemical analysis of the soil conducted after the property had been sold to the Wolfs revealed a substantially higher degree of mercury contamination in the upper three feet of soil. See Exhibit S-16 and the test report which is part of Exhibit S-17). Nonetheless, the Metcalf & Eddy report showed contamination of between 5 and 375 parts per million even in the soil samples taken from depths of more than three feet below the surface and mercury contamination of up to 2000 parts per million of the groundwater taken from the core holes (P-755).

Both S.K. Derderian and Joseph H. Bernstein, the two Ventron representatives who dealt with Robert Wolf in the course of selling him the Wood Ridge property, were familiar with the Metcalf & Eddy report and with the conditions of soil contamination which it confirmed (9/21/78 Bernstein T23-22 to T24-2, T24-17 to T25-7, T35-20 to T39-19; 9/25/78 Bernstein T108-9 to T110-4; 9/26/78 Bernstein T38-8 to 20, T93-8 to T94-16; 9/12/78 Derderian T71-24 to T72-12, T73-18 to T74-25; 9/18/78 Derderian T57-9 to T64-25). Derderian was a professional chemist, a Massachusetts attorney and Ventron's Vice President and General Counsel (9/11/78 Derderian T8-2 to T9-25). Bernstein was a graduate chemical engineer and had been Ventron's Director of

Chemical Operations since 1970 (9/20/78 Bernstein T4-1 to 5; T2-21 to T3-6).

Derderian testified that he expected a chemical plant to pollute the site where it was located, that consequently he knew that operating a mercury processing plant at Wood Ridge for forty years had caused mercury to be discharged into the soil, and that the degree of mercury contamination in the soil and ground water disclosed by the Metcalf & Eddy report was consistent with what had been his prior impression (9/12/78 Derderian T73-5 to T13; 9/18/78 Derderian T61-19 to T62-22, T64-21 to 25). Indeed, Derderian admitted that apprehensions about the future consequences to the company of the increasing concern of the governmental agencies with the mercury which was saturating the soil at the plant site was one of the reasons for selling the property (9/12/78 Derderian T75-1 to 9, T77-12 to T78-14).

Bernstein had participated in the conferences leading to the commissioning of the Metcalf & Eddy report (9/21/78 Bernstein T36-11 to T45-25, W-144). At those conferences the EPA officials had stated their inferences that the soil was saturated with mercury. (Ibid. See testimony of Tidwell and Horner cited at p.6 of this brief.) Bernstein had also received the warning from Ventron's consultant that the soil at the site should not be excavated lest it release the mercury which it contained (P-891; 9/26/78 Bernstein T93-17 to T94-16; 10/18/78 Faye T55-24 to T56-24). Bernstein had received an internal report which recognized the probable necessity of re-cementing

all of the walls and floors and paving the entire ground surface at the site at a cost of between $50,000 and $100,000 to protect the workmen from mercury vapors (P-954 [The Joint Appendix refers to the document as P-955, but the transcript as P-954] especially at P-3; 9/28/78 Bernstein T42-10 to T43-1, T43-13 to 16, T44-5 to T45-8, T46-7 to 11, T47-19 to T52-7).

Robert Wolf signed the option contract to purchase the Wood Ridge property February 5, 1974 (H-30, 9/11/78 Derderian T36-21 to T40-9). His letter electing to exercise the option is dated April 19, 1974 (H-33). The closing at which the property was conveyed from Wood Ridge Chemical Corporation to Mr. and Mrs. Wolf took place May 20, 1974 (9/12/78 Derderian T33-10 to 11).

Ventron did not disclose to the Wolfs that the soil at the Wood Ridge site was grossly polluted by mercury (11/6/78 Wolf T14-5 to T15-22). The Wolfs' soil engineers who took borings and tested the soil at the site for its bearing capacity before the option was exercised did not detect the mercury pollution (11/1/78 Scheil T80-14 to T23; 11/2/78 Scheil T76-2 to 25). Arthur C. Hensler Jr., Esq. and Julius B. Poppinga, Esq., partners of McCarter & English, Esqs. who, with the consent of both parties, represented both the Wolfs and Ventron Corporation in connection with the Wood Ridge property (11/1/78 Hensler T10-6 to T12-6), never knew of any pollution problem (11/1/78 Hensler T17-11 to 23, T19-2* to T21-4; 11/1/78 Poppinga T57-16 to 23). No

* The transcript refers to "January of 1974", but immediately subsequent references indicate that that is a typographical error and should read, "June 1974". See T20-6 to 10.

broker or other prospective purchaser of the property, including one prospective purchaser whom Ventron perceived as being on the verge of signing a purchase agreement (9/25/78 Bernstein T123-15 to 19), was ever advised or ever became aware that the land would present an environmental problem (10/25/20 Dicicci T20-19 to T21-15; 11/2/78 Vecchione T10-17 to T11, T17-20 to T18-3).

On May 9, 1974, eleven days before the closing of the sale of the property to the Wolfs, Mr. Lucarelli and Mr. Gomez, of the New Jersey Department of Labor and Industry visited the Ventron site (10/25/78 Lucarelli T23-20 to T24-1, T-27-18 to 20, H-69). Mr. Lucarelli, near the beginning of his direct testimony, volunteered the information that "there are numerous events that took place, and I can't put them in proper chronological order." (10/25/78 Lucarelli T29-17 to 19). Nonetheless, he was pressed to describe what he observed on his first visit to the site on May 9 and he testified that Wolf's demolition subcontractor was engaged in demolishing the buildings (T31-10 to 19). On cross-examination, however, when shown his contemporaneous notations recording the degree of completion of the demolition work on each of several dates, Mr. Lucarelli testified far more convincingly that demolition work for Wolf was not commenced until after May 22 (10/30/78 Lucarelli T40-12 to T43-2).

The May 9 visit was the routine result of an announcement in a construction trade report that demolition and construction were about to take place on the site (10/25/78

Lucarelli T24-5 to T25-9). The purpose of their visit was to "protect workmen on the site" by directing which buildings could be demolished immediately, which would have to be cleared of chemicals prior to demolition and what precautions would have to be taken because the buildings had been part of a chemical factory (10/30/78 Lucarelli T26-10 to T27-18).

Apparently no representative of Wood Ridge Chemical Company or of Ventron was present at the May 9 meeting, and, in fact, Ventron's process engineering manager, whom Mr. Lucarelli attempted to contact by telephone, refused to speak to him (10/30/78 Lucarelli T38-14 to 25). However, Mr. Bratt, the insurance company representative, was familar with the Wood Ridge Chemical Company plant (4/21/77 deposition of Bratt, T46-10 to T47-2, T70-8 to 19). He identified various chemicals in containers and storage tanks in and about the buildings and in spills on the floors of some of the vacated structures (H-69).

Mr. Lucarelli and Mr. Gomez were concerned that those chemicals and the chemical dust on the structures would be hazardous to the demolition crews. (H-69; 10/30/78 Lucarelli T43-14 to T44-5). Mr. Gomez advised precautionary clothing and showers for the crews and directed that chemicals remaining in the tanks, buildings and in open pits should be removed and disposed of. Significantly for subsequent events, Mr. Gomez directed that the demolition contractor wash the entire plant area with water to reduce the dust accumulation on the walls and floors of the buildings (H-69; 73-E).

Using printed state forms, each of which bears the legend "Order to Cease Violations", Mr. Lucarelli wrote out instructions in accordance with Mr. Gomez' advice, directing the demolition contractor not to proceed with demolition until the chemicals left in and about the plant buildings had been removed and the prescribed precautions taken to safeguard the health of the demolition crews (H-73A through H-73D, H-73F through H-73L). Mr.Lucarelli testified that these instructions were not served as orders to cease violations because there had been no violations, but that they were furnished to the general contractor and the demolition contractor to assure that when work commenced, it would proceed properly (H-73A through L; 10/30/78 Lucarelli T18-22 to T20-1).

On the day of the visit by Mr. Lucarelli and Mr. Gomez or on the following day, Mr. Wolf learned from Mr. Andrews, who was in charge of Rovic Construction Company, the general contractor of which Mr. Wolf was the sole or principal shareholder, that Department of Labor representatives who were concerned about the safety of the demolition crew wanted certain precautions taken (11/6/78 Wolf T10-24 to T11-12, T72-14 to 23). Mr. Lucarelli's memorandum of May 9 on his "Order to Cease Violations" form asked the "contractor to certify to this bureau by responsible person or persons that all harmful chemicals had been removed from building [and] all residue cleaned . . . so as to prevent any hazard to workmen during demolition." (H-73B). To comply with that directive, Mr. Wolf hired a Mr.

Using printed state forms, each of which bears the legend "Order to Cease Violations", Mr. Lucarelli wrote out instructions in accordance with Mr. Gomez' advice, directing the demolition contractor not to proceed with demolition until the chemicals left in and about the plant buildings had been removed and the prescribed precautions taken to safeguard the health of the demolition crews (H-73A through H-73D, H-73F through H-73L). Mr.Lucarelli testified that these instructions were not served as orders to cease violations because there had been no violations, but that they were furnished to the general contractor and the demolition contractor to assure that when work commenced, it would proceed properly (H-73A through L; 10/30/78 Lucarelli T18-22 to T20-1).

On the day of the visit by Mr. Lucarelli and Mr. Gomez or on the following day, Mr. Wolf learned from Mr. Andrews, who was in charge of Rovic Construction Company, the general contractor of which Mr. Wolf was the sole or principal shareholder, that Department of Labor representatives who were concerned about the safety of the demolition crew wanted certain precautions taken (11/6/78 Wolf T10-24 to T11-12, T72-14 to 23). Mr. Lucarelli's memorandum of May 9 on his "Order to Cease Violations" form asked the "contractor to certify to this bureau by responsible person or persons that all harmful chemicals had been removed from building [and] all residue cleaned . . . so as to prevent any hazard to workmen during demolition." (H-73B). To comply with that directive, Mr. Wolf hired a Mr.

