A-1446-79

A-1374-79
A-1395-79
A-1432-79
A-1545-79

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NOS. A-1374-79, A-1395-79
A-1432-79, A-1446-79
A-1545-79 (Consolidated)

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff-Appellant,

-vs-

VENTRON CORPORATION, et al.,

Defendants-Appellants.

ROVIC CONSTRUCTION CO., INC.,

Intervenor-Plaintiff,

-vs-

VENTRON CORPORATION, et al.,

Defendants.

MOBIL OIL CORP., CHEVRON, U.S.A., INC., TEXACO, INC. and EXXON COMPANY, U.S.A.,

Plaintiffs-Respondents,

-vs-

STATE OF NEW JERSEY, et al.,

Defendants-Respondents.

Civil Action

On Appeal from the Order of Judgment of the Superior Court of New Jersey, Chancery Division Bergen County

Sat Below:

Honorable Sherwin D. Lester, J.S.C.

0-4

BRIEF OF DEFENDANT-APPELLANT VELSICOL CHEMICAL CORPORATION

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PROCEDURAL HISTORY

On March 31, 1976, the State of New Jersey Department of Environmental Protection ("State") filed a complaint in the Superior Court of New Jersey against Ventron Corporation ("Ventron"), Wood Ridge Chemical Corporation ("WRCC"), Robert M. Wolf and Rita Wolf, his wife ("Wolf") and The United States Life Insurance Company ("U.S. Life").

The State alleged in its complaint that defendants Ventron and WRCC owned and operated a mercury processing facility on an approximately 7-acre tract in Wood Ridge, New Jersey, until May 7, 1974 at which time they sold said premises to defendants Wolf. (Ja2 - Ja3). It was further alleged that defendant Wolf, in turn, sold a portion of said premises to defendant U.S. Life on December 11, 1975 (Ja3). The State alleged in Count One that the named defendants' activities on said 7-acre tract caused "quantities of mercury, distilled mercury, mercury compounds and other hazardous substances [to] have been leaked, dripped, spilled, and discharged from the real and personal property of the defendants, aforesaid, into the soil underlying the property in question." (Ja3). It was contended further by the State that the substances in the soil had "migrated, runoff and discharged into the waters of the State" in violation of N.J.S.A. 58:10-23.4 which was enacted in June of 1971 (Ja3). Paragraph 11 of the First Count stated that the State intended "to authorize third parties to correct the condition complained of at the expense of defendants pursuant to N.J.S.A. 58:10-23.5 and 58:10-23.7"[1] (Ja4).

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[1]No such action was ever attempted by the State and, in fact, an attempt by the defendant Velsicol to force the State to do precisely that which it threatened was frustrated by the State, itself.

The relief sought under the First Count was an injunction to cease the discharge and/or reimbursement of the State for costs incurred, if any, to prohibit the discharge. In the Second Count, the State sought relief under N.J.S.A. 23:5-28 ("1937 Act") consisting of an injunction against further violations (discharges) and a penalty of $6,000.00 per violation (Ja5). The Third Count sounded in nuisance and sought to eliminate the discharge from the allegedly mercury saturated soils.

This initial Complaint by the State did not allude in any fashion to defendant Velsicol. The relief sought clearly did not encompass a cleanup of Berry's Creek. Instead, the State sought to eliminate discharges to the Creek emanating from the allegedly contaminated soils on the 7-acre tract on which the mercury processing plant of defendant, WRCC, had been located. The Velsicol tract, which lies between the 7 acre tract and Berry's Creek, was not cited in the complaint as a source of pollution and clearly was then not in the case.

On April 22, 1976, defendant Wolf filed an Answer denying the material allegations made by the State in its Complaint and on or about said same date the defendants Wolf filed a Crossclaim against the defendants WRCC and Ventron alleging fraudulent concealment, negligent misrepresentations, nuisance, breach of a deed covenant and indemnification and contribution (Ja41).

On June 7, 1976 defendant U.S. Life filed an Answer denying the State's material allegations and asserting a Crossclaim against defendants Wolf to whom defendant U.S. Life had leased its acquired premises on December 11, 1975; the defendant U.S. Life sought indemnification (Ja23).

On June 9, 1976 defendants Ventron and WRCC filed an Answer denying the State's material allegations with respect to the alleged statutory and nuisance liability. (Ja9). There was no assertion therein that the defendant WRCC was not liable to the State because of any control exercised by the defendant Velsicol; the defendant Velsicol was not mentioned and no third party action was instituted by defendants WRCC or Ventron against defendant Velsicol. On or about the same date a Crossclaim was filed by the defendant Ventron seeking indemnification and contribution from the defendant Wolf (Ja31). In said Crossclaim the defendant Ventron alleged that, as a result of defendant, WRCC merging into defendant Ventron on June 15, 1971, Ventron had acquired all the rights of defendant WRCC including the right to maintain the Crossclaim (Ja23). The thrust of the defendant Ventron's Crossclaim was that it was the demolition and construction activities of defendant Wolf which resulted in the pollution complained of by the State. Contemporaneous with the filing of their Answer and Crossclaim, the defendants WRCC and Ventron filed an Answer to the Crossclaim of defendants Wolf (Ja56). In said Answer the defendants WRCC and Ventron alleged that the $630,000.00 sales price received from defendant Wolf was the fair market value of the land and that the defendants Wolf knew or should have known of the presence of mercury in the soil. There was no disclaimer by defendants WRCC or Ventron of any liability predicated upon the prior ownership or control exercised by defendant Velsicol.

On June 22, 1976 defendants Wolf filed an Answer to the Crossclaim of defendants WRCC and Ventron denying liability for any soil or water contamination and asserting that any such contamination was solely the result of defendant Ventron's failure to properly cleanup the site prior

to sale and its failure to properly warn the defendants Wolf of the continued presence of hazardous chemicals. (Ja35).

On November 9, 1976 the State filed a motion for leave to file an Amended Complaint joining as additional defendants F.W. Berk and Co., Inc. ("Berk") and Velsicol Chemical Corporation ("Velsicol"). The supporting affidavit of D.A.G. Heksch stated that the State had discovered that defendant Ventron purchased the property in question from Velsicol (Ja66).[2] The Heksch affidavit (Paragraph 3) further stated that Velsicol for a period of time owned and operated the mercury processing plant on said 7-acre tract which had generated the alleged pollution (Ja66).[3] The Heksch affidavit went on to state that he had learned that the property adjoining the 7-acre plant site had some degree of contamination and that was the second aspect of Velsicol's alleged involvement in the case (Ja67)[4]; there was no assertion in the Heksch affidavit that defendant Velsicol had deposited the pollutants on its property, but only that it had the responsibility to abate the nuisance, i.e., this was the State's "mere ownership" theory of liability. The affidavit which served as the predicate for bringing the defendant Velsicol into the dispute does not even allude to defendant Velsicol's

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[2]The State was misinformed because Velsicol never owned the 7-acre tract that was the site of the mercury plant and never sold defendant Ventron any land. (P-16; P-18; P-19; P-21; P-25).

[3]This statement is patently incorrect; Velsicol never operated any such plant, but did own defendant WRCC which did. It was defendant WRCC, not the land, which Velsicol sold to Ventron in February, 1968. (P-756)

[4]At this point in time the State did not know if the Velsicol property was discharging pollutants into the State's surface waters. (See, Vel-Dal64).

prior ownership of defendant WRCC or any "alter ego" theory of liability. The Heksch affidavit states further that the State had learned that the 7-acre tract had been purchased by defendant Velsicol from defendant Berk (Para. 2; Ja66).[5]

On December 3, 1976, a Consent Order was entered granting the State leave to file the Amended Complaint (Ja69) and on December 14, 1976, the State filed its Amended Complaint alleging that defendants, Ventron, WRCC, Berk and Velsicol owned and operated the mercury plant. Aside from including the defendants Berk and Velsicol as operators of the mercury plant and adding the defendant Velsicol's property, the Amended Complaint was virtually identical to the original Complaint. There was no suggestion by the State in the Amended Complaint of any "alter ego" liability on the part of defendant Velsicol; nor was there ever any suggestion that Velsicol had formerly owned defendant WRCC.

On January 5, 1977 defendants Ventron and WRCC filed an Answer to the State's Amended Complaint admitting that prior to 1969 (actually February, 1968) defendant WRCC was a wholly-owned subsidiary of Velsicol and admitting that defendant Berk operated the plant prior to

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[5]The State again was misinformed because Velsicol never purchased any land from defendant Berk; defendant WRCC, however, did purchase assets of Berk which included the 7-acre site and the property currently owned by Velsicol. Substantially after Velsicol was in the case, the State was still of the mind that Velsicol had owned the plant: "Question 33: The defendant Velsicol has never held title to the Wolf property or any portion of the Wolf property. Answer: Denied." (Vel-Da:163)

[6]Note that the defendants WRCC and Ventron refuted the charge that Velsicol, itself, ever owned and operated the mercury plant and correctly noted that it was defendants WRCC and Berk.

defendant WRCC, but denying any liability in connection with the allegations made by the State (Ja79).[6] At this time the defendants WRCC and Ventron did not assert any Crossclaim against defendant Velsicol or deny any responsibility for the period that defendant Velsicol owned defendant WRCC.

On January 10, 1977 defendants Wolf and U.S. Life filed their respective Answers to the State's Amended Complaint (Ja86; Ja93). On or about April 4, 1977, Velsicol filed its Answer to the State's Amended Complaint denying that it ever operated a mercury processing facility and that it had owned the 7-acre plant site. The defendant Velsicol also asserted a Crossclaim for indemnification and/or contribution against all the other defendants. (Ja99 and Jal07). On April 6, 1977 defendants Ventron and WRCC filed their Answer to defendant Velsicol's Crossclaim denying Velsicol's right to indemnification and/or contribution, but failing to assert by way of defense any excessive control by defendant Velsicol over defendant WRCC or any "alter ego" responsibility. On April 18, 1977 defendants Wolf filed an Answer to defendant Velsicol's Crossclaim denying such allegations as pertained to defendants Wolf. (Ja 123).