Magier (11/6/78 Wolf T74-10 to T81-5; 11/9/78 Wolf T54-2 to T62-18) who described himself as a former chief chemist for Ventron Chemical Corporation (B-49). Mr. Magier issued a series of letters advising in which buildings there were chemicals which should be removed and then certifying that the buildings could safely be demolished either because no chemicals had been left in them, or because the chemicals there had been removed pursuant to his advice (B-49; B-54; B-55, B-58; see H-73G).

On June 7, the Federal Environmental Protection Agency notified Mr. Longstreet of the New Jersey Department of Environmental Protection of "a possible pollution incident" at the Wood Ridge site (6/20/78 Longstreet T112-14 to T113-1). Mr. Longstreet observed that water was being used at the site for dust control in order to comply with the requirements of the Department of Labor and Industry (S-14, 6/21/78 Longstreet T19-22 to T20-5). He was concerned that the resulting runoff would wash chemical residues into Berry's Creek, the nearby stream (6/21/78 Longstreet T20-22 to T21-9). Mr. Longstreet considerd the problem to be chemicals left on and about the premises, on the surfaces of the buildings, or in piles on the ground or in containers. He had no inkling of soil contamination by mercury, except that he thought that water flowing over the chemical debris might have percolated into the ground in spots (6/21/78 Longstreet T22-20 to T23-1, T30-16 to 21, T35-8 to 23, T41-22 to T42-5; 6/29/78 Longstreet T82-5 to 14, T83-16 to T84-7).

The New Jersey DEP directed Wolf to remove loose drums, containers, flasks, and other superficial material from the site, to build a catch basin to collect the water which was being used to wash down the buildings pursuant to the instructions of the Department of Labor and Industry, to pump the water into the large tanks which remained on the site, and then to have the waste materials, including the liquid, removed by qualified waste handlers. Wolf complied with those requirements and, in return, Federal and State regulatory agencies agreed on July 1, 1974, that masonry rubble, concrete slabs and wood from the demolition could be removed from the site, but that chemicals, chemical sludges and soil which was suspected of having been contaminated in places supposedly from the runoff during demolition (6/27/78 Longstreet T48-7 to 19, T50-19 to T52-9) should remain on the site until they were analyzed (S-15; 6/21/78 Longstreet T40-18 to T43-16; 11/6/78 Wolf T115-9 to T118-7).

To satisfy these requests for analyses and to ascertain whether any chemicals had contaminated the soil, Wolf commissioned U.S. Testing Company and later Jersey Testing Laboratories to make soil studies. The first report of such a study was received about August 13, 1974 (S-16). This report of the chemical analysis of earthen cores taken from borings at nine different test sites on the property showed very high concentrations of mercury at each of the test sites, on the surface and at depths of one, two and three feet below the surface. This

was the first report (other than the 1972 Metcalf & Eddy report which Wolf had never seen and the EPA and DEP had buried in their files and forgotten) that provided an indication either to the regulatory agencies or to Wolf of the magnitude of the mercury contamination of the property (6/29/78 Longstreet T83-29 to T84-7). (Mr. Longstreet testified that he first received the test results in late 1975, but that was obviously an error. He received the first soil test results in late 1974 [6/29/78 Longstreet T14-17 to T15-10, P-335, P-231, T16-23 to T17-1]).

On August 16, 1974, after receipt of the first U.S. Testing Company report, representatives of the EPA and the DEP met with Wolf and reached an understanding, incorporated in a signed memorandum, authorizing construction upon compliance with certain conditions (P-163; 6/21/78 Longstreet T54-6 to 20). If Wolf would remove the top several inches of soil from the westerly portion of the property, he would be permitted to build one building on the cleared part of the tract, provided that soil tests confirmed relatively low levels of contamination in the areas to be built upon. No construction would take place on the more heavily contaminated easterly portion of the property without prior approval from the DEP and such approval would not be forthcoming until contaminated materials to a depth of three feet had been removed and disposed of in accordance with procedures that were to be specified or approved by the regulatory agencies (P-163).

The confirmatory soil tests of the westerly portion of the property were obtained and submitted to the DEP. A building was ultimately constructed on that part of the property with the approval of the regulatory agencies (6/21/79 Longstreet T72-5 to T73-10; 6/29/78 Longstreet T12-7 to T20, T14-8 to T18-9). That was the building, title to which was conveyed to U.S. Life Insurance Company in a sale-and-leaseback transaction (6/29/78 Longstreet T15-14 to 22).

After August 16, 1974, in accordance with the memorandum of agreement, Wolf sought expert help from numerous sources to learn how the removal of the contaminated soil from the site could be accomplished (11/6/78 Wolf T20-9 to T22-2). In response to Wolf's inquiries, the experts expressed initial opinions that the mercury could successfully be extracted from the soil and sold, thus offsetting at least some of the cost of its removal (11/9/78 Wolf T81-15 to T82-14; 10/31/79 Johnson T30-1 to T31-12). However, more detailed studies carried out over a period of months concluded that, particularly in view of the environmental constraints which would be imposed, there was no feasible way of extracting the mercury. Entombment was the only practicable approach (10/31/78 Johnson T31-13 to T33-23; T38-5 to T38-21; W-440).

Accordingly, some time before January 1975, Thomas . Scheil, Wolf's soils engineer who had done tests of the bearing capacity of the soil on the site, was asked to devise an entombment scheme. He recommended utilizing especially constructed

foundation walls and, on one side, a cut-off wall exterior to the foundation. These walls would be tied into relatively impervious layers of organic material and sand to contain the mercury on the site. (P-1146, B-46, B-47, 11/1/78 Scheil T86-1 to T91-6). His proposal was submitted in writing to the EPA and the DEP in a letter dated January 30, 1975 (P-1208).

After about a month, the DEP and EPA responded, accepting the concept of entombing the mercury within the foundation of the building, but insisting that Wolf build a cut-off wall of a greater depth around the entire perimeter of the building and pave the entire property, including a railroad siding and a drainage channel, that he accept an open-ended obligation to comply with whatever additional requirements might be imposed in the future, and that this undertaking constitute a covenant running with the land to be included in the title documents (S-18, 6/21/78 Longstreet T91-13 to T92-4). Wolf objected both to any covenants of record (6/21/78 Longstreet T94-2 to 18) and to other aspects of the agencies' proposal which he considered impractical or unnecessary (11/8/78 Wolf T23-23 to T25-18; T30-10 to 24; T33-21 to T35-12; T37-4 to T38-5).

Wolf proceeded with construction of Building Two either with the explicit permission of the EPA and DEP (11/6/78 Wolf T83-12 to 21) or at least with their tacit approval since they did not seek to enjoin the construction. The top soil which had been removed from the westerly portion of the tract was placed

within the foundation of Building Two and that building was constructed in accordance with the Scheil proposal. At least 60 percent of the westerly portion of the property was contained within the foundation walls and the exterior cut-off wall. Except for the railroad siding and the drainage channel, the entire property which was not within the perimeter of the foundation wall and the cut-off wall was paved (11/6/78 Wolf T22-3 to T24-18; T84-1 to T89-14; T91-1 to T96-2).

During the course of the trial in the court below, the State admitted in the course of a colloquy with the Court that the Department of Environmental Protection was satisfied with the manner of construction of Building Two except in three respects. First it objected to the absence of any recorded covenant. Secondly it objected to Wolf's refusal to undertake a continuing obligation to monitor for mercury. Thirdly, it objected to Wolf's failure to construct a deep cut-off wall around the entire perimeter of the property even before there was any proof that the containment system as actually constructed was inadequate. The Court then observed that those objections on the part of the State all dealt with actions which, if necessary and legally justified, could be taken in the future and that they were not objections to Wolf's moving dirt and demolishing the buildings which previously stood on the site (6/21/78 Longstreet T116-12 to T119-11). Mr. Longstreet, the DEP witness who was on the stand, explicitly agreed (6/21/78 Longstreet T119-11).

Following Wolf's completion of Building Two with its specially built containment system, the State commenced this suit, joining the Wolfs as defendants. The statutory receiver of Wolfs' wholly owned construction company, Rovic, which had become insolvent, intervened to assert a claim against Ventron Corporation which was parallel to the Wolfs' claim.

POINT I

THE TRIAL COURT PROPERLY FOUND THAT VENTRON CORPORATION WAS LIABLE TO THE WOLFS FOR HAVING FRAUDULENTLY FAILED TO DISCLOSE THE GROSS CONTAMINATION OF ITS LAND BY MERCURY, AND ITS JUDGMENT IN THIS RESPECT SHOULD BE AFFIRMED.

INTRODUCTION

The Trial Court determined that the Wolfs had demonstrated fraudulent concealment on the part of Ventron by clear and convincing evidence. In its opinion, the Court noted that:

> Wolf has demonstrated 'fraudulent concealment by clear and convincing evidence. He has shown the existence of a material fact not readily observable to the purchaser; (2) the seller's knowledge of that fact; (3) the seller's intentional failure to disclose that fact; and (4) the buyer's reliance, to his detriment, Weintraub v. Krobatsch, 64 N.J. 445 (1974). (Vel-Da59)

Ventron does not dispute that the saturation of the entire Wolf property by mercury was a material fact. Nor has Ventron contended that it had no duty to disclose that fact to the Wolfs. Ventron has apparently recognized the great weight which is appropriately given by an appellate court to a trial judge's opportunity to see and hear the witnesses and consider the voluminous evidence enfolding over a 55-day trial, particularly on the issue of fraud vel non. Presumably for that reason, Ventron no longer insists, as it did strenuously at trial, that its vice-president, S.K. Derderian, made explicit intentional disclosures to Wolf concerning mercury pollution on the

premises. Instead, Ventron's major contention now is that inadvertent or incidental disclosures to Robert Wolf that the Wood Ridge Chemical Company processed mercury was a sufficient disclosure to put Wolf on notice of, presumably, the 126 tons of mercury with which the property was saturated, and that Wolf made his own investigation, so that he knew or should have known about the extent of the mercury contamination.