During the course of the the instant action, Velsicol requested the State to produce all of the documents on which the State had relied in support of its riparian claim to title to the Velsicol property which claim was pending before Judge Petrella, (Vel-Da180). The State refused to produce such documents contending that the documents were irrelevant to the matter at hand. (Vel-Da185). Appropriate for consideration at this point would be the factual background leading up to this document

demand. In light of the State's "mere ownership" claim, the issue of title was of vital importance and there was pending a companion case instituted by defendant Velsicol against the State prior to Velsicol's involvement in the pollution case; this companion case was a quiet title action encompassing the totality of Velsicol's property (Vel-Da162). It was somewhat ironic that the State on the one hand, claimed title to the property in question; then, on the other hand, the State asserted liability for soil contamination attached to Velsicol by virtue of Velsicol's ownership of that same property. The State's refusal to produce the requested documents caused Velsicol on May 27, 1977 to file a motion to compel production accompanied by an affidavit of counsel in support of said motion. (Vel-Da180). Paragraph 4 of the said affidavit stated that the State's basis for asserting liability on behalf of defendant Velsicol was Velsicol's ownership of a portion of the allegedly contaminated property and not by reason of any affirmative acts of pollution by Velsicol or anything else, such as "alter ego" liability.

> The plaintiff in its Complaint seeks to hold the defendant Velsicol liable and responsible for mercury contamination of a certain parcel of property simply by virtue of the fact that presently Velsicol owns said property; it is not apparently contending that, as to this piece of property, the defendant Velsicol took any affirmative action which caused or contributed to said soil contamination. Therefore, the DEP's entire case against Velsicol is predicated on the issue of title to the contaminated property.

(Vel-Da182). Notably, the State filed no papers in opposition to this affidavit, and underscoring the State's position that ownership alone fixed liability on Velsicol was the fact that that same posture was iterated and reiterated in the proceedings before Judge Gelman wherein Velsicol argued its motion to compel production of the State's title documents and the State resisted. Specifically, on page 2 of the tran-

script of the aforementioned proceeding, the State's basis for suing Velsicol is clearly set forth, adamantly affirmed by the Court, and not questioned or objected to by the State:

> MR NEARY: My position essentially is this, your honor, that the State is suing us. We own a vacant piece of property next to what you used to be formerly a chemical plant owned by the Wood Ridge Chemical Company. There was never any activity on our piece of property.
>
> We are being sued in part on the theory--we don't know how the State doesn't know how the mercury or the other hazardous materials got on our property, but merely by virtue of the fact that we are the title owner we have the obligation to correct it.
>
> THE COURT: That is right.

(Vel-Dal34). Once again, on the following page of the transcript, the Court defines the State's claim against Velsicol as one founded on its ownership of the property in question; the Court states specifically that the State makes no allegation that Velsicol actually did anything wrong:

> THE COURT: You are claiming that they have a liability because they own a specific piece of property. There is no allegation, ...I have never received anything from you, indicating that they actually did something wrong themselves.
>
> They are here as a defendant simply because they happen to own a piece of property, vacant land, which apparently somebody else may have contaminated.

(Vel-Dal34). The Court continued to press the point that establishing Velsicol's ownership of the property is all important because, absent said ownership, there can be no Velsicol liability.

> In another action the State of New Jersey, and I don't care whether you call them the Natural Resource Council or anybody else, the State of New Jersey says they are liable. The State has an inconsistent position. I think they are entitled to know what is the State relying on in that case to claim ownership of that land, because if that is the case they are not liable to the State in this case.

(Vel-Da135). Since no wrongful act of pollution had been alleged by the State against Velsicol and since the only basis of the State's suit against Velsicol was Velsicol's alleged ownership of the property, the Court suggested that the State should dismiss the case as against Velsicol, pending a determination of the title question:

> THE COURT: Why don't you dismiss as against Velsicol until such time as that case has determined the title question?

(Vel-Da136) In answer to the State's contention that it should not have to produce documents pertaining to title because a different department of the State was claiming title to Velsicol's land, the Court once again termed ownership of the land by Velsicol to be the whole basis for the State making Velsicol a party defendant in the case at bar:

> MR RINDONE: They are the owners of record of this property, that is correct. THE COURT: Fine, so that is the whole basis upon which they are made a party defendant here.
>
> MR RINDONE: Keep in mind that they owned all of this property at one time [false].
>
> THE COURT: I know, but as I understand it, no one has alleged that they were the person or persons who were responsible for the introduction of the contaminants into the piece of property.
>
> MR. RINDONE: I don't know.
>
> THE COURT: It would be different if they were an active wrongdoer of some kind, but where their only wrong is the fact that they own a piece of property which somebody else may have contaminated and you are claiming in another action that you own the property; so I think they are entitled to know.
>
> MR. RINDONE: The logic is deceptive because, as I understand it, Velsicol owned the entire tract on which all of the affected properties were located at one time.
>
> THE COURT: How does that make this any different.

MR. RINDONE: Their ownership....

(Vel-Da137-38). The transcript continues in this vien, stating over and over Velsicol's liability, if any, stemmed from Velsicol's ownership of the property in question. At no time did the State allege that there was any basis, other than ownership, by which Velsicol could be held into the case at bar as a party defendant. So clear was this the basis for the State's suit against Velsicol that the Court placed that aspect of the case on the inactive list pending resolution of the ownership question in the quiet title action. (Jal72).

On June l0, l977 the State filed a Request for Entry of Default against defendant Berk for said defendant's failure to plead or defend (Jal69).

On June 29, l977 an Order was issued placing the Velsicol property aspect of the case on the inactive list (Jal7l).

The action was pretried on July 7, l977 (Jal47) before the Honorable George B. Gelman and in the factual contentions the State did not contend that defendant Velsicol's liability was predicated upon any undue control over defendant WRCC (Jal50). Moreover, the relief sought did not encompass any cleanup of Berry's Creek (Jal5l).

Late in the case, on or about July l2, l977, defendants Ventron and WRCC filed a joint Crossclaim against defendant Velsicol for contribution, indemnification and damages (Ja l27). Contemporaneous with the filing of their Crossclaim, the defendants WRCC and Ventron filed an Amendment to their Answer to the State's Amended Complaint (Jal4l) and a Crossclaim for contribution and/or indemnification against the defendant Berk (Jal43). This flurry of activity was a product of the injection of new counsel (Backes & Backes) into the case. As to the

Amendment to their Answer, said amendment did not seek to avoid liability on the ground of any alleged undue control by defendant Velsicol over defendant WRCC. The Crossclaim against the defendant Berk essentially alleged that the defendant Berk was responsible for the condition alleged by the State if, in fact, such a condition did exist. In part, the relief sought in the Crossclaim against defendant Velsicol was predicated upon the control allegedly exercised by the defendant Velsicol over the defendant WRCC during the period of its ownership. This was the first and only pleading ever to make such an assertion.

Defendant Velsicol on or about July 15, 1977 filed an Answer to the Crossclaim of defendants Ventron and WRCC admitting defendant Ventron's purchase of defendant WRCC from defendant Velsicol and denying the material allegations of defendants Ventron and WRCC. (Ja133).

On or about July 20, 1977 the State filed its Second Amended Complaint by virtue of leave granted under the pretrial order which Complaint was identical to the Amended Complaint except that a Fourth Count was added (Ja193). Under the Fourth Count, the State sought relief against all the defendants under recently enacted legislation known as the "Spill Compensation and Control Act", N.J.S.A. 58:10-23.11, et seq. which was enacted upon the repeal of the "New Jersey Water Quality Improvement Act of 1971", N.J.S.A. 58:10-23.1, et seq. The "Spill Act" became effective on April 3, 1977. Under said "Spill Act", the State sought the same relief as under the repealed 1971 Act, i.e., elimination of the discharge and penalties allowed by statute. Again, there was no relief sought with respect to the clean up of Berry's Creek.

In July and August of 1977, the various defendants filed their respective Answers to the plaintiff's Second Amended Complaint. (Ja225; Ja203; Ja213; Ja221).

On or about July 22, 1977 the defendant Velsicol filed a motion for leave to file a Counterclaim under the Spill Act against the State with respect to the Velsicol property which aspect of the case remained on the inactive list (Vel-Da150). The proposed Counterclaim sought to compel the plaintiff State to take the steps required of it under the Spill Act to clean up any pollution present on the Velsicol property. The defendants WRCC, Ventron and U.S. Life subsequently filed similar motions and by Order of August 16, 1977 Judge Lester granted leave to file such a Counterclaim (Vel-Da 157). The said Counterclaims were thereafter filed by said defendants including the defendants Wolf (Ja173, Ja183; Ja216).

On September 6, 1977 defendants Ventron/WRCC, joined by defendant Velsicol, applied for an Order to prevent Dr. McCormick, one of the State's experts, from testifying; the said application was denied (Ja236).

On or about September 7, 1977 the plaintiff State filed a motion to restore the Velsicol property to the active trial list. (Vel-Da143) The supporting affidavit of counsel which had attached a transcript of the proceedings before Judge Gelman did not assert that Velsicol was responsible for the placement of the pollutants on the Velsicol property either directly or indirectly contaminate the site under any corporate control theory. On September 30, 1977 an Order was entered removing the Velsicol property aspect of the case from the inactive list and denying the State's motion for consolidation of the pollution case with

the quiet title action then pending before Judge Petrella (Ja 237).

On September 12, 1977 the State filed an Answer to the defendants' Counterclaims denying the allegations made by defendant Velsicol and asserting by way of defense that the claim should be asserted against the "New Jersey Spill Compensation Fund" rather than plaintiff (Jal77; Jal87; Ja229).

On or about September 28, 1977 the defendant Velsicol filed a motion for summary judgment seeking a partial summary judgment that liability could not be imposed merely on the basis of property ownership and summary judgment on its Counterclaim against the State under the Spill Act. (Vel-Da159) In response to said motion the State filed an opposing brief wherein the State conceded that the Spill Fund monies could and should be used:

> It is important to note that the plaintiff herein and this writer takes the position that Fund money can and should be used in the instant case. Because of this, it will not be able to take a position adverse to the moving party on this issue.

(Vel-Da188) However, the State sought to stave off utilization of the Fund monies and perforce cleanup by arguing that the Court should allow the Fund to come in as a separate party and argue its non-liability.

> [T]he liability of the Fund in this case and others like it is not crystal clear and, therefore, cannot and should not be decided without the Fund being a party and its position adequately presented to this Court. There are serious factual and legal issues which must be decided before the ultimate question of the Fund's liability can be determined. Since the issues were by the defendants' motion regarding the Act were matters of first impression and the Court's ruling may have enormous ramifications, it should have the benefit of a complete record and also the benefit of Fund's position before it makes a ruling. In addition, these issues should be decided in an adversary proceeding which as noted above as not present here at this point in time.

(Vel-Da188, emphasis added). The defendant Velsicol was attempting to have the situation cleaned up by using the Spill Fund monies without prejudice to its right of indemnification. The State agreed that the Spill Fund was liable, but blocked any action by insisting that the matter should be decided in an adversarial context. The result was that the State hired special counsel to represent the Fund and argue non-liability and, as far as cleaning up the subject properties, nothing was done.

On December 9, 1977 a Letter Opinion was handed down relating to summary judgment motions and procedural questions wherein Judge Lester alerted the parties to certain substantive issues which were of utmost concern to the Court, namely:

> (1) What is the nature and extent of the pollution?
>
> (2) Who caused it?
>
> (3) On which property does it exist and to what extent?
>
> (4) From which property did it emanate and to what extent?
>
> (5) What steps must be taken (a) to abate any nuisance? (b) to stabilize the situation?
>
> (6) What is the cost of each such program?[7]

(Ja24).

On February 1, 1978 an Order was filed granting leave to file a Complaint and intervene in this matter in favor of Rovic Construction Co., Inc.("Rovic"), a corporation owned by defendants Wolf. This

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[7]It is clear that the Court did not contemplate at that juncture of the case that the clean up of the sediment in Berry's Creek was a claim before the Court. Also, it is apparent that questions 4, 5 and 6 were never adequately answered to the satisfaction of the trial judge.

Order further provided that all claims and Crossclaims theretofore filed against defendants Wolf would be deemed to have been asserted against Rovic as well. (Ja270-Ja271).

On February 1, 1978, Intervenor Rovic filed a Complaint against defendants Ventron, WRCC, Velsicol and Berk (Ja271).

On February 8, 1978, an Order was entered denying defendant Velsicol's motion for partial summary judgment based on Velsicol's contention that it had no liability predicated merely on a record ownership of the property in question (Ja268). Also denied within this order was defendant Velsicol's motion for partial summary judgment based on Velsicol's contention that the State was "strictly liable" to the defendant Velsicol for the removal of pollutants from its property (Ja268).

On May 15, 1978 an Order was filed entering a default on the Crossclaim of defendants Ventron and WRCC against defendant Berk (Ja283) and granting the application of the New Jersey Spill Compensation Fund ("Spill Fund") to intervene in this action (Ja285).

The action was tried sporadicially during the period of May, 1978 through September, 1979 with the defendant U.S. Life successfully moving for dismissal at the end of the State's case.

On November 27, 1978 plaintiff oil companies (Mobil, Chevron, Texaco and Exxon) brought suit against the State and the Spill Fund (Ja363). Since the State had taken the position that the Spill Fund was applicable to discharges occurring before the effective date of the Spill Act and because said position could have increased the oil companies' tax liability under the Spill Act, the plaintiff oil companies sought a declaration that the Fund was not applicable to the aftermathh of discharges occurring prior to the effective date of the Act (Ja366).

On March 12, 1979, an Order was filed entering judgment in favor of U.S. Life against the State, dismissing U.S. Life's Counterclaim against the State as well as dismissing all of the Crossclaims of the other defendants against U.S. Life and denying U.S. Life's motion for reimbursement of counsel fees (Ja359-Ja361).

On August 27, 1979, Judge Lester issued his 69 page written opinion. (Vel-Da2)[8]

On November 15, 1979, an Order was filed for the consolidation of the above oil company's action with the State v. Ventron, et al case and the Rovic v. Ventron, et al case (Ja 367).

After numerous proposed Orders of Judgment where forwarded to the Court, on September 25, 1979 Judge Lester held a hearing to settle the form of the Order. (Vel-Da72)

On December 28, 1979, the plaintiff State filed a Notice of Appeal (Ja 381). On January 8, 1980 the defendants Ventron and WRCC filed a Notice of Appeal (Ja 387). On January 8, 1980 defendant Velsicol filed a Notice of Appeal (Ja391). On January 31, 1980 defendant Spill Compensation Fund filed a Notice of Appeal (Ja395). On January 24, 1980 the plaintiff oil companies (Mobil, Chevron, etc) filed a Notice of Appeal (Ja401). On January 24, 1980 the defendants Wolf filed Notice of Cross-Appeal (Ja409).

On February 21, 1980 an Order was entered by the trial court denying a motion for a stay pending appeal with the exception that Velsicol was required to prepare and file its surfacing plan.

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[8] The opinion found in the joint appendix (Ja289) is an earlier draft of the trial judge which should be disregarded; it was included by mistake.

On April 29, 1980 the Appellate Division entered its Order denying the application for a stay filed by the defendants Velsicol, Ventron and WRCC. (Ja419).

On May 28, 1980 the New Jersey Supreme Court entered an order denying the defendant Velsicol's application for a stay, but qualified that denial with language to the effect that once the final remedy has been determined and sought to be implemented defendant Velsicol could reapply to the appropriate court (Vel-Da187).

OPINION OF THE TRIAL COURT

Judge Lester's decision was that defendants Berk and WRCC, as the actual owners and operators of the mercury plant, are jointly and severally liable for the implementation of the Court's remedy (Vel-Da25). It was held that the State had failed to prove any of its claim against the defendants Wolf or U.S. Life. The Counterclaims of the various defendants were denied (Vel-Da26). The Court found for the defendants Wolf on their Crossclaim against the defendant Ventron predicated upon fraudulent concealment in the land sale transaction, but no relief was afforded to Intervenor Rovic on the theory that Rovic's claim was that of the defendant Wolf (Vel-Da27 & 28). All other Crossclaims were denied in the opinion of the trial court (Vel-Dal7). As to the consolidated declaratory judgment action between the oil companies (Mobil, Chevron, etc), the Court found for the State holding that the Spill Fund was potentially liable for the monitoring suggested in the Court's opinion and would be liable for all abatement costs exceeding the security to be fixed subsequently by the Court and posted by the defendants Ventron and Velsicol (Vel-Da42). Velsicol and Ventron, in turn, were each made severally liable for half the liability of defendant WRCC.[9]

Velsicol was found to have derivative liability for defendant WRCC's nuisance and defendant WRCC's violation of N.J.S.A. 23:5-28 during the period of defendant Velsicol's ownership (the 1971 Act was

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[9]Bear in mind that, due to the fact that the trial judge made WRCC and Berk equally liable for 100% of the pollution, the net result is that Ventron and Velsicol have each been made liable for half of the total condition including that attributable to the defendant Berk.

not in effect during that period). The defendant Velsicol also seemingly was found liable in a primary or direct sense under the Clean Water Act of 1971, N.J.S.A. 58:10-23.1, et seq., for the pollution (dumping on Velsicol property) of defendant WRCC under Ventron's ownership on the basis that defendant Velsicol was a landowner with knowledge of the dumping and should have stopped defendant WRCC, then owned by Ventron.

The trial judge, other than to find defendant WRCC liable for 100% of the remedy, proceeded to ignore the separate corporate existence of WRCC, a named defendant represented by its own counsel (then, Backes & Backes, now, Backes, Waldron & Hill). None of the obligations attendant to a finding of liability were imposed on defendant WRCC but, instead, the trial court imposed defendant WRCC's obligations directly on defendantsVelsicol and Ventron purportedly on an equal basis but, as will be noted subsequently, even on that point the trial judge was inconsistent.

By making defendant Ventron liable for only half of defendant WRCC's liability, the trial court was inconsistent because it elsewhere found that defendant Ventron had direct and primary liability for all of WRCC's acts by virtue of the merger. The trial judge found as follows:

> Ventron's liability may be held to be direct or derivative. It is direct by virtue of the merger of the WRCC into Ventron in June, 1974 shortly after Ventron sold the facility at Wood-Ridge. The "Certificate of Ownership and Merger" which was filed with the Secretary of State of Nevada, expressly provided that Ventron would assume the liabilities and obligations of WRCC. Furthermore, the merger would have resulted in the assumption of all of WRCC's liabilities as a matter of law. N.J.S.A. 14A:10-6(e). (Emphasis added)

(Vel-Da37-38). Despite that finding, the Court relieved defendant

WRCC, itself, of all responsibility for its actions and relieved defendant Ventron of half its legal responsibility for defendant WRCC and imposed that liability instead on defendant Velsicol. There is no attempt to explain why Ventron and WRCC's liability are not co-equal, i.e., why defendant Ventron, by virtue of the merger, is not primarily liable for 100% of the necessary remedial action as expressly indicated by the trial judge in connection with the defendant Ventron's merger liability. Ventron was also found liable for WRCC, in a derivative sense, by virtue of excessive control exercised over its affairs and the trial judge properly noted such a finding was superfluous in light of the finding of 100% primary liability under the merger theory. The critical distinction between the two theories of liability is that one is direct (merger) and one is derivative (control). The derivative finding could lead to partial and secondary liability for defendant WRCC, but defendant WRCC would remain primarily liable. The finding of direct merger liability would lead ineluctably to 100% primary liability because WRCC and Ventron would be one and the same. The trial court's imposition of 100% primary liability on the part of defendant WRCC and Ventron and then the release of said liability, total as to WRCC and partial as to Ventron, conflicts with the legal import of the trial court's own findings and conclusions.

As to the basis for Velsicol liability, the trial court stated that a parent corporation was "an entity which the legislature intended to include within the statutory control scheme" (Vel-Da38) and that the "control" necessary to impose liability under the anti-pollution statutes is something different from, and less than, the "control" justifying the piercing of a corporate veil. (Vel-Da38) No supportive data in the trial

record or legal authority is cited by the trial judge because there is no legislative history or other authority supporting such a statutory interpretation and none was offered by any party. Indeed, it is impossible to discern to what statutory scheme the court made reference.

Interestingly enough, the trial judge made the startling admission in his opinion that he did not analyze in depth the testimony and memoranda submitted by the parties on the corporate control or "alter ego" issue because the usual standards did not apply due to the fact that public policy dictated that in a pollution case a parent corporation must be absolutely and strictly liable.

> The indicia of control necessary where strict liability is imposed by statute need not be as extensive as in the usual case where one attempts to "pierce the corporate veil". One must, in a public interest case, examine the nature of the business, the ability to control and the morality or immorality of a failure on the part of the parent company to act. (Vel-Da38)
>
> * * *
>
> [T]he determination of dominance, control and whether the corporate veil should be pierced might be more difficult and the many pages of testimony and the lengthy legal memoranda would have to be analyzed in depth...[were it not for the fact that the] public policy of this State demands that with respect to the public need for environmental protection the usual standards cannot and should not apply. Whether or not the subsidiary is or is not solvent, is not the question. If one, with knowledge of the acts and with the ability to control the activities of a subsidiary by failure to act permits the subsidiary to endanger the environment, then as a matter of public policy, the parent must face the responsibility of its permissive inaction. (Vel-Da41)

This criticism of defendant Velsicol for failing to act should not be misconstrued. The court did not mean to suggest that there was anything that could or should have been done by defendant Velsicol to stop pollution of defendant WRCC. The court was quite precise in finding no intentional wrongdoing:

> [T]he court cannot find that the acts were done with the intent to pollute the waters of the State or with the knowledge that such an invasion was substantially certain to occur. No such knowledge or intent may be imputed to defendants under an intentional tort theory.