In its brief to this Court, Ventron has thus sought to shift the focus of the case from its own fraud to Wolf's supposed negligence, arguing in effect that Robert Wolf, the victim, could have avoided the fraud through the exercise of greater caution or diligence and, therefore has no remedy against the party that defrauded him. This cynical view was rejected below and should be rejected here. The Trial Court held that Robert Wolf was not negligent and furthermore, the legal position for which Ventron contends would encourage the perpetration of frauds. It is bad policy and, contrary to the assertions of Ventron's brief, it is not the law of this State.

A.

The Record Below Amply Supports the Trial Judge's Findings of All the Elements of Fraudulent Non-Disclosure of a Material Fact to the Wolfs Demonstrating the Kind of Intentional Tort to Which a Victim's Negligence is No Defense.

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There is substantial evidence in the record, most of it uncontroverted, to support the Trial Court's finding that Ventron knew

that the property which it was selling to
the Wolfs was saturated by mercury.

Ventron's and its predecessors' purposeful dumping of mercury, their repeated spills and splashes of mercury and of mercury compounds on walls, floors and the ground, and the repeated inspection reports describing mercury-oxide dusts, droplets of metallic mercury and mercury vapors throughout the property were so widespread and so patent that their existence is proof that Ventron, as their perpetrator or inheritor, knew of the resulting mercury saturation.* (It should be emphasized that for purposes of the crossclaim, Ventron and Wood Ridge Chemical Company are identical because of their merger and Ventron's assumption of Wood Ridge's liability).

Ventron's Vice-President and General Counsel, S.K. Derderian, who was a professional chemist, admits that at the time of sale to the Wolfs, he was consciously aware of the 1972 Metcalf & Eddy report which showed gross contamination of groundwater and of the soil at the Wood Rige site, even three to five feet beneath the surface of the ground (9/12/78 Derderian T71-24 to T72-12, T73-18 to T74-25). Furthermore, Ventron had concluded that the walls and floors of its buildings and its grounds were so contaminated by mercury that re-cementing the building surfaces and hot-topping the entire grounds at a cost

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* In addition to the references to the factual record contained in this brief, the Court is respectfully referred to Velsicol's main brief, Vel-Db51-7 to Vel-Db60-18 and Vel-Db168 to Vel-Db176 for a further detailed description of Ventron's awarness of the massive pollution which existed and to which it was constantly adding.

of between $50,000 and $100,000 would probably be necessary to reduce chemical exposures of the workers to mercury vapors (P-954).

Moreover, at trial, Derderian testified repeatedly and insistently about the warnings of mercury contamination which he had given to Robert Wolf, to Wolf's attorneys, and to other prospective purchasers (To Attorney Poppinga, 9/12/78 Derderian T26-20 to T27-21; to Attorneys Poppinga and Hensler, 9/19/78 Derderian T83-4 to 21; to Attorney Vecchione for a prospective buyer, 9/12/78 Derderian T87-23 to T88-2; to DiCioccio, broker, 9/12/78 Derderian T82-22 to 24). The evidence demonstrated overwhelmingly, and the Court below implicitly held, that these claims of disclosure were blatant lies (Hensler: 11/1/78 Hensler T17-11 to 23, T19-2 to T21-4; Poppinga: 11/1/78 Poppinga T57-16 to 23; Vecchione: 11/2/78 Vecchione T10-17 to T11-11, T17-20 to T18-3; DiCioccio: 10/25/80 DiCioccio T20-19 to T21-15). But the fact that Derderian felt compelled to make those claims in his testimony was itself an acknowledgment that the evidence of Ventron's knowledge of the gross mercury contamination of its land was too strong to be denied. Indeed, the very vastness of the contamination was itself sufficient to show that Ventron knew it was sitting on a mercury mine.

It is uncontroverted that Ventron knew of the regulatory agencies' growing concern with Ventron's mercury-saturated soil. That concern had led to the Metcalf and Eddy report which responded to the EPA's request for a chemical analysis of soil by

supplying an analysis of soil only from depths of three feet or more below the surface of the ground (P-755). At the request of the Environmental Protection Agency, Ventron had prepared a special report describing methods of immobilizing mercury in the soil. (See B-41(B) a letter sent to Rovic in September 1974 which refers to a "report done for the EPA describing methods of tying up or 'gettering' Hg in soil."). Most damning, Derderian testified:

> . . . The DEP is saying, 'you can't put any more material in there,' so it is a natural consequence that sooner or later they are going to say 'as [if] it's a great big surprise 'There's mercury in the soil,' and then the next thing is going to be, 'Gee, who put it there?' So it's a natural sequence of events. The question hasn't been raised, because up until this point in time, there was no problem with mercury being in the soil. But now when they're controlling effluent discharge and they tell you that the specs are going to diminish and eventually come to zero, why then it follows from that that the next step will be, 'What's in there already?' and so it becomes a concern, the negative factor in the scale." (9/12/78 Derderian T77-24 to T78-14).

Apprehension about what the regulatory agencies would do when they finally focused fully upon the mercury in the ground, Derderian said, was one of the factors which led to the sale of the property (9/12/78 Derderian T77-15 to 23).

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> The record shows that Ventron did not make any explicit written disclosure to the Wolfs of the mercury saturation of their land.

There is no deed, option agreement, letter or other

writing of any sort in which Ventron disclosed to Robert Wolf, or to any of its other prospective purchasers, that the Wood Ridge Chemical Company site was grossly contaminated by mercury. Ventron's Joseph Bernstein did claim to have sent Wolf a copy of the Metcalf & Eddy report of mercury in the soil under cover of a letter dated August 24, 1973 (H-37, 9/21/78 Bernstein T99-23 to T104-23). Mr. Wolf, however, testified that that letter enclosed only the Craig Testing Laboratory report which disclosed the soil composition of the various borings (without any mention of mercury), but not the chemical analysis of those borings which was prepared by Metcalf & Eddy (11/1/78, Wolf T102-24 to T103-20). The Trial Court credited Mr. Wolf's testimony, corroborated as it was by the text of the cover letter which referred only to the Craig Testing Laboratories (and not to Metcalf & Eddy), by testimony that it was the Craig report which was deliverd to Bernstein to be sent to Wolf (9/25/78 Bernstein T25-22 to T30-4; B-32) and by Bernstein's admission that, in fact, he had no direct personal knowledge of what had gone into the envelope which was sent to Wolf because his secretary had prepared the cover letter, signed it in his name and had it mailed (9/25/78 Bernstein T17-3 to T20-5).

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> There is ample evidence in the record which proves that, as the Trial Court found, Ventron did not orally disclose the mercury contamination of its property to the Wolfs.

The only evidence in support of Ventron's claims that

it made oral disclosures to Wolf of the contamination of its land was the testimony of S.K. Derderian. As previously noted, his tesimony was internally inconsistent, unbelievable, and controverted by the testimony of disinterested witnesses. It was justifiably rejected by the Trial Court and Ventron has prudently refrained from relying on it.

B

As the Court Below Correctly Held, Wolf Was Not Negligent, But Even if He Were, Negligence of the Victim is No Defense to an Intentional Fraud.

In place of its now abandoned reliance on Derderian's testimony, Ventron now premises its defense on the admitted fact that prior to signing the option agreement of February 5, 1980, Wolf knew that the land which he was interested in buying was the site of a chemical company which used mercury in its products. For example, Ventron emphasizes that the Wood Ridge Chemical Corporation sign on the roof of a building and references to mercury in conversation and on a layout plan were notice to Robert Wolf. Notice of what? That information was not equivalent to the disclosure that the land was massively polluted by mercury. Mr. Derderian himself testified that when Ventron had purchased the property from Velsicol Chemical Corporation in 1968, knowledge that it was buying a mercury processing plant did not then give Ventron notice that the ground was contaminated (9/18/78 Derderian T33-20 to 24). The Court then asked whether, as a result of "what developed in the years after 1968 publicly

would be sufficient together with the knowledge of the fact that there was a mercury processing plant at any location to indicate to a prospective purchaser that there could be contamination in the land." Mr. Derderian answered with the equivocation, "More so than in 1968," thereby supporting the conclusion that, whatever a chemical company itself might have inferred about mercury contamination from the use of mercury on a site, such information was surely not notice to a non-chemist real estate developer (9/18/78 Derderian T34-14 to 22).

Wolf's soil engineers who made soil borings and excavations on the site observed no evidence of mercury contamination (11/1/78 Scheil T80-14 go 23; 11/2/78 Scheil T76-2 to 25). They had no custom or capacity to test for chemical contamination of the soil (11/1/78 Scheil T72-13 to T73-19). Mr. DiCioccio, the local broker, did not infer mercury contamination or environmental problems from his observation during a plant visit that mercury was being used in its operation (10/25/78 DiCioccio T7-24 to T8-25; T20-19 to 23). Charles Klatskin, a local real estate broker whom Ventron produced as one of its expert witnesses, testified that he himself had never caused chemical tests to be made of soil and that he did not know of anyone who had ever done so (10/24/78 Klatskin T124-5 to T125-15). In one instance, he had been associated with developers who planned to construct a building on a site previously occupied by a chemical company. He had advised chemical tests of the soil on that occasion, but such testing was obviously not common practice since, as he testified,

the idea had not occurred either to the construction company or the real estate lawyer who were associated with him in the venture and, in fact, the tests were never made (10/24/78 Klatskin T117-5 to T122-18). All of this was ample justification for the Trial Court's conclusion that the information given to Wolf that the property was the site of a chemical operation which used mercury was not notice to him that he was about to buy a mercury mine.

Ventron's argument to this Court that before the May 20 closing Wolf was warned by the New Jersey Department of Labor and Industry that the land was grossly contaminated by mercury is specious, and Ventron's assertion that on May 9, 1974, Wolf was served with an order to cease violations is a distortion of the record. Mr. Lucarelli, the person who prepared the document served upon Wolf, testified, on direct examination by Ventron's counsel that "This was not a violation. This was a notice not to perform demolition work on certain buildings, not to perform demolition work until certain hazardous chemicals and residues had been removed from -- evidently I did not complete it -- from the project." (10/30/78 Lucarelli T19-8 to 12).

If Wolf's complaint against Ventron were failure to disclose chemical dust on beams and rafters or chemicals left on laboratory shelves or in an isolated pit on the property, Mr. Lucarelli's memoranda would have constituted notice of those conditions. But the Wolfs' Factual and Legal Contentions at

the pretrial conference alleged, "Unknown to Wolf, but known to Ventron, Ventron and its predecessors had caused severe mercury contamination of the first three feet of soil on the easterly portion of the site." (Ja155-31 to 40). The memoranda from the Department of Labor and Industry was not notice that the site had the highest concentration of mercury in the world outside of a mercury mine, or that it contained 126 tons of mercury on seven acres! Most significant for inferring what Wolf should have perceived about the nature and extent of the contamination of the property are the perceptions of Mr. Longstreet, the DEP investigator most closely involved with this matter. He testified that when he first arrived at the Ventron site on June 7,1974 "...my original investigation led me to believe that it was a spill situation we were dealing with (6/21/78 Longstreet T21-14 to 17). On June 12, Longstreet still considered that contamination at the site was "a surface problem" (6/29/78 Longstreet T82-5 to 7). On June 12, the regulators asked for soil tests to determine the amount of "soil infiltration" because "During the course of the meeting, somebody expressed an opinion that it could be a problem, and since water had flown over ground and some of the chemicals may have penetrated into the ground." (6/29/78 Longstreet T82-5 to 14). In July 1974, concern that chemicals might have gotten into the ground was still "only a theory" on the part of the DEP and EPA and they "had no evidence one way or the other to indicate indeed contaminants would penetrate the ground." (6/27/78 Longstreet T48-7 to 19; T50-19 to 25).

Asked by the Judge, "When did the agency finally arrive at the conclusion that it was more than a surface problem," Mr. Longstreet replied, "When we got the test results that showed very high levels of mercury in soil three feet down." (6/29/78 Longstreet T83-24 to T84-2). Mr. Longstreet's recollection was that that had occurred "late in 1975." (6/29/78 Longstreet T84-3 to 7). Mr. Longstreet almost certainly meant "late in 1974" since U.S. Testing Company sent Rovic a report of soil tests under cover of a letter dated August 13, 1974 (S-16) and a copy was sent to Mr. Longstreet in advance of the August 16, 1974 meeting (11/6/78 Wolf T17-22 to T18-24). That report shows mercury contamination at three feet below the surface. That result apparently came as a surprise to Mr. Longstreet and presumably to Mr. Wolf, but not to Ventron which had obtained the Metcalf & Eddy report two years earlier. However, it should be noted that that provision of the August 16, 1974, memorandum of agreement itself P-163) calling for Rovic to "remove contaminated fill to a depth of three feet" indicates that the magnitude and intractability of the problem was being vastly underestimated even then. It was the gross contamination suggested by the test report, not dust on the rafters, which aroused the consternation of the regulatory agencies over the following months, causing them to seriously delay the construction which Wolf had planned. It was that gross contamination, that saturation of the soil by mercury which should have been, but was not, disclosed.

Even assuming that Wolf could have discovered the contamination had he been more alert, New Jersey law does not consider such "negligence" to be a defense to an intentional fraud. The recent decision, Pioneer Nat'l Title & Ins. Co. v. Lucas, 155 N.J. Super. 332 (App. Div.), affirmed per curiam on the basis of the App. Div. opinion, 78 N.J. 320 (1978), not cited or discussed by Ventron, decisively puts that question to rest.

In Pioneer, the defendant learned that there was a cloud, dating from the 19th century, on the title of property she owned in Morris County. Despite this knowledge, she arranged to have the plaintiff insurance company issue title insurance, based on the customary sixty-year search. After the policy was issued, an adjoining landowner brought a quiet title action. The insurance company then brought an action to rescind the title insurance policy. Reversing the trial court, the Appellate Division held that the defendant's deliberate failure to disclose the known cloud on the title to the insurance company was part of a design to mislead it into issuing the title policy. In granting rescission, the court rejected the contention that the insurance company should have been denied relief because of its own negligence. Even if the insurance company was negligent, the court declared, that would not change the result. The court wrote:

> One who engages in the kind of conduct here involved may not urge that his victim should have been more circumspect or astute. See Judson v. Peoples Bank and Trust Co., 25 N.J. 17, 27 (1957); Heake v. Atlantic Cas. Ins. Co., 15 N.J. 475, 483-484 (1954);

> Peter W. Kero, Inc. v. Terminal Constr. Corp., 6 N.J. 361, 369-370 (1951). Even if Pioneer negligently searched Lucas' title, it violated no duty toward defendants in the context of the facts disclosed by this record. As stated in Parker v. Title and Trust Co., [233 F. 2d 505 (9th Cir. 1956), reh. den. 237 F. 2d 423 (9th Cir. 1956)], where allegations of negligence were also raised: "Surely a person thus led into a trap owes no duty to the one who did the trapping." 233 F2d. at 510. [155 N.J. Super. at 342-343].

If the negligent searching of title by the title insurance company which was the defendant in Pioneer did not preclude it from obtaining relief against its insured's fraudulent non-disclosure of material facts, the Court below was correct in declining to penalize Wolf for not detecting pollution, regardless of whether or not it might have been perceived by an expert in chemistry like Ventron.

This rule of law enunciated in Pioneer Nat'l Title & Ins. Co. is in no way novel. In Bilotti v. Accurate Forming Corp., 39 N.J. 184, 205 (1963), the Court pointed out, ". . . the law is settled in this state that fraudulent misconduct is not excused by the credulity or negligence of the victim or by the fact that he might have discovered the fraud by making his own prior investigation."

As stated in Peter W. Kero, Inc. v. Terminal Const. Corp., 6 N.J. 361, 369-370 (1951):

> It is the policy of the law to protect the unwary and foolish as well as the vigilant from the wiles and artifices of evil-doers[,] and negligence in trusting a representation will not, according to the greater weight

> of authority, excuse a positive willful fraud. . . .

This rule applies even in the case of fraud allowed by failure to read a written instrument. See, e.g., Heake v. Atlantic Casualty Ins. Co., 15 N.J. 475 (1954) (failure to note misrepresentations placed by insurer's agent in automobile liability policy); Lloyd v. Hulick, 69 N.J. Eq. 784 (E. & A. 1906) (failure to read deed containing restrictive covenants not agreed to by the parties). Even if the defrauded party would certainly have detected the fraud but for defects or omissions in its investigation which could readily have been avoided, such shortcomings on the part of the victim are not a defense. State Farm Mut. Auto Ins. Co. v. Wall, 92 N.J. Super. 92 (App. Div. 1966).

The cases cited by Ventron do not support a contrary rule. In John Hancock Ins. Co. v. Cronin, 139 N.J. Eq. 392 (E. & A. 1947), for instance, a life insurance company brought an action to rescind a contract because of misrepresentations by the insured with respect to his history of illness and hospitalization. The defendant, the wife of the insured, asserted that no fraud existed because the insurance company did not rely upon the misrepresentations, but based its action upon independent investigation. At page 88 of its brief, Ventron cites John Hancock for the proposition that when one undertakes to make an investigation and relies upon it, he is presumed to have been guided by it and to be bound accordingly. That quotation is misleading, however, and fails to give the full import of the

John Hancock decision. The true rule of decision from that case is as follows:

> . . . where the independent investigation discloses the falsity of the material misrepresentations or the source of the information is revealed by the insured where the parties are not in an equal position to know the facts, and in either event the knowledge gained or which could have been gained by the exercise of reasonable diligence is substituted for the insurance application, . . . the appellant is precluded from relying upon the misrepresentations in the application. The mere fact that an insurer makes an investigation does not absolve the applicant from speaking the truth nor lessen the right of the insurer to rely upon his statements, unless the investigation discloses facts sufficient to expose the falsity of the representations of the applicant or which are of such a nature as to place upon the insurer the duty of further inquiry. [139 N.J. Eq. at 398].

In our case, as the Court below held, Wolf's independent investigation did not disclose the deception on the part of Ventron or reveal facts which should have led him to further inquiry.