(Vel-Da50) The court was equally clear in providing that defendants were not negligent and that due care was exercised to avoid pollution:

> The standards as to effluent treatment, even as late as 1974 and 1975 at the time of demolition, did not require any higher degree of care or caution then was taken by them. (Vel-Da52)... [T]he court cannot find that Berk, WRCC, Velsicol or Ventron acted negligently. The conduct of those defendants was reasonable in light of the state of knowledge as it then existed.

(Vel-Da52-53) The failure of the defendant Velsicol to exercise such control over the defendant WRCC as to prevent pollution was, therefore, not unreasonable and, if it had exercised control, defendant WRCC was in any event acting with due care. There being no intentional misconduct or negligence, we are back obviously to strict liability.

There was no attempt by the trial judge to cite any supportive authority for such a far-reaching ruling which in essence held that a parent corporation is strictly liable for the pollution of its wholly-owned subsidiary. The rationale for piercing the corporate veil of defendant WRCC is difficult to discern because it certainly made no difference to the State whether WRCC, Ventron or Velsicol pays the cost of remedial action and there was no proof submitted that WRCC/ Ventron lacked the finances to implement the relief required by the Court or demanded by the State. Further, the trial court's theory of strict liability on the part of the parent corporation failed to treat the issue of the continued nature of defendant WRCC's liability.

The trial court in continuing the statement of its reasons for imposing strict liability on the part of Velsicol made in quite clear that the requisite knowledge was being imputed by virtue of its stock ownership stating that "Velsicol may not have known the consequences of the actions of WRCC" and that perhaps Velsicol did not even know that mercurial waters were being discharged (Court states it knew or should have known). (Vel-Da36) The trial judge states in a conclusory manner that there was some control exercised by Velsicol over unrelated matters.[10] However, this exercise of control, as with knowledge, is not the basis for liability, it is the failure to exercise control so as to stop pollution which underlies Velsicol liability.[11] This point was made clear when the court, perhaps recognizing the weakness of its conclusory remarks relative to control, went on to state:

> Even if Velsicol had not...dominated the affairs of WRCC...., it had the ability through its 100% stock ownership to control those acts of WRCC which might affect the public and the environment.

(Vel-Da38-39). The point the Court was making was that defendant Velsicol was strictly liable for defendant WRCC in any event and re-

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[10] The Court stated: "Velsicol was in a related and compatible business. Velsicol personnel, directors and officers were constantly involved in the day-to-day operation of the business of WRCC. Quality control of WRCC was handled by Velsicol. In general, WRCC was treated as a division of Velsicol." (Vel-Da39). These statements are all patently incorrect and, if the trial judge had reviewed the evidence, as he admitted he did not, he would know the statements were inaccurate.

[11] The assertion that Velsicol should have exercised control to stop the WRCC pollution ignores the Court's prior finding that it was not proven that Velsicol knew of any mercury pollution problem during the period of its ownership of WRCC or thereafter. Further, such contention conflicts with the court's finding that there is no basis for imposing Velsicol liability on the basis of intentional or negligent conduct. How can defendant Velsicol be liable for not stopping defendant WRCC's pollution when the court found that defendant WRCC was exercising due care.

gardless of the degree of control actually exercisedor its actual knowledge of pollution. Under the trial court's reasoning, Velsicol was obviously damned if it did exercise control and damned if it didn't. The only criteria for liability in the court's mind, were: (a) did WRCC pollute and (b) did Velsicol own WRCC. Clearly, the trial court imposed strict liability on Velsicol merely because WRCC was a wholly-owned subsidiary which the Court determined to be an active, although unintentional and non-negligent polluter.[12] (How defendant WRCC, the actual polluter according to the Court, could have no liability and Velsicol can have primary liability due to its ownership of said polluter, WRCC, is difficult to comprehend). The trial judge acknowledged that Velsicol's liability is derivative to that of defendant WRCC and defendant WRCC is primarily liable, but he nonetheless made Velsicol liable for and, in effect, to WRCC and perforce Ventron for the period of Velsicol's ownership. Bear in mind that the Crossclaims by Ventron and WRCC against Velsicol for indemnification and/or contribution were denied by the trial judge.[13]

The final basis for imposing liability on Velsicol was the Court's finding that Velsicol allowed the dumping of mercury on its property without objection both before and after it acquired title to the vacant 33 acres. Seemingly, the trial court was imputing knowledge of defendant

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12 On pages 51 through 54 of the opinion, the trial judge made an explicit finding that there was no intentional or negligent pollution by any of the defendants and expressly provides that liability arises out of strict liability. (Vel-Da53 & Da56)

13 The question which goes unanswered in the opinion is: Why are not WRCC and Ventron, due to the merger, primarily liable to the DEP for 100% of the remedy?

WRCC to defendant Velsicol because there is not a shred of evidence in the trial record to support a finding of actual knowledge and a finding of actual knowledge would conflict with the trial judge's finding elsewhere in his opinion that defendant Velsicol may not have been aware of any mercury pollution and the pollution was unintentional and non-negligent. The Court reasoned that this aspect of defendant Velsicol's liability was direct under the 1971 Act. (Vel-Da39) Preliminarily, it should be noted that prior to 1971 defendant Velsicol had sold defendant WRCC to defendant Ventron so that liability under the 1971 Act can only be predicated on dumping by WRCC/Ventron. It is difficult to understand how the court translated the passive "allowance" of WRCC/Ventron to dump on Velsicol's property into direct and primary liability on the part of Velsicol. Clearly, WRCC and Ventron would be primarily liable for such dumping and liable to indemnify Velsicol on Velsicol's Cross-claim for said dumping.

The opinion of the trial court went on the provide that, following the posting of the security to be fixed by the court, the defendants Velsicol and Ventron were released from all further liability to the plaintiffs State and Spill Fund for the condition of the subject properties and Berry's Creek and the property owned by defendant Velsicol will be released from any liens or restrictions on the transfer of title, except liens of record. (Vel-Da69)

As to the remedial portion of the trial court's opinion, the trial court found that the State was not acting fairly in its remedial demands:

> The State apparently does not want to take the

> responsibility of living with its own choice. The State's position has been to say to defendants, in effect, you clean it up and when your done you will be responsible to see that you've accomplished a result. In essence, the State seeks a judgment requiring the defendants to bear the burden of clean up as well as the responsibility for subsequent expenses should the measures taken prove inadequate.
>
> This court will not permit the State to assert such a position. The State must take the lead. The court will order the State to act.

(Vel-Da66). The State was ordered to present a plan for the clean-up of Berry's Creek and the liable defendants, Ventron and Velsicol, were to submit their responses to such a plan (Vel-Da66); defendant Velsicol and Ventron were to share equally the cost of the cleanup plan finally approved by the Court without a plenary hearing. In addition, the defendant Velsicol was to prepare and submit a plan for surfacing a portion of its property so as to preclude surface water transport of mercury off the site and into Berry's Creek (Vel-Da66-67). The State was required to submit a response to such a surfacing proposal and defendant Velsicol would assume the full cost of the surfacing plan ultimately adopted by the Court without a plenary hearing.

The trial court decided that the State had failed to prove that mercury was leaching from the subject properties via the ground waters:

> it [the State] has not demonstrated that pollutants were now entering that waterway from the premises in question through ground water.

(Vel-Da23). Therefore, the court did not require that the Velsicol tract be entombed as sought by the State.

> The Court will not now require entombment of the entire Velsicol tract. The preponderance of the evidence does not demonstrate that there is present leaching of ground water, nor is there proof that such leaching would create in a dredged Berry's Creek a hazardous condition.

(Vel-Da67). The Court, however, decided to give the State a second opportunity to prove its case for site containment by providing that when the clean-up of Berry's Creek and surfacing of the Velsicol property have been completed, the State, at its option, could commence site monitoring for a one-year period to determine if mercury is leaching into the Creek and in what amounts (Vel-Da67). At the conclusion of such monitoring period, the State is permitted to present again its case for entombment. There was no provision made for a plenary hearing on this second application and no provision was made for discovery. The Court imposed the initial cost of such monitoring on the State.

> The cost of monitoring, however, must be initially borne by the State. The State has heretofore failed to prove its case as to present leaching. If it seeks to prove such leaching, the burden is upon it. The State or the Fund will initially serve as the source of financing such monitoring.

(Vel-Da68). The basis for imposition of such monitoring costs on the Fund was that it is "part and parcel of the abatement of spills and discharges as to which the State must act and for which the Fund is strictly liable." (Vel-Da68). Ultimately, the Court indicated that the defendants Ventron and Velsicol may be charged with all or a part of such monitoring costs if it is proved that there is leaching and the amount of leaching is in violation of existing standards. (Vel-Da68).

The Court determined that a limit on the future liability of defendants Ventron and Velsicol must be fixed (Vel-Da69) and decided that this could best be accomplished by providing that said defendants provide security for the one-year monitoring costs and the potential cost of emtombing the Velsicol site (Vel-Da69). The precise amount of said security was to be determined at a later date, but the court estimated that the maximum future liability of defendants Ventron and

Velsicol would be $1 million each. (Vel-Da69-70). Any additional costs beyond the approximate maximum of $1 million were to be borne solely by the State and the Spill Fund because the State had a degree of culpability.

> The State is not merely an innocent party. The DEP could have and should have closed down the plant as early as 1968. Its inaction in the years subsequent to 1968 must relieve the liable defendants of some of the burden and responsibility. Yet, in so doing, the public must be protected.
>
> The clean up of Berry's Creek, the surfacing of the Velsicol tract, the monitoring and possible, future entombment, together with the escrowed monies will provide the necessary protection. Beyond that, the Legislative scheme mandates that the Spill Compensation Fund be utilized to protect the environment and the public.

(Vel-Da70).[14] As to the security to be posted, said security was to be returned or discharged unconditionally if, at the conclusion of the one-year monitoring period, the State failed to prove leaching in such amounts as would violate present standards and create a dangerous situation. (Vel-Da70).

The monetary liability imposed on the liable defendants was, as stated by the trial court, "in lieu of any fines and penalty here sought" (Ja372).