The remaining decisions cited by Ventron are beside the point. Citing Nat'l Premium Budget Plan Corp. v. Nat'l Fire Ins. Co., 97 N.J. Super. 149 (Law Div. 1967), aff'd 106 N.J. Super. 238 (App. Div. 1969), Ventron claims that Wolf, with his "special knowledge and experience" in the business of purchasing and developing industrial real estate, cannot be permitted to rely on circumstances under which the average layman could recover. See Ven. Db-81. However, Ventron omitted to point out that the Appellate Division expressly rejected the rule of law for which Ventron cited the case. The Appellate Division stated:

> Plaintiff belabors the point that unjustified reliance on the misrepresentation by the plaintiff-victim is not a proper basis for the defense of contributory negligence to an action for fraud and deceit. This is generally so, but is beside the point of the present issue. . . . [106 N.J. Super. at 242 (emphasis deleted)]

Moreover, the Trial Court's reliance language in Nat'l Prem. Budget Corp. seems to be directed to the issue of apparent agency, an entirely different matter from whether a victim was "entitled" to rely on the tortfeasor's fraud.

The remaining cases cited by Ventron stand only for the proposition that because of the impossibilities of proof, a party who has stared a fact in the face will not be believed when he swears that he has not seen it. See, e.g. Condon v. Sandhowe, 97 N.J. Eq. 204 (Ch. 1925). If such cases are interpreted to stand for any different principle of law, they have been over-ruled by cases such as Pioneer, Wall and John Hancock, supra.

C

Ventron Does Not Appear to Dispute That, as the Court Below Held, it Had a Legal Duty to Disclose to Wolf That the Soil at the Wood Ridge Site was Grossly Contamined by Mercury.

Ventron itself has crossclaimed against Velsciol alleging that when Velsicol sold Ventron the property in 1968, Velsicol was legally obligated to disclose that the land was contaminated by mercury. (See the Fourth Count of Ventron's Crossclaim for Contribution, Indemnification and Damages against

Defendant Velsicol Chemical Corp. (Ja130-42 to Ja131-40). Thus, Ventron itself has recognized the pertinent rule of law.

The leading New Jersey case on a vendor's duty of disclosure is, of course, Weintraub v. Krobatsch, 64 N.J. 445 (1974). In that case, a unanimous Supreme Court, speaking through Mr. Justice Jacobs, declared that the earlier rule which imposed no liability upon a seller for fraudulent failure to disclose conditions material to the sale did not "represent our sense of justice or fair dealing and it has understandably been rejected in persuasive opinion elsewhere." (64 N.J. at 450). After a careful examination of cases throughout the country, the Supreme Court held that "deliberate concealment or non-disclosure of a 'significant nature" entitled the buyer to a remedy against the seller which, in that case, was rescission. The premise of the entire opinion is simply that intentional non-disclosure of material facts in a real estate transaction will not be permitted because such conduct is inconsistent with "current principles grounded on justice and fair dealing embraced throughout this opinion...."(64 N.J. at 456.) Cf. Schipper v. Levitt & Sons, Inc., 44 N.J. 70 (1965); Reste Realty Corporation v. Cooper, 53 N.J. 444 (1969).

The Supreme Court's opinion in Weintraub v. Krobatch, supra, was followed in Tobin v. Paprone Constr. Co., 137 N.J. Super. 518 (L. Div. 1975), and Neveroski v. Blair, 141 N.J. Super. 365 (App. Div. 1976). In both those cases, intentional non-disclosure of material facts was the basis for an award of

damages. The Tobin v. Paprone Constr. Co. case, although involving a fraud which was far less aggravated than that presented by our case, is, in some ways, analogous to the instant suit. The defendant in the Tobin case sold a building lot knowing that the vendee would construct a tennis court on it. Such a tennis court, however, was inconsistent with the character of residential use which a second purchaser of another lot from the same developer was entitled to anticipate. Adopting the rule of the Weintraub case with its stress upon the proposition that "our law should be based on current notions of what is "right and just'", the Court in Tobin held that the developer's "silence" in failing to advise the subsequent purchaser about the prospective tennis court "was a fraudulent representation and a failure of an implicit condition of sale." Tobin v. Paprone Constr. Co., 137 N.J. Super. at 526.

Similarly in our case, Ventron knew that the soil of the Wood Ridge site was permeated with mercury and that the regulatory agencies had been showing increasing concern with mercury in the ground. The soil contamination was one of the factors which Ventron took into consideration in determining to dispose of the site. Derderian anticipated that the EPA would ultimately want the mercury removed from the soil. Ventron knew that Wolf wanted to purchase the property for the purpose of demolishing the existing buildings and erecting new ones, a process which Ventron had been warned would inevitably disturb the mercury then in the soil and cause its release into the environment. Thus, Ventron failed to disclose a conditon of

the property which it knew was far more signifcant--indeed central--to its vendee's utilization of the property than the presence of an adjacent tennis court had been to the vendee's enjoyment of his home site in the Tobin Paprone Const. Co. case.

In the aftermath of Weintraub v. Korbatsch, supra, the proper New Jersey rule must surely be that which was adopted below, that a chemical company such as Ventron, which has caused or contributed to the gross chemical contamination of a piece of land, may not, in anticipation of adverse regulatory action, sell the property and, with impunity, fail to disclose the facts to an unsuspecting vendee who then suffers from the consequences of the vendor's pollution. Such a result would be so patently contrary to "current principles grounded on justice and fair dealing" that it could not be New Jersey law.

D

Ventron's Argument That the Trial Court's Decision Against it on the Wolfs' Cross-claim was Prompted by Statements Dehors the Record is Outrageously Improper and Unjustified.

To argue before this Court, as Ventron does, outside of any record, that the motivation for the judgment in favor of the Wolfs was their counsel's reference to a contingent fee arrangement, is grossly unfair to the Trial Judge and unwarranted by the facts. First of all, if the incident which Ventron's counsel now makes the fulcrum of his appeal had seemed nearly so significant to him immediately after it occurred as he contends it does now, after his client has sustained an adverse

judgment based upon intentional fraud, he would no doubt have made an immediate record of what he claims occurred. Had he done so, the Trial Court would have been in a position to take whatever corrective action, if any, was necessary, and whatever argument was made to this Court would not be based, as the present argument on this issue is, entirely upon counsel's recollection, without any documentation whatsoever. Secondly, the recollection of the events by counsel for the Wolfs, although admittedly somewhat indistinct, is entirely at variance with what has been alleged on behalf of Ventron. Because of the tactic adopted by Ventron's counsel, explanation of this second point regrettably requires an argument in the first person, without documentation in the record.

The trial below occupied some 55 trial days. The documents offered were voluminous and frequently cumulative, sometimes literally duplicative of documents offered earlier. Although the facts material to the Wolfs' fraud claim were sharply controverted, the basic facts underlying the State's case against Ventron, Velsicol and Wood Ridge Chemical Company were never really in dispute. It appeared, at least to some, that most of the 55 days were spent proving that there was an enormous quantity of mercury on the subject property, that Ventron, Velsicol and their predecessors had put it there, that much of it had gotten off and more of it was therefore likely to escape in the future and that, if it did, it would be potentially dangerous. None of these facts seemed really subject to bona

fide dispute. Consequently, as testimony droned on, tempers began to get somewhat shorter than they had been at the inception of the trial.

During the course of the trial, there were numerous conferences between counsel and the Court, attempting either to settle the case, or at least some facets of it, or to reach a stipulation of facts which would obviate the tedious and probably unnecessary process which was devouring the Court's time and that of counsel. All of those attempts proved futile.

During one such conference among the Court and counsel, conducted off the record but in the courtroom, frustration from the failure of efforts to shorten the trial prompted accusations, I do not remember from whom, that those attorneys who were resisting efforts to curtail the trial time by agreeing upon a stipulation of facts or a settlement of at least some of the issues were motivated by the fact that they were being paid by the hour. In order to disassociate myself from the attorneys against whom that accusation might arguably be leveled, I blurted out that my compensation, for the most part, was contingent and therefore I had no motive to prolong the trial.

The information that my compensation was in part contingent could not have come as a relevation to the Trial Court. The Judge knew that Rovic Construction Company, of which Mr. Wolf had been first the principal and then the sole stockholder, was insolvent and appearing before him by its court appointed

receiver. He knew, at least, that Robert Wolf claimed to have suffered enormous financial losses. Certainly the compensation of Rovic's counsel was dependent upon his client's success at trial and it would have been a fair inference that, whatever the form of the compensation agreement between the Wolfs and their attorneys, receipt of that compensation was also probably dependent upon the outcome.

I do not doubt that I should not have blurted out any reference to a contingent fee arrangement. I am sure that if I had taken a few moments to reflect, I would have avoided doing so. But the very belated contention by Ventron's counsel that that momentary indiscretion, which no one thought sufficiently signifcant at the time even to note on the trial record, was the motivation for the Court's decision, is outrageous. That so experienced and capable an attorney as Ventron's has advanced such an argument is explicable only by the dearth of meritorious arguments in support of his appeal from the fraud judgment against his client.

POINT II

THE COURT BELOW COMMITTED ERROR BY RULING THAT WOLFS' RECOVERY COULD NOT INCLUDE DAMAGES FOR LOST PROFIT OR THE DIMINISHED VALUE OF THE LAND. THAT RULING SHOULD BE REVERSED.

The Trial Court's ruling purporting to enumerate and limit the elements of the Wolfs' damages was unnecessary and inappropriate at this stage of the proceedings. By the terms of the pretrial order, the trial of the Wolfs' counterclaim against Ventron was limited to the issue of liability. If liability was established, there was to be a separate trial to prove damages (Ja149-7). Consequently, there was neither pretrial discovery nor substantial proof at trial specifically devoted to establishing either the nature or amount of the Wolfs' damages or what limitations, if any, should be imposed upon them.

Nonetheless, despite having found fraudulent non-disclosure on the part of Ventron, the Court shrank from recognition of the full injury which that fraud had inflicted upon the Wolfs and the magnitude of the damages to which they were fairly entitled as compensation. Listing the "elements of damages which apply," (Vel-Da26-29) the Court limited them to "the costs of demolition" in excess of those which should reasonably have been anticipated in demolishing a chemical plant, the costs incurred for constructing a containment system and the "legal fees of Wolf necessary to defend the action of the State (based on the deed covenant)." (Vel-Da26). At another point,

the Court adds "other costs incurred in abating the pollution to the satisfaction of the EPA, including the added costs of the containment system and other costs incurred by Rovic...." (Vel-Da63 to Vel-Da64) However, the Court declared, "Wolf may not recover damages in the nature of potential loss of profits or based on the diminution in value or due to possible restrictions or liens on the land." (Vel-Da64)

The Trial Court's rationale for the limitations which it imposed on the Wolf's damages are variously described as follows: (1) "Wolf's failure to attempt to mitigate damages, and his continued efforts as an expert real estate developer to further the project <u>after</u> he had both full knowledge and a choice does not change the result, but does limit his right to recovery." (Vel-Da27) (2) "Wolf's recovery will be limited by his failure to mitigate damages by rescission or otherwise at that point in time when his knowledge of the facts was as extensive as or almost as extensive as Ventron's." (Vel-Da58) (3) "Nevertheless, Wolf's expertise and profit motivation will preclude any accrual of damages on the fraud claim after he knew or should have known, the non-disclosed facts. At that point in time, Wolf could have rescinded. He may not, under the circumstances here choose not to rescind, and to thus burden Ventron with additional consequential damages. Wolf chose to retain the land. Damages must be limited to adjustment of the purchase price to provide Wolf with the land in the condition that he bargained for." (Vel-Da63).

The trial court's enumeration of the elements of damages recoverable by the Wolfs is inconsistent with the principle for the award of damages in cases of fraud as enunciated in Zeliff v. Sabatino, 15 N.J. 70, 74 (1954), as follows:

> "If a charge of fraud is sustained, all damages which are the proximate result of the wrong should be awarded. 'Regardless of whether the out of pocket rule or the benefit-of-the bargain rule is the correct one, the fundamental rule universally employed' ...is that the 'victims of fraud are entitled to compensation for every wrong which was the natural and proximate result of the fraud.' "

In Gardner v. Rosecliff Realty Co., 41 N.J. Super. 1, (App. Div. 1956), the Appellate Division, speaking through Judge Clapp, applied the rule of Zeliff to hold that in an appropriate case damages for fraudulent misrepresentation would include lost profits of a business. The defendant in the Gardner case had fraudulently induced the plaintiff to incur various expenses for the purpose of operating a ferry service between New York City and Palisades Park. The Court said:

> "...the law fixes damages in an action for deceit according to one of two measures, depending (except where the plaintiff is content with damages on the lesser scale or where the representation amounts to a warranty) on the dictates of justice as viewed by the court in the particular case. Under the first of these measures the Court will award to the plaintiff such damages as would effect restitution -- that is, in this case, damages equal to the amounts paid out of pocket by the plaintiffs for chartering the boat, etc.....less the net amount earned by plaintiffs through the use of the boat on sightseeing parties conducted during 1951 . . . . under the second of these measures the court will award such damages as will

give to the plaintiffs the 'benefit of the bargain' held out to them by the perpetrator of the fraud, thereby requiring him to make the representation good--in other words, the court will award damages equal to that which plaintiffs would . . have received if the representation had been true; . . . . but damages cannot be awarded according to the measure second stated--giving to plaintiffs the 'benefit of the bargain' -- unless the amount of that benefit can be established by the proofs with sufficient certainty." (41 N.J. Super. at 10-11).

In the instant case, because the trial of the Wolfs' crossclaim against Ventron Corporation was bifurcated, there is as yet no evidential basis for determining what elements of damages will be proved. The evidence already in the record, however, demonstrates clearly that the Wolfs and Rovic Construction Company (whom the Court considered identical for purposes of damages) suffered a substantial financial injury for which they are entitled to compensation (11/6/78 Wolf T30-10 to T32-20). The Wolfs should be permitted to prove their full damages at the forthcoming damage trial and to recover in accordance with the proofs presented, consistently with the Trial Court's assertion that "Wolf should be made whole." (Vel-Da27).

The Trial Court's ruling that "Wolf's failure to attempt to mitigate damages, and his continued effort as an expert real estate developer to further the project after he had both full knowledge and a choice limit his right to recovery" appears to be based upon a misconception of three legal rules, none of which supports the result reached. See

Harold v. Pugh, 174 Cal. App. 2d 603, 345 P.2d 112 (Cal. Ct. of App. 1959). The first of these is the rule that every plaintiff's recovery is subject to a duty to mitigate, that is, a duty to take whatever action is reasonable under the circumstances to minimize his injury. McDonald v. Mianecki, 79 N.J. 275, 299 (1979). However, the burden of proving failure to mitigate is upon the defendant. Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437 (App.Div. 1976), cert. den. 71 N.J. 503 (1976). See Sommer v. Kridel, 74 N.J. 446, 457 (1977). Because mitigation was thought to be a question which would be tried during the damage trial, there were no proofs introduced specifically directed to that issue. Such proofs presumably would include evidence of what alternative courses of action Wolf might have pursued such as, for example, abandoning construction entirely when the soil borings began to disclose the extent of the mercury contamination in the late summer and fall of 1974. However, the evidence would also include what Wolf reasonably perceived would be the consequences, financial and otherwise, of such alternative courses of action and what reasonably seemed the likelihood at that time of economically removing or entombing the contamination. In any event, it was simply wrong for the Trial Court to have ruled, as it did, without evidence or argument that "Wolf's failure to attempt to mitigate damages . . . does limit his right to recovery."

Secondly, the ruling below disregards the principle

that a party induced by fraud to enter into a contract or to make a purchase has an absolute choice whether to affirm the transaction and sue for damages or, provided that he disaffirms the transaction promptly upon learning of the fraud, to rescind it. But although delay may defeat what would otherwise be the absolute right of rescission, it is always the rule that "Without question, New Jersey recognizes that a defrauded party may affirm a tainted transaction and sue at law in deceit," i.e. for damages, Bilotti v. Accurate Forming Corp. 39 N.J. 184, 201 (1963). If the party defrauded continues to perform the contract for an undue time after learning of the fraud, he will have waived his right to rescind. Ajamian v. Schlanger (I), 20 N.J. Super. 246 (App. Div. 1952). However, continued performance of the contract which has been induced by fraud, even for a time so long that it will deprive the plaintiff of his right to rescind, will not defeat his damage claim.

The rule that failure to rescind does not waive damages is illustrated by Ajamian v. Schlanger (II), 14 N.J. 483 (1954). In June 1946, plaintiff in that case bought a business as the result of fraud in the inducement. He became aware of the fraud within a month afterwards. Nonetheless, he continued to deal with the property of the business and to make installment payments on account of the purchase price until March 1947 when he filed suit solely for rescission, not damages. The case did not come to trial until some three years later. During the interval, plaintiff continued to operate the business. At trial,

the Court held that the plaintiff had ratified the contract before bringing suit and was therefore not entitled to rescind. Plaintiff did not seek to amend to ask for damages. Judgment was therefore entered in favor of defendant at the close of plaintiff's case. Following the affirmance of the judgment on appeal, the plaintiff's assignee commenced a suit at law for damages based upon allegations virtually identical with those of the complaint in the previous suit for rescission. In a decision by Justice Brennan, the Court held that the judgment in the rescission suit barred the second suit for damages. What is important for our case, however, is that Justice Brennan repeatedly emphasized that the plaintiff in the rescission suit could and should have amended his complaint to claim damages when the fatal consequences of lapse of time for his rescission remedy had become apparent. Emphasizing by implication the point that the delay and election which defeated rescission would not have prevented damages, Justice Brennan's opinion noted,

> "Even after the trial judge's oral decision from the bench dismissing the rescission suit at the close of plaintiff's case had made his plight clear, the purchaser offered no amendment although an opportunity to amend at that stage might readily have been allowed subject to the limitations of former Rule 3:25-2, now R.R.4:15-2."

The third rule which appears to have been misconstrued by the Court below is the rule that if a defrauded party learns of the fraud while his contract is wholly executory, he may not proceed with the contract, but must disaffirm or lose

his damage remedy. Lembeck v. Gerken, 86 N.J.L. 111, 117 (Sup. Ct. 1914). To the same effect, see Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 144 (App. Div. 1960) (recognizing, however, "an exception to this rule may apply where the defrauded party is unable to rescind without prejudice.").

That rule is obviously inapplicable to the instant case because the Wolfs did not learn of the fraudulent misrepresentation which had been perpetrated upon them until after they had paid the purchase price for the property and received the deed at the May 20, 1974 closing. Had the Trial Court accepted Ventron's argument that communication to Mr. Wolf on May 9 or 10, 1974, of the concern of the Department of Labor and Industry that chemical dust and residues would affect the demolition crews was notice to him that the entire property was saturated with mercury, this case might have come within the rule of Lembeck v. Gerken, supra. But the Court quite properly rejected that contention and held that chemical dust on rafters or bottles on laboratory shelves were no warning of the seven-acre mercury mine whose discovery thereafter caused the problems which have precipitated this law suit. In the light of these facts, for the Court below to limit the Wolfs' damages because they affirmed their transaction rather than rescinding, even though they did not learn of the fraud until after they had completed purchase of the property and had commenced demolition, would effect a major and entirely unwarranted change in the law.