In connection with the preparation of an order of final judgment the parties submitted various forms of orders and a hearing was held to settle the form of the order on September 25, 1979. Velsicol sought

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[14] The court's reference to 1968 as the date when the State should have closed down the plant impliedly supports the defendant Velsicol's position that prior thereto mercury pollution was not considered. ten or fifteen years during litigation. It was in 1968 that Ventron acquired WRCC.

clarification as to the surfacing requirement:

> As I understand the Court's opinion with respect to Ventron and Velsicol, the Court has held that they are severally liable for 50 percent, in effect, of the entire problem out there by virtue of joint and several liability of Berk and Wood Ridge. If I'm wrong on that -- the reason I raise it is because when we get to the surfacing problem --
>
> THE COURT: No. No, understand this. The surfacing problem is Velsicol's alone because that is something they want to do and they have to do anyhow to develop the land. I am doing that, frankly, because the whole purpose of this remedy approach was to make all of this land available for use by the owners and not tie it up for the next Now, it is obvious that the Wolf property had to be surfaced to be used and it's equally obvious that the Velsicol property must be surfaced to be used.

(Vel-Da95-96). Counsel for Velsicol objected to the Court's assumption of what Velsicol wanted to do pointing out that surfacing now would have to be destroyed at such time in the future as Velsicol might want to develop the land with the obvious implication that defendant Velsicol was being asked to absorb considerable pollution-related expense over and above its 50-50 liabilty with Ventron.

> MR NEARY: The only difference is Wolf surfaced it after he completed his construction. We're surfacing it now. We'll have to rip it up.

(Vel-Da96) The Court, however, closed the discussion by essentially admitting that the requirement would only be fair if it were part of overall normal site development:

> THE COURT: One moment. I asked you for a plan. Now, if you give me a development plan which has buildings and the entire development, that could be the surfacing I'm trying to make it palatable from a commercial point of view rather than just putting a layer of blacktop over 33 acres. So that's the caveat to the 50-50 split, Mr. Neary.
>
> MR. NEARY: Thank you, your Honor.

(Vel-Da96-97).

There was a brief discussion about the right of the defendants Ventron and Velsicol to a judgment for contribution on their respective Crossclaims against the defendant Berk for which the trial court had afforded no relief in its opinion:

> THE COURT: ....Now I did make some -- I won't call them errors...but some miscalculations.
>
> Mr. Hill, I had forgotten that there had been an application to bring in Berk on a crossclaim and you are absolutely correct. I held that Berk and Wood Ridge Chemical were jointly and severally liable for the various reasons set forth in the opinion. I then held that Velsicol and Ventron were severally liable for the reasons set forth, basically secondarily and to some extent primarily, but on the part of Velsicol.
>
> Your application to amend the pleadings to set forth a crossclaim against Berk is granted the judgment will include a contribution claim.
>
> Mr. Hill, yes.
>
> MR. HILL: Yes, I rise at this moment because I think we have such a crossclaim already on file.
>
> THE COURT: Well, then, there was more confusion, but if there is such a crossclaim, judgment will be entered. If it requires amendments of the pleadings, so be it.
>
> MR. HILL: Yes.
>
> THE COURT: It was the intention of the Court initially to lay primary liability on Wood Ridge and Berk jointly and severally.
>
> And Mr. Hill -- Mr. Neary, you rise.
>
> MR.NEARY: Velsicol also has a claim and that will apply to Velsicol.
>
> THE COURT: Well, it comes up through Wood Ridge in any event to both of you. In other words, the primary responsibility I held was Wood Ridge and Berk. So since both of you have secondary liability, at least partly through Wood Ridge, of course, you would obtain the benefits of any contribution

by Berk.

(Vel-Da77-78). Counsel for defendant Velsicol sought to carry the discussion one step further to the issue of defendant WRCC's liability to defendant Velsicol:

> MR. NEARY: Well, would Velsicol as a party that would be secondarily liable under your Honor's opinion have a right against -- aside from Berk -- a right against Wood Ridge for indemnification since Wood Ridge was primarily liable?
>
> THE COURT: No.
>
> MR. NEARY: You're saying Berk and Wood Ridge are 100 percent liable for 100 percent of the problem?
>
> THE COURT: Let me see if I can be more specific ...Wood Ridge and Berk are jointly and severally liable. Now, after that I had the problems involving Velsicol and Ventron's "ownership" of Wood Ridge. I did the best I could with respect to the liability of Wood Ridge, I felt that the two concerns -- because Wood Ridge is no longer an active company I gather --
>
> MR. NEARY: An answer has been filed on behalf of Wood Ridge.
>
> THE COURT: Well, practically what I'm saying is that whatever Wood Ridge has to pay, you two split.

(Vel-Da78-79). The discussion thereafter returned to defendant Berk's liability to defendants Ventron and Velsicol:

> MR. NEARY: ...With respect to Velsicol's crossclaim against Berk. Velsicol has a crossclaim for indemnification and one for contribution.
>
> * * *
>
> THE COURT: Well, the liability of Velsicol as one primarily liable is rather -- is comparatively minor. The ones who I felt were primarily liable and in the main liable were Berk and --
>
> MR. NEARY: Wood Ridge.
>
> THE COURT: Berk and Wood Ridge. The are jointly and severally liable, therefore, to the extent that you pay -- when I say you, that is Velsicol or

Ventron pays anything under this liability which is really Wood Ridge's, they can ask for half of it from Berk. That simple. That's contribution rather than indemnification.[15]

MR. NEARY: I would think if Berk was the active polluter, I think the liability of Velsicol is really two fold under your Honor's opinion, one, because of ownership exercised or unexercsied, at least the right to exercise control over a wholly owned subsidiary and, two, ownership of land with knowledge, with knowledge of pollution by someone else.

THE COURT: Well, one moment. Do not confuse whether I find liability in favor of the State and as against whether I find liability as between or among the polluting defendants. I specifically indicated that the crssclaims based upon the various theories among the defendants would be dismissed. That includes any action, any suit against Berk on any theory other than for contribution because I just can't see in this type of case a polluter saying to another polluter, look, you polluted first and you gave me the land, therefore even though I polluted, you will indemnify me and that's what I held.

Now, Mr. Hill, I understand that this is contrary to all of the arguments which you put in your summations and in your briefs. Under the set of facts here -- let me ask this question. Are we talking about something that is a waste of time? Is Berk a viable company?

MR. NEARY: As I understand it, the parent corporation is a viable company.

* * *

THE COURT: I don't even remember arguing on the crossclaim or seeing any briefs on the crossclaim against Berk, or was that in the brief, Mr. Neary?

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[15] It is contribution to the extent that defendant WRCC is entitled to recover 50% from the defendant Berk as a joint tortfeasor. To the extent that the defendant Velicol can recover monies, it would seem that it would be predicated on indemnification. The trial judge continues to equate Velsicol with defendant WRCC which is a mistake.

MR. NEARY: It was in all the briefs.

THE COURT: That just shows you how much thought I gave it at the time.

Mr. Hill.

MR. HILL: Yes. Your Honor, if we could, I wonder if we could go a couple of steps further on the crossclaims of Ventron and Velsicol.

Now, against Berk on contribution, the extent of that I don't believe we've really gone into that.

THE COURT: No, I have not. I didn't think it was appropriate to go into it at this time. There's no question in my mind as to the layers of liability[16] and I've tried to do that thinking that the law would fall into place. I don't know how we can put this in easy language. If I had my druthers I would like to see Wood Ridge and Berk pay for this in total. I think over the years they did the polluting...

* * *

MR. HILL: Well, you've indicated throughout the trial and I think you've indicated basically in your decision that Berk was one of the heavy polluters. You've indicated now that Velsicol and Ventron will share Wood Ridge's exposure here. But there has been nothing included in the decision so far which actually exposes Berk for the payment of any dollars relative to the cleanup.

THE COURT: I think inherent in the opinion and what I've said today would be this. If a dollar was spent and all parties had the ability to contribute, that it would end up, assuming that Wood Ridge is no longer the viable company that it was, and it would end up that 50 cents would be paid by Berk, 25 cents would by each Ventron and Velsicol.

(Vel-Da125-131). Ultimately the trial court drafted its own form of Order dated November 15, 1979. (Ja369). Despite the fact that at the hearing on the proposed form of Order the trial judge acknowledged

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[16] The court speaks of layered liability, but its conclusion that the defendants Velsicol and Ventron stand in the shoes of the defendant WRCC places liability on a single line.

that the defendants Ventron and Velsicol were entitled to a judgment on their respective crossclaims against defendant Berk for 50% of the liability of each (Vel-Da131), the order of judgment inexplicably made no such provision. Paragraph 7 of the order of judgment, to some degree, clarified the language of the trial judge's opinion by expressly providing that the defendants Berk and WRCC were primarily liable for the cost of all remedial measures except surfacing the Velsicol property:

> The cost of the remedial relief imposed or to be imposed by this court shall be borne by the liable defendants as follows:
>
> A Defendants F.W. Berk & Co., Inc. and Wood Ridge Chemical Corp. shall be liable jointly and severally for the entire cost for the clean-up of Berry's Creek; and defendants Velsicol Chemical Corporation and Ventron Corporation shall be each severally liable for one-half of the cost of any remedial measures imposed upon defendant Wood Ridge Chemical Corp. in this regard.
>
> * * * *
>
> C. The cost of any monitoring performed by the State shall be borne initially by the State or the Spill Compensation Fund but, in the event said monitoring reveals leaching of mercury from the subject properties into Berry's Creek in prohibited quantities the defendants F.W. Berk & Co., Inc. and Wood Ridge Chemical Corp. shall be primarily liable for the costs of said monitoring and defendants Velsicol Chemical Corp. and Ventron Corp. shall be secondarily liable each for one-half of such monitoring costs as aforesaid.
>
> D. The cost of any remedial measures that may be imposed by this court to eliminate the presence of mercury found to be leaching into Berry's Creek from the subject properties, disclosed by the aforementioned monitoring, shall be borne primarily and in full by the defendants F.W. Berk & Co., Inc. and Wood Ridge Chemical Corporation and defendants Velsicol Chemical Corporation and Ventron Corporation shall be secondarily liable each for one-half of such costs as aforesaid.

(Ja376-77). As stated, the trial court persisted in its imposition of exclusive liability on the defendant Velsicol for the surfacing task and

the inclusion of defendant WRCC as having primary liability appears to have been purely cosmetic because paragraph 8, dealing with the posting of security, ignores both defendants Berk and WRCC and imposes the responsibility for same on the defendants Ventron and Velsicol. It is, of course, implicit in the terms of the judgment that defendants Berk and WRCC are primarily liable for posting the security, but defendant Berk is ignored because it defaulted and defendant WRCC is ignored because it merged into defendant Ventron. Velsicol is afflicted with half the liability of WRCC but defendant Ventron by merger enjoys 100% of the assets of WRCC. The Court should not assume that a defaulting defendant, Berk, will not honor the judgment; nor can the Court ignore the primary responsibilities of the defendant WRCC simply by virtue of the merger with defendant Ventron. The primary liability of defendant WRCC is the primary liability of defendant Ventron as a matter of law.