Moreover, if the rule were otherwise, when should the Wolfs have rescinded? When they learned that there was chemical dust in the rafters or in bottles and cans on laboratory shelves which their demolition contractor could be expected to deal with? When they learned that the DEP and EPA were upset because the water used to comply with the Department of Labor's edicts was washing chemical debris which Ventron had left behind into Berry's Creek? When they learned that there was mercury, at least in some spots, at depths of three feet below the surface but believed that the problem could readily be solved? When extensive soil tests disclosed that their property was permeated by mercury throughout, but the experts had encouraged them to think it could be removed from the soil? When they learned that the experts' optimism was unfounded and the delays imposed by the bumbling efforts of the EPA and DEP confronted them with financial disaster? At the very least, there should be an opportunity to explore the pertinent facts and to demonstrate, if we can, that it would be reasonable neither to expect the Wolfs to rescind nor to penalize them for affirming their purchase of the Ventron property and seeking full compensation for the losses which they have sustained.

Finally, for Ventron Corporation now to argue that the Wolfs should have rescinded the sale rather than seek damages is at least disingenuous. Until the brief filed in this Court, Ventron Corporation, particularly through its Vice President and General Counsel, S.K. Derderian, has always con-

tended that it made full disclosure to the Wolfs of the contamination. Furthermore, even in Ventron's amendment to its answer to the State's complaint filed July 12, 1977, more than a year after commencement of the suit, Ventron Corporation alleged that it did not have sufficient knowledge or information to form a belief whether the property which it had sold to the Wolfs was, as the State alleged, "saturated with mercury, distilled mercury, mercury compound and other hazardous substances." (Paragraph 8 of First Count of Complaint, JA-196, and of Answer, JA-205) That gross mercury contamination, which the Trial Court has found, formed the basis of the misrepresentation claim. It is patently obvious that the Wolfs would not have been able to obtain rescission in any shorter period of time than will be required for them to obtain damages. By that time, Ventron Corporation would surely have claimed that rescission had been barred by laches. Ajamian v. Schlanger (I), supra.

The judgment below should be reversed insofar as it limits the Wolfs' recovery to less than full compensation for losses sustained, leaving to the damage trial the determination of what losses of profits, out-of-pocket expenses, increases in costs of construction or of interest, punitive damages or other measures of damages are warranted by the evidence and should therefore be awarded as full and just compensation for the injuries which the Wolfs have suffered from Ventron's fraud.

POINT III

THE COURT BELOW CORRECTLY HELD THAT THE WOLFS WERE ENTITLED TO DAMAGES MEASURED IN PART BY THE ATTORNEYS FEES WHICH THEY HAVE INCURRED TO DEFEND AGAINST THE STATE'S CLAIM AND THE JUDGMENT BELOW SHOULD BE AFFIRMED ON THIS POINT.

The judgment against Ventron and in favor of the Wolfs for fraud provides that their damages include the attorneys' fees which they have incurred in defense of the State's suit against them. Since the Wolf's involvement in that suit was one of the consequences naturally flowing from their purchase of the mercury-permeated property which was induced by Ventron's fraud, the expenses, including attorneys' fees, which they have reasonably incurred to defend against the State's claim against them are part of their recoverable damages. That principle is well settled New Jersey law. Feldmesser v. Lemberger, 101 N.J.L. 184 (E. & A. 1925). See Verhagen v. Platt, 1 N.J. 85 (1948). Under our modern procedure the suit to establish the fraud has been combined with the suit which was the consequence of the fraud, but that does not alter the applicability of that principle. See McMinn v. Damurjian, 105 N.J. Super. 132, 142 (Ch. Div. 1969).

The same rule has been applied throughout the country. See e.g. Highlands Underwriters Ins. Co. v. Elegante Inns, Inc., 361 So. 2d 1960, 1066 (Ala. Sup. Ct. 1978); Prentice v. No. Amer. Title Guar. Corp., 59 Cal. 2d 618, 30 Cal. Rptr. 821, 381 P.2d 645, 647 (Cal. Sup. Ct. 1963); Professional Rodeo Cowboys Assn. v. Milch, Smith & Brock, 589 P.2d 510, 513 (Colo. Ct.

App. 1978); Canadian Universal Ins. Co. v. Employers Surplus Lines Ins. Co., 325 So. 2d 29, 31 (Fla. Dist. Ct. App. 1976); Uyemura v. Wick, 551 P.2d 171 (Hawaii Sup. Ct. 1976); Turner v. Zip Motors, 65 N.W.2d, 427, 431 (Iowa Sup. Ct. 1954); M.F. Roach Co. v. Town of Provincetown, 247 N.E.2d 377, 378 (Mass. Sup. Jud. Ct. 1969); Prior Lake State Bank v. Groth, 108 N.W. 2d 619, 622 (Minn Sup. Ct. 1961); Security State Bank v. W.R. Johnston & Co., 228 P.2d 169, 172 (Okla. Sup. Ct. 1962); Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871 (Va. Sup. Ct. App. 1960) (breach of contract); Wells v. Aetna Ins. Co., 376 P.2d 644, 645, (Wash. Sup. Ct. 1962).

POINT IV

THE JUDGMENT OF VENTRON'S LIABILITY TO THE WOLFS SHOULD BE AFFIRMED ON THE ADDITIONAL GROUND OF AN IMPLIED WARRANTY IN CONNECTION WITH THE SALE OF THE LAND BY VENTRON TO WOLF.

In its opinion, the Trial Court stated:

> "Perhaps warranties should be implied in all sales of realty. Perhaps the seller of land, even without knowledge, should be held to have impliedly warranted the fitness of the land for the purpose intended. Those statutes which have adopted the Uniform Land Transaction Act, are carrying out the sound policy statement of the New Jersey Supreme Court as express[ed] in Schipper [v. Levitt and Sons, 44 N.J.70 (1965)]. The Uniform Act, which parallels the Uniform Commercial Code creates express warranties of conformance from affirmations of fact which form the basis of the bargain. 77 Am Jur. Vendor and Purchaser, § 329 (Supp. 1978 at 32).
>
> This Court need not determine whether the law should imply warranties in all sales of realty. Yet Wolf could have made a good argument. Logic, fairness and the absence of justification for distincion between personalty and realty would at least under these facts have justified an implied warranty of fitness, had Ventron been ignorant of the facts." (Vel-Da63).

In McDonald v. Mianecki, 79 N.J. 275 (1979) the Supreme Court has held that an implied warranty applies to the construction of new homes by builder vendors and the Court has intimated that an implied warranty should apply to other sales of real estate as well:

> "Caveat Emptor is an outmoded concept and is hereby replaced by rules which reflect the needs, policies and practices of modern day living." 79 N.J. at 299.

It is well settled, of course, that a judgment may be affirmed even upon a ground not raised below. Accordingly, the judgment of liability in favor of the Wolfs and against Ventron on their crossclaim should also be affirmed on the additional ground that Ventron created an implied warranty of usability of the property for its intended purpose, demolition of the buildings and use of the land for the construction of commercial or industrial structures.

POINT V

THE JUDGMENT OF THE TRIAL COURT ABSOLVING THE WOLFS OF ANY LIABILITY TO THE STATE OR TO THEIR CO-DEFENDANTS AS A JOINT TORTFEASOR WAS CORRECT AND SHOULD BE AFFIRMED.

A

The Statute Relied on by The State Does Not Support the Imposition of Liability on the Wolfs to Pay the Costs of Remedying the Mercury Pollution.

The sole remedy which the Court below has granted to the State against any of the parties is an order that those defendants who caused the pollution of the subject premises and the surrounding area now cure the pollution which they created. The Court found, and its findings on this point are virtually uncontroverted and incontrovertible, that the entities which caused the pollution by bringing mercury onto their premises and releasing it into the environment are Ventron Corporation, Velsicol Chemical Corporation, Wood Ridge Chemical Corporation, and their predecessors. It is uncontroverted and incontrovertible that the Wolfs did not introduce any mercury to the property. Consequently, the Court ruled that those entities which were the authors of the pollution, and not the Wolfs who were its victims, were liable to bear the costs of removing or entombing it.

That result, absolving the Wolfs from any financial responsibility for dealing with the pollution caused by others,

is mandated by the statute upon which the State relies in its effort to reverse the Trial Court's holding on this point, the New Jersey Water Quality Improvement Act of 1971, L.1971, c.173 (formerly N.J.S.A.58:10-23.1 to 58.10-23.10, repealed by L. 1976, c. 141, Section 28).

The critical statutory language of that statute is that of section 5:

> Section 5: "Any person responsible for discharging petroleum products, debris or hazardous substance in the manner prohibited by Section 4 shall immediately undertake to remove such discharge to the Department's satisfaction. If the person responsible fails immediately to undertake to remove the discharge to the Department's satisfaction, the Department may undertake the removal of such discharge and may retain agents and contractors for such purpose who shall operate under the direction of the Department. The Department may authorize a third person, affected by such an unlawful discharge, to expend funds to remove said discharge at the expense of the person responsible for same."

The concept of the "person responsible" is emphasized by the last sentence of Section 5, empowering the Department to "authorize a third person, affected by such an unlawful discharge, to expend funds to remove said discharge at the expense of the <u>person responsible</u> for same. "

Assume for the sake of argument that the State has proved that the Wolfs were "any person responsible for discharging . . . debris or hazarous substances in the manner prohibited by section 4. . . ." They would have to "remove such discharge." Remove what discharge? The statutory answer is, those "hazardous substances" which they have "caused or allowed ("per-

son responsible") to flow or runoff into or upon the waters of this State and the banks or shores of said waters. . . ."

For the purposes of this argument, let us disregard the distinction between the Wolfs and Rovic on the one hand and their independent demolition contractor, V. Ottilio and Sons, on the other. Disregard also for the sake of argument that factually and morally-- and therefore, legally--it was Ventron Corporation, by its failure to warn the Wolfs, which was responsible for the events which followed and it was the State Department of Labor and Industry, blind to the data in the files of another Department, which directed them to wash down the demolition site before the buildings were razed. If all those assumptions are made and distinctions disregarded, solely arguendo, the fact remains that the maximum environmental injury for which the Wolfs might arguably have been responsible was to have washed into Berry's Creek some mercury clinging to walls and rafters of the buildings or mercury which contaminated the piles of dirt occasionally left without tarpaulins to protect them from wind and rain.* We do not know, because the State has not proved, how much, if any, mercury escaped into the waters of the State because of that conduct for which, arguendo, we have assumed the Wolfs were responsible. Whatever it may have been, however, it was obviously miniscule compared with the 126 tons

* Ventron describes the washing as if it were the Noadic Flood, but no record support is cited for its lurid description (Ven-Db22-7).

of mercury which Ventron, Velsicol and their predecessors have deposited upon Wolf's seven acres, the 160 tons of mercury which they have deposited upon Ventron's 33 acres, and the unmeasured quantities of mercury which have polluted the entire central portion of the Hackensack Meadowlands District. There is no conceivable action which the Wolfs could be required to take to "remove," that is, to remedy, the discharge of mercury for which they might arguably be responsible, miniscule as it is in comparison with the total problem, which would not be entirely inconsequential in comparison with, and entirely duplicative of, the remedial efforts which the Court has properly required of the culpable defendants.

The State refers to the term " allow" in Section 4 of the statute, arguing from that language that "The Wolfs have a duty to make sure that the pollutants on their land are being properly contained." (Pb-50) That argument misconstrues the statute. First of all, Section 4 prohibits only a "discharge" which "allows flow or runoff into or upon the waters of this State and the banks or shores of said waters. . . ." The predicate for liability is responsibility for a discarge. The Wolfs have not caused any discharge of mercury which needs to be, or could be, remedied separately from the massive discharges caused by the culpable defendants. Secondly, to read the "allow" language of Section 4, as the State does, to impose upon "the Wolfs. . . . a duty to make sure that the pollutants on their land are being properly contained would disregard the thrust of

the statute which imposes the costs of removing the pollution solely upon the party "responsible" for its being there.

That emphasis upon the responsibility of the party who has caused the problem is consistent with and forms part of the statutory basis for the rule that mere ownership of property, without the kind of "enterprise liability" which should make a successor entity liable for the acts of its predecessor, is not a basis for liability of a landowner to remove the pollution which he finds upon his property through no fault of his own. State v. Exxon Corporation, 151 N.J. Super. 464 (Ch. Div. 1977).

Moreover, the assumption which was made for the sake of the preceding argument, that the Wolfs were responsible for some discharge, is contrary to the evidence. First of all, the demolition work in connection with which water was used to wash away the chemical dust on the buildings to be razed was performed by V. Otillio & Sons, an independent contractor. (10/25/78 Lucarelli T35-24 to T38-5.) The Wolfs are not responsible for the torts, if any, of such an independent contractor. Majestic Realty Assn. Inc. v. Toti Contracting Co., 30 N.J. 425, (1959); Restatement (Second) of Torts, §409. Secondly, the washing down of the buildings to be razed and the piling up of the dirt, either in the hope of removing it from the site or in order to place it within the foundation of the second building, was done at the direction of the State. The State, acting in one instance through its Department of Labor & Industry and in

the other through its Department of Environmental Protection, is the party responsible for the conduct which arguably caused the discharge of some relatively miniscule quantity of mercury. The statute, by imposing a duty only upon the responsible party, exonerates the Wolfs who acted, if at all, only at the direction of the State. Cf. Dvorkin v. Dover Township, 29 N.J. 303, 313-315 (1959); East Orange v. Bd. of Water Commissioners of East Orange, 73 N.J. Super. 440 (L. Div. 1962), affirmed, 40 N.J. 334 (1963); Skulfki v. Nolan, 68 N.J. 179, 198 (1975). Cf. N.J.S.A. 58:10-23.117(a) (No person who renders assistance in continuing or removing or discharge shall be liable for any civil damages "except for gross negligence or willful misconduct.")

B

The Wolfs Are Not Responsible For The Cost of Removing the Mercury on Their Property Under any Doctrine of Maintaining a Nuisance.

The State's argument that the Wolfs adopted or maintained a nuisance upon their property by proceeding with construction after they learned that the soil was grossly contaminated fails to consider the consequences of the alternative course of action--not proceeding with construction. The record shows that Robert Wolf discovered that his property was saturated with mercury only after he received the first report of soil tests by United States Testing Company in August 1974. By July 2 demolition was fifty percent completed and by September 27, one hundred percent completed. (See Lucarelli's percentage

of completion notations on H-73K and H-73L) Consequently, by the August date when Wolf first received the report of United States Testing Company which, at least to a chemist or environmentalist, suggested the possible magnitude of the contamination problem, demolition was already far advanced, probably almost completed. Surely the State does not seriously contend that the mercury contamination would have been more securely contained if Robert Wolf had abandoned work in August 1974, leaving the property just as it was on that date.

Wolf's cleanup and containment efforts certainly improved the situation materially. Water polluted by mercury and residual chemicals which Ventron, contrary to its representations to the DEP (B-5) had left about the plant site, were removed. The most heavily contaminated soil was entombed within a specially constructed foundation and cut-off wall. Two buildings constructed by Wolf cover sixty percent of the seven-acre tract and almost all of the rest has been paved. These measures constituted reasonable abatement of the conditions which the Wolfs found on the property.

On the effectiveness of the Wolfs' containment system, the Trial Court held, "The State has failed to demonstrate that the system is not working. The evidence indicates that the Wolf containment system and the natural land barrier between the Wolf location and Berry's Creek guard against pollutants within the Wolf containment system further polluting the waterways of this State." (Opinion, Vel-Da1 to Vel-Da8) There is no credible

evidence in the record to the contrary. The only evidence which the State's expert, Dr. McCormick, could point to as the basis for his assertion that mercury was finding its way out from under the Wolfs' Building Two and ultimately into Berry's Creek was evidence as to three test wells on the seven acre tract (8/16/78 McCormick T59-16 to 20). One of these wells, Well I, is inside the foundation of Building Two. The other two wells, Well S and Well E, are a short distance from the building, outside the foundation and cut-off wall, one south and the other east of it.

Testing by the State in 1977 showed that water in Well I had a high level of dissolved mercury and that water in Wells S and E had lower levels of dissolved mercury, but that the remaining wells on the property showed no detectable levels of dissolved mercury (S-22 at 74). From the juxtaposition of the three wells and from their relative levels of contamination, Dr. McCormick inferred that dissolved mercury would leak out of the containment system. (Ibid.)

However, the evidence also showed that the interior well, unlike Wells S and E, was nearly dry when the State sought to draw water from it for samples (6/13/78 Reed T71-3 to T72-24, T86-4 to 9; 6/14/78 Reed T10-19 to 23). The water level of the two exterior wells were strongly affected by the tidal movements of Berry's Creek, but the water level of the interior well was not (H-10, H-11; 6/20/78 Hutchinson T64-10 to 23; T55-17 to 25; T67-21 to T69-18). The exterior wells were

near a ditch through which water ran to and from Berry's Creek, depending upon the tidal phase (6/20/78 Hutchinson T71-6 to T73-11). The two exterior wells were located at or near spots which were identified as the locations most heavily contaminated by mercury (8/16/78 McCormick T81-17 to T83-22). These facts tended strongly to show that the foundation and cut-off wall effectively prevented the mercury which was entombed within the building and which was detected in the interior well, from leaching into the exterior wells, particularly since no dissolved mercury was detected in any of the exterior wells other than Wells S and E which were located at the most heavily contaminated spots on the property. The conclusion of the Trial Judge that the State had not proved any breach of the Wolf containment system was thus amply supported by substantial evidence.

Moreover, even if there were some escape of pollutants from the Wolf property, that tract is separated from Berry's Creek by the 33 acre Velsicol tract. Whatever measures are ultimately adopted to contain the mercury that will remain on the Velsicol tract will also serve as further protection against mercury from the Wolf property leaching into the waterway.

Finally, even if some remedial measures were necessary on the Wolfs' land or become necessary at some future date without their fault, it would simply be unjust to hold that the Wolfs have "maintained" a nuisance and should therefore be liable for the costs of abatement. They are the primary victims

of Ventron's fraud and of the pollution caused by Ventron and its predecessors. Neither the householders at Love Canal nor the Wolfs on Berry's Creek can justly be made responsible for cleaning up the pollution beneath their properties. The injustice of the contrary position urged by the State is, of course, the reason why the same contention was rejected in State v. Exxon, 151 N.J. Super. 464, 482-86 (Ch. Div. 1977).

C

The Judgment That the Wolfs Have No Liability For the Cost of Remedial Measures Should Also Be Affirmed on the Ground That That Holding Places the Financial Onus Where it Properly Belongs.

The Wolfs are entitled to recover from Ventron Corporation as damages whatever sums are necessary fully to compensate them for the injuries which they sustained as the result of Ventron's fraud. If the financial burdens which the Wolfs acquired when they purchased the property as the result of that fraud include the burden of further abatement measures, then Ventron is liable to indemnify or exonerate them against that burden also.

CONCLUSION

For all of the reasons stated herein, Robert M. Wolf and Rita W. Wolf respectfully ask that the judgment below be affirmed except insofar as paragraph 9 thereof erroneously limits the damages which they are entitled to prove and to recover, and that, as to that issue, the judgment be reversed with directions that the Wolfs are legally entitled to prove and to recover the full range of compensatory damages required to make them whole, together with such punitive damages as may be just.

Respectfully submitted,

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