The order of November 15, 1979 also provides that the defendants Berk, WRCC, Ventron and Velsicol are liable under Counts "One,Two, Three and Four of the Second Amended Complaint" (Ja372). The reference to Count Four clearly is in error because the Fourth Count was the State's claim under the Spill Act and in its opinion the trial court was quite precise in finding no liability on the part of said defendants under the Spill Act: "The Court finds no impediment to its applying the 1977 Act provisions to the State while denying recovery to the State against these defendants under the same Act." (Vel-Da49). As stated on page 22 of the opinion, liability was predicated exclusively on the 1937 and 1971 Acts as well as statutory and common law nuisance. (Vel-Da24) A finding of Berk liability under the 1971 Act would also

appear to be in error because defendant Berk went out of the mercury business in 1960 and the Court held the Act could not be applied retroactively.

STATEMENT OF FACTS

The defendant F.W. Berk & Co., Inc. ("Berk") owned and operated a mercury processing facility on an approximately 7-acre site in Wood Ridge, New Jersey for a period of approximately 30 years, spanning the period of 1929 through 1960. (P-16; P-18; P-19; P21). Aside from the 7-acre plant site, defendant Berk also owned an adjoining vacant tract consisting of approximately 33 acres which was located between the plant and Berry's Creek, a tributary of the Hackensack River. The adjoining 33 acre tract (now the Velsicol property) has never been the site of a chemical plant (Vel-Da162). The plant operations of defendant Berk were under the scrutiny of the State Department of Health and there is no evidence that the defendant Berk was ever cited for having mercury in the plant effluent which was being discharged from the plant across the adjoining vacant property into Berry's Creek (H-60).

There did exist among the State surveillance reports relative to the defendant Berk's operation, a report which reflected that there was no detectable mercury in the plant effluent. The State's inspection report of February 4, 1960 states: "Toxic mercuric compounds were absent from all three individual effluents [Bldgs. 9, 13 & 18] and from the combined effluent" (N-20, page 3). In the State's transmittal letter of March 4, 1960, the State placed particular emphasis on the absence of mercury in the effluent: "Toxic mercury compounds were absent" (N-41, para. 2)

In April and May of 1960 the defendant Velsicol Chemical Corp. ("Velsicol") was exploring the feasibility of purchasing certain assets of

the defendant Berk including the mercury plant. The defendant Velsicol's business involved the manufacture of hydrocarbon resins, benezoic acid and derivatives of benezoic acid. (Vel-Da-Vol.2, Kirk Dep. T7-11 to 21).During the course of the defendant Velsicol's investigation of the operation of defendant Berk, the defendant Velsicol was furnished by defendant Berk with a copy of the State's surveillance report of February 4, 1960 (See, P-660). The defendant Velsicol relied upon such report, the absence of any contrary reports and defendant Berk's assurances that there was no mercury pollution problem at the site in formulating its decision with respect to the contemplated purchase (Vel-Da-Vol.2, Kirk Dep. T52-2 to T54-7).).

In June of 1960 the defendant Velsicol incorporated the defendant Wood Ridge Chemical Corp. ("WRCC"), as a wholly-owned subsidiary of the defendant Velsicol and the defendant WRCC purchased certain of the assets of the defendant Berk, including the 40-acre tract and the Berk plant. (P-513; P-514; P-517; P-519; P-524; P-526; P-529). The defendant Berk thereafter dissolved. All the corporate formalities were puncitiliously complied with by defendant Velsicol as is demonstrated by WRCC's corporate minutes for the period of Velsicol's ownership (H-36); there are minutes for each meeting, the meetings actually occurred, were properly conducted, resolutions were properly approved and in their entirety the minutes reflect an on-going recognition of the separateness of WRCC by Velsicol. The defendant WRCC's corporate minutes establish personnel who served as directors and officers of defendant WRCC, served defendant WRCC in a commendable fashion in furtherance of the bestinterests of defendant WRCC and without any compensation by defendant WRCC.

The defendant WRCC, as a subsidiary of defendant Velsicol, operated the mercury plant until February of 1968 when the defendant WRCC was purchased by the defendant Ventron Corp. ("Ventron") (P-756). Approximately six months after defendant WRCC purchased the Berk assets, the State inspected the effluent of the plant and, under spectrographic analysis discovered no mercury (N-29). There is no State of federal surveillance report encompassing the defendant WRCC's plant operations during the period of Velsicol ownership which indicates the presence of mercury in the plant effluent or in the soil. The State has admitted that:

> The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of mercury.
>
> The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of any of the hazardous substances which are the basis for plaintiff's action herein.

(Vel-Da167) The defendant Velsicol never became aware of any mercury contamination ate the site. (VelDa-Vol.2, Kirk, T65-16 to 21). There was no testing of the soil for mercury at the defendant WRCC's plant while the corporation was owned by the defendant Velsicol. (VelDa-Vol.2,Kirk, Dep. T66-17 to 23).

In connection with the defendant WRCC's acquisition of the defendant Berk's assets, defendant WRCC retained certain of the managerial staff of the defendant Berk. (VelDaVol.2, Kirk Dep., T27-5 to T28-1).

The defendant WRCC, as a subsidiary of defendant Velsicol, operated the mercury plant until February of 1968 when the defendant WRCC was purchased by the defendant Ventron Corp. ("Ventron") (P-756). Approximately six months after defendant WRCC purchased the Berk assets, the State inspected the effluent of the plant and, under spectrographic analysis discovered no mercury (N-29). There is no State of federal surveillance report encompassing the defendant WRCC's plant operations during the period of Velsicol ownership which indicates the presence of mercury in the plant effluent or in the soil. The State has admitted that:

> The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of mercury.
>
> The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of any of the hazardous substances which are the basis for plaintiff's action herein.

(Vel-Da167) The defendant Velsicol never became aware of any mercury contamination ate the site. (VelDa-Vol.2, Kirk, T65-16 to 21). There was no testing of the soil for mercury at the defendant WRCC's plant while the corporation was owned by the defendant Velsicol. (VelDa-Vol.2.Kirk, Dep. T66-17 to 23).

In connection with the defendant WRCC's acquisition of the defendant Berk's assets, defendant WRCC retained certain of the managerial staff of the defendant Berk. (VelDaVol.2, Kirk Dep., T27-5 to T28-1).

Bill Taylor, who was general manager under defendant Berk, served defendant WRCC in the same capacity. (VelDaVol2., Kirk Dep., T23-9 to 11; T28-16 to 23). John Bratt, another former Berk employee, was employed by defendant WRCC as its plant manager. (VelDaVol.2,Kirk Dep., T29-2 to T31-7) and took over as general manager when Bill Taylor ceased to serve that function several years later. (Vel-Da-Vol.2, Kirk Dep. T41-18 to 21). Ed Clark, a former employee of defendant Berk, was hired by defendant WRCC as production manager. (Cadmus, 10/12/78, T94-4 to T95-2). John Hoffman, a former Berk employee, was hired by defendant WRCC and had plant operating responsibilities. (Vel-Da-Vol.2, Kirk Dep. T32-17 to T33-4). Eugene Cadmus, a former Berk employee, was hired as the chemist in charge of quality control. (Vel-Da-Vol.2, Kirk Dep. T33-5 to 10; Cadmus, 10/12/78, T33-6 to 9). Velsicol, having no prior experience in the mercury business relied upon these former Berk personnel to run the plant. (Vel-Da-Vol.2., Kirk Dep. T15-22 to T16-10; T27-5 to T28-1).

During the Velsicol years, the operation managers at the WRCC plant reported to the WRCC Board of Directors that the mercury was being recovered from the waste streams and was not a cause of pollution. (Vel-Da-Vol.2., Kirk Dep. T53-13 to T54-3).

The defendant WRCC's takeover of the defendant Berk's operations retaining as it did the Berk operational staff and employees, was so subtle and unobtrusive that Eugene Cadmus and Harry Pfeiffer both thought that there had been no change in ownership and believed that there simply had been a change in name from "Berk" to "Wood Ridge Chemical Corp.". (Pfeiffer, 6/6/78, T59-4 to 9; Cadmus, 10/16/78,

T56-9 to 13). Certainly this failure to detect a change in ownership bespeaks a definite lack of Velsicol control rather than the contrary. Cadmus did not even know who the officers and directors of WRCC were during the period of Velsicol ownership. (Cadmus, 10/16/78, T29-12 to 18). Cadmus acknowledged that to the extent he had any contact with defendant Velsicol personnel, that contact in his view was beneficial to defendant WRCC. (Cadmus, 10/16/78, T31-19 to T33-19). Cadmus had no communication with defendant Velsicol personnel concerning mercury in the plant effluent. (Cadmus, 10/16/78, T69-7 to T70-14; T74-18 to 23). Cadmus, who was at the site on a daily basis during Velsicol's ownership, disclaimed any knowledge of dumping (Cadmus, 10/12/78, T78-18 to 25) nor did Cadmus discuss with John Kirk Cadmus' work on the plant effluent. (Cadmus, 10/16/78, T72-2 to 4).

Bendis owning the defendant WRCC the defendant Velsicol was also a minor customer of the defendant WRCC in that the defendant WRCC manufactured one or two products sold to defendant Velsicol and for which Velsicol furnished the product specifications.(Cadmus, 10/12/78, T33-23 to T38-3; Vel-Da-Vol.2, Kirk Dep., T40-12 to T44-23).

During the period of Velsicol's ownership of defendant WRCC, WRCC had retained two outside consulting firms: Edward R. Grich, Inc. and Bogert Associates. These firms were retained for the purpose of studying the plant's effluent and devising a mode of treatment which would permit the effluent, following such treatment, to be discharged to a local sewerage treatment plant rather than Berry's Creek. (Cadmus, 10/16/78, T43-16 to 24). The work of these consultants did not concern mercury. (Cadmus, 10/19/78, T52-9 to T54-19; N-18; S-42).

During the period of Velsicol's ownership, the defendant WRCC installed a vertical tank at the rear of the plant site for the purpose of experimenting with various methods of treating the waste streams. (Cadmus, 10/16/78, T47-24 to T48-7). In addition to sedimentation and filtration, the process streams during the Velsicol years were treated with formaldehyde, salt, hypophosphorous acid, lime, sodium dimethyl carbamate and sodium hydroxide. (Bernstein, 10/16/78, T37-15 to T43-1); Cadmus, 10/16/78, T117-2 to 4). No one connected with the State, Velsicol or WRCC expressed the view that there was mercury in the plant effluent as it left the site. (Cadmus, 10/16/78, T110-12 to T111-5).

Dr. Joselow, who was retained by defendant WRCC under the ownership of both defendant Velsicol and defendant Ventron as an environmenal consultant on in-plant environment and employee exposure, in one of his reports to defendant WRCC, while owned by defendant Velsicol, does he express any concern about soil or surface waters. (See Joselow reports P-502 to P510; P502A to P510A). Dr. Joselow does not even mention in his reports the presence of waste piles until his final report of July 8, 1970 during the period of defendant Ventron's control. (P510A) (Joselow, 6/13/78, T17-21 to T22-12). At no time did Dr. Joselow take any sludge or water samples. (Joselow, 6/13/78, T41-3 to 11).

Approximately one year prior to the defendant Velsicol's sale of defendant WRCC to defendant Ventron, the defendant Velsicol concluded that the defendant WRCC lacked the growth potential it desired and defendant Velsicol determined that it could achieve a better return on investment in another venture. (Vel-Da-Vol.2, Kirk Dep. T46-9 to

T49-1). Pollution problems and/or regulatory controls played no role in the decision to sell defendant WRCC. (Vel-Da-Vol.2, T152-22 to 23).[2]

The Ventron/Velsicol negotiations transpired over a period of six to eight months. (Vel-Da-Vol.2, Kirk Dep., T46-18 to 20). Every aspect of the operations of defendant WRCC were thoroughly scrutinized by the defendant Ventron before agreeing to the purchase of defendant WRCC (N-11). The defendant Ventron was not interested in acquiring the adjacent 33 acres owned by defendant WRCC, so in June, 1967 the defendant WRCC issued a land dividend consisting of said property. (P-24). In July of 1967 the defendants Ventron and Velsicol entered into a secrecy agreement which allowed the defendant Ventron access to even confidential and proprietary information of the defendant WRCC. (P-756, Art. 10(a); Vel-Da-Vol.2, Kirk Dep., T46-21 to T47-1; T64-6 to 7).

Thereafter thehe independent accounting firm of Arthur Andersen & Co. was retained at defendant Ventron's request (N-12) to render an overall report on the condition of the defendant WRCC as of July 31, 1967. (P-568). The Arthur Andersen Report notes that the defendant WRCC "is a separate entity having its own sales, production and accounting functions" (P-568). The defendant Ventron acknowledges receiving the Arthur Andersen Report in the stock purchase agreement (P-756, Art. 1(1)(d) and the defendant Ventron's letter of November 24, 1967 (N-13). It was in the defendant Ventron's letter of November 24, 1967 (N-13) that defendant Ventron made its offer of purchase which it characterized as reasonable in light of "the potential costs of tighter controls on air and water pollution on which Ventron's people have spent considerable time." Thus, it is clear that the defendant Ventron,

prior to purchase, was sensitive to the environmental concerns related to plant operations and utilized those concerns and anticipated costs related thereto to bargain down the purchase price of the WRCC stock.

In its letter of January 3, 1968 (N-14) the defendant Ventron made a second offer to purchase the defendant WRCC and again utilized "the potential expenses involved in pollution control" as a major bargaining point.

The stock purchase agreement of February 1, 1968 between defendants Ventron and Velsicol (P-756) expressly informed the defendant Ventron that defendant WRCC is subject to federal, state and local laws and regulations designed for "the prevention and control of environmental pollution, which the parties have previously discussed." (P-756, Schedule "A"). This agreement further provided that "Velsicol expressly disclaims any warranty that operation of the Wood Ridge plant will not at some time entail alterations or other steps to comply with applicable federal, state, or local laws and regulations." (P-756, Schedule "A"). The purchase price found in the purchase agreement undoubtedly reflects a discount, at defendant Ventron's urging, due to projected costs to meet ever tightening environmental controls. The agreement also reflects a willingness on the part of the defendant Ventron not to require any indemnification from the defendant Velsicol for liabilities of defendant WRCC arising out of pre-purchase conduct of defendant WRCC. The defendant Ventron knowingly chose to purchase, not the assets of the defendant WRCC but, the stock of defendant WRCC and thereby defendant Ventron assumed all the legal implications arising from a stock deal. WRCC, when purchased by defendant Ventron, clearly was not a mere instrumentality of defendant Velsicol, but was a

viable corporation with substantial assets. Arthur Andersen, in its analysis of WRCC, stated that in 1966 WRCC had cash assets of $155,786.00, marketable securities valued at $299,510.00, accounts receivables of $244,534.00, an inventory valued at $1.1 million and property, plant and equipment valued at $809,637.00. (P-568). In 1967, according to Arthur Andersen, WRCC had $58,833.00 in cash, $501,774.00 in account receivables, an inventory valued at $953,764.00 and property, plant and equipment valued at $764,204.00 (P-756). As of July, 1967 WRCC had four bank accounts and a labor force of 64 individuals including the following management personnel who held positions with defendant Berk: John Bratt, Vice-Pres. and General Manager; Edward Clark, Vice-Pres. and Plant Manager; John Hoffman, Production Supervisor; and Eugene Cadmus, Technical Director. (P-568).

At the time of defendant Ventron's purchase of defendant WRCC the purchase agreement (P-756) between the defendants Velsicol and Ventron reflected that, as of the purchase date, the defendant WRCC had the following: (1) insurance coverage for merchandise in transit, workmen's compensation, general liability, auto liability, fire and extended coverage on all real and personal property, business interruption, hospitalization and life and marine open cargo. (Schedule "F"); (2) ten foreign patents, one foreign patent application pending; fourteen U.S. trademarks, two foreign trademarks and seven U.S. patents (Schedule "E"); (3) union contract with the Oil, Chemical and Atomic Workers International Union and its Local 8-447; (4) an Employees' Pension Plan (Schedule "E"); (5) thirteen service contracts, nine sales contracts, and fourteen purchase contracts (Schedule "C"); (6) consultant agreement with Bill Taylor, former owner of defendant Berk,

dated March 17, 1964 (Schedule "C"); (7) seven acres of real estate; (8) physical inventory (Art. III); and (9) working capital (Art. III). The Arthur Andersen report also noted that defendant WRCC had been examined by the Internal Revenue Service through 1964 (P-568 at 46).

Following the defendant Ventron's acquisition of the defendant WRCC, it proceeded to toally dominate the operations of defendant WRCC and ignore its separate existence. Within the first two years of operations under Ventron, 15 hourly employees were laid off (Bernstein, 9/20/78, T16-4 to 6). During that same period two engineering personnel were laid off: Ed Clark and Vito Vignale. (Bernstein, 9/20/78, T16-7 to 11). Vignale was a process engineer and Clark was the plant engineer. (Bernstein, 9/20/78, T16-14 to 17). Also during this 2-year period, the accounting department was reorganized and people were discharge or resigned (Bernstein, 9/20/78, T16-20 to 23).

William Zolner, Ventron's Treasurer, had ultimate responsibility for the accounting functions of defendant WRCC. (Cadmus, 10/16/78, T16-11 to 21). The defendant Ventron's sales personnel sold defendant WRCC's products (Cadmus, 10/16/78, T16-22 to T17; Bernstein, 9/28/78, T42-13 to 16) and defendant Ventron's advertising material promoted defendant WRCC's product. (Cadmus, 10/19/78, T17-6 to 13). After acquisition by defendant Ventron, defendant WRCC had no sales force of its own. (Cadmus, 10/16/78, T17-14 to 18). The defendant Ventron's Joseph Bernstein was involved in defendant WRCC's sales efforts because it was he who decided on what customers the sales people should contact. (Bernstein, 9/28/78, T42-17 to T43-3). In the area of quality control, Eugene Cadmus, who had this reponsibility under Berk and WRCC, was replaced by Ventron approximately a year after it acquired defendant

WRCC; Cadmus was transferred to the defendant Ventron's Massachusetts operation and Bernard Magier was inserted by defendant Ventron in Cadmus' position at defendant WRCC. (Cadmus, 10/16/78, T17-14 to T18-2). Ventron's technical personnel in Massachusetts oversaw and participated in quality control at Wood Ridge. (Cadmus, 10/16/78, T30-3 to 7). Scientific Chemical, a Chicago division of defendant Ventron, did the analytical work for defendant WRCC (Cadmus, 10/16/78, T31-16 to 18). Shortly before defendant Ventron transferred Cadmus to Massachusetts, Barry Faye was sent by Ventron to WRCC as Plant Engineer and Faye had on-site responsbility for quality control aspects of production. (Cadmus, 10/16/78, T18-12 to 18). It was Faye who played a mjor role in the development of the plant's treatment system and he was the chief contact of defendant WRCC with the State and federal environmental agencies. Even after Faye returned to Massachusetts, he continued to supply the State with defendant WRCC's effluent reports. (Faye, 10/18/78, T3-14 to 22). Forrest Griffin of Ventron, defendant Ventron's Manager of Manufacturing, visited the WRCC site twice a month. (Cadmus, 10/16/78, T19-14 to T20-10). John Van Horn, an Executive Vice President of defendant Ventron, was involved in defendant WRCC's operations. (Cadmus, 10/16/78, T26-25 to T27-16; Bernstein, 9/28/78, T43-15 to 18). Ted Myskowski was defendant Ventron's Chemical Engineer and he was specially assigned by defendant Ventron to work on pollution abatement at WRCC. (Cadmus, 10/16/78, T27-20 to T28-6; Faye, 10/4/78, T47-3 to 5). Frank Wilson, a Ventron engineer, also became involved in the development of defendant WRCC's treatment facilities (Cadmus, 10/16/78, T28-12 to T29-1). Joseph Bernstein, while employed by defendant Ventron, spent a con-

siderable amount of his time working on defendant WRCC's matters, including environmental concerns. (Bernstein, 9/26/78, T43-15 to 18; T100-19 to 23). S.K. Derderian, Ventron's Vice-President and General Counsel, represented defendant WRCC on the sale of its assets to Troy Chemical Co. (Derderian, 9/13/78, T14-22 to T15-1). John Hoffman, while in charge of defendant WRCC's production and Cadmus, while with defendant WRCC, reported to Forrest Griffin, Ventron's Director of Manufacturing. (Cadmus, 10/12/78, T13-13 to T14-6).

Aside from the extensive control being exercised via the injection of defendant Ventron's personnel and supervision, the defendant Ventron disregarded the separate corporate existence of defendant WRCC. The corporate meetings of defendant WRCC were quite few and they were "consent meetings" rather than actual meetings such as occurred under defendant Velsicol's ownership. (Derderian, 7/11/78, T12-15 to 17). The defendant Ventron caused the defendant WRCC to manufacture products such as "Vinyzene" and "Pyroturd" which were sold by defendant Ventron's Scientific Chemicals Division in Chicago. (Faye, 10/17/78, T33-22 to T34-2). The defendant Ventron inaugurated a triple-distilled mercury operation in its Scientific Chemicals Division and utilized spare pieces of equipment taken from the defendant WRCC, apparently without compensation. (Faye, 10/17/78, T36-16 to 20). The defendant Ventron imported to Wood Ridge waste/residue from its mercury operation in Chicago. (W-119). The defendant Ventron took an exclusive assignment of Cadmus' patented soidum borohydride process (H-68) even though it was developed by Cadmus while working for defendant WRCC and defendnt Ventron then proceeded to market the process as an adjunct to one of defendant Ventron's major products.

(Faye, 10/17/78, T51-23 to T52-3; Cadmus, 10/16/78, T11-10 to T13 19). This was a flagrant misappropriation of an asset properly that of defendant WRCC because all prior patents developed by Cadmus were assigned to his employer, either defendant Berk or defendant WRCC (Cadmus, 10/16/78, T11-23 to T13-2). At that time the defendant WRCC's plant was shut down, the defendant Ventron sold all WRCC's business, including the the equipment, to Troy Chemical Co. and, as to that equipment which Troy Chemical Co. did not want, the defendant Ventron took for itself. (Pfeiffer, 6/6/78, T24-16 to 22; N-9). The defendant Ventron had a letterhead with defendant WRCC's address in Wood Ridge listed as defendant Ventron's address and defendant Ventron used that letterhead in its communications with the environmental agencies. (Cadmus, 10/16/78, T24-1 to T26-12). The defendant Ventron went so far as to change the lettering on the roof of building 18 (the main building) from "WRCC" to "Ventron". (Faye, 10/17/78, T67-6 to 15).

The control wielded by the defendant Ventron was so extensive that the federal environmental agecnies understood that defendant Ventron, not defendant WRCC, was operating the plant at Wood Ridge. Mr. Horner, of the EPA enforcement branch understood it to be a Ventron operation. (Horner, 6/8/78, T114-9 to T115-4). Mr. Tidwell of the EPA, who was involved in plant operations at Wood Ridge from 1971 to 1973, testified that he similarly understood that defendant Ventron ran the plant. (Tidwell, 6/8/78, T57-1 to 4). Mr. Tidwell was totally unfamiliar with defendant WRCC:

> Q. Did you have any contact with a company by the name of Wood Ridge Chemical Corporation?

A. None directly that I know about. The only thing I really know about Wood Ridge was that the name, I believe, was still on the file when I got it and that the formal name change within our organization occurred sometime after 1970-71.

Q. All of your contact and discussions related to the plant site and enforcement activities they were with a company called "Ventron"?

A. Yes.

(Tidwell, 6/8/78, T59-13 to 17).

It was during the defendant Ventron's operation of defendant WRCC that mercury became well known as an environmental contaminant. (Bernstein, 9/28/78, T57-20 to 24; Joselow, 6/13/78, T28-9 to 14). Thee first contact between defendant Ventron and the federal regulatory authorities was a phone call in October of 1970 to defendant Ventron's Hoffman by a Mr. Ciancia of the Federal Water Quality Administration ("FWQA") wherein he expressed concern about the mercury in defendnt Ventron's plant discharge. (H-39; Bernstein, 6/20/78, T48-11 to T50-8). On or about November 6, 1970 there was a meeting attended by representatives of defendant Ventron (Joseph Bernstein and Barry Faye) and Messrs. Ciancia and Stein of the Federal Water Quality Administration ("FWQA") (Ciancia, 10/24/78, T11-18 to T12-8). At this meeting, the FWQA advised the defendant Ventron that the federal government had recently experienced problems with mercury contamination in Lake St. Clair in Michigan as a result of discharges by a chemical company. (Bernstein, 9/20/78, T56-4 to 9). As a result, the FWQA had embarked on a recent effort to attempt to control mercury discharges. (Bernstein, 9/20/78, T55-6 to 20). A recent sampling of the defendant Ventron's discharge was deemed by the FWQA to have excessive mercury content (Bernstein, 9/20/78, T57-11 to 16). Ventron

outlined to the FWQA the nature of the operation and the proposed mode of treatment. (Ciancia, 10/24/78, T13-1 to 7). The defendant Ventron was advised that the FWQA had set an interim goal of .5 lb. per day, but Ventron was advised that very shortly thereafter a standard of .1 lb per day would be enforced. (Bernstein, 9/20/78, T61-3 to 25). It was at this meeting that the FWQA requested that defendant Ventron monitor its discharges and keep the FWQA informed. (Bernstein, 9/20/78, T65-14 to 20).

In or about December 1970 the U.S. Environmental Protection Agency ("EPA") was formed and Gus Bennett of the EPA was placed in charge of the Ventron plant (Tidwell, 6/8/78, T50-7 to 8; Ciancia, 10/14/78, T122-9 to 18). At this meeting, it was agreed that the defendant Ventron would submit to the EPA a record of daily composite samples as measured at the point of treatment and at the point when the total effluent stream ultimately existed the site. (Ciancia, 10/24/78, T27-14 to 24). It was sometime in 1971 that the defendant Ventron commenced to keep records of its sampling of its treated and total effluent. (Bernstein, 9/20/78, T66-4 to 10) and such records were transmitted to the State and the EPA on a regular basis. (Bernstein. 9/20/78, T66-13 to 14). Both the EPA and defendant Ventron kept the EPA advised of its effots to control the mercury in its discharge. (Bernstein, 9/20/78, T66-16 to 24). This sampling was totally by defendant Ventron. (Bernstein, 9/20/78, T67-4 to 9).

By letter of June 8, 1971 (H-45) Bennett of the EPA indicated to Ventron's Bernstein that the ultimate objective of the EPA was to "eliminate" the discharge of mercury into the country's waterways. On July 6, 1971 there was an EPA/Ventron meeting wherein defendant Ventron sought to

explain to the EPA how the plant was a unique situation making compliance with the EPA's goal most difficult. (Faye, 10/4/78, T111-6 to T112-7). Following this meeting, in August or September of 1971, representatives of the EPA visited the plant and were taken on a tour of the operation. (Faye, 10/4/78, T112-12 to 22). At this time the defendant Ventron was debugging its treatment process. (Faye, 10/4/78, T113-1 to 8). During this inspection tour, the EPA's Horner expressed his opinion that the soil around the plant was contaminated with mercury and that soil tests should be undertaken. (Faye, 10/18/78, T53-11 to 18).

In October or November, 1971 the EPA made another plant inspection and took some effluent and soil samples (Faye, 10/4/78, T113-9 to 14; 10/4/78, T113-17 to 18). The defendant Ventron's representatives even took the EPA's representatives on a walk across the Velsicol property to Berry's Creek. (Faye, 10/4/78, T113-19 to 22; Faye, 10/18/78, T54-3 to 8).

The defendant Ventron's effluent reports reflected that there was a higher concentration of mercury at the ultimate discharge point where the discharge left the plant sitethan at the point where it existed the treatment system. In or about January 1972, the defendant Ventron again met with the EPA for the purpose of discussing anomaly. (Faye, 10/4/78, T114-10 to 16) (W-144; Horner, 6/8/78, T83-3 to T84-8; Fay,e 10/4/78, T115-18 to 21). The EPA considered the ultimate discharge unacceptable. (W-144). In the opinion of the EPA there were two possible sources for the increased concentration of mercury in the final effluent: (1) soil contamination or (2) contamination of the sewer system (Horner, 6/8/78, T89-7 to 12). The EPA's Horner suggested that

defendant Ventron eliminate the existing sewer system and install a new one, but that suggestion apparently was considered too expensive and/or impractical by defendant Ventron (Horner, 6/8/78, T89-23 to T90-4). The suggestion was deemed impractical because defendant Ventron claimed it was not aware of the location of all the sewer lines (Horner, 6/8/78, T90-6 to 24). By letter of February 24, 1972 the defendant Ventron sought to explain the discrepancy in the two mercury readings (P-755). Subsequent to January of 1972, with the exception of the semi-monthly effluent reports, there was virtually no contact between defendant Ventron and the EPA (Fay, 10/4/78, T113-22 to 24). In or about September, 1972 Faye of defendant Ventron called Horner of the EPA to request if the semi-monthly reports could be reduced to once a month. (Faye, 10/4/78, T116-5 to 25). Horner agreed to the proposal and Faye sent a confirming letter of September 21, 1972 (Faye, 10/4/78, T117-3 to 11; H-65).

The defendant Ventron, while operating defendant WRCC, was of the opinion that it had no legal responsibility for mercury residue in the process and sewer lines, but the EPA's guidelines related to total mercury being discharged and thus the EPA held defendant Ventron accountable (Tidwell, 6/8/78, T34-13 to 19). Sometime in 1970-71 the WRCC/Ventron sewer lines were flushed out. (Faye, 10/17/78, T103-19 to T104-1; W-52). At the time of this action, the defendant Ventron anticipated that there was residual mercury in the lines. (Faye, 10/17/78, T104-4 to 7), but no attempt was made by Ventron to treat the discharge from this flushing operation; the result was that it was being discharged onto and into the defendant Velsicol's property through the drainage system and, to the extent the mercury was not absorbed by

the soil on the vacant Velsicol property, it was discharged into Berry's Creek. (Faye, 10/17/78, T104-21 to 25). The defendant Ventron never advised the State or the EPA of this flushing operation. (Faye, 10/17/78, T104-21 to T105-9). Ventron claimed it had received permission from John Ciancia of the EPA, (Faye, 10/17/78, T104-12 to 17), but Ciancia denied ever agreeing to such wanton pollution. (Ciancia, 10/14/78, T63-25 to T64-2; T78-17 to 23). As a result of this unauthorized flushing operation, which transpired over a period of several weeks (W-52), unknown quantities of mercury residue were discharged onto and into the Velsicol property and, in part, into Berry's Creek.

Debris found by the State on the adjoining vacant property, including invoices of WRCC/Ventron, demonstrates that debris from the WRCC plant was dumped on the Velsicol property at some time after the Ventron acquisition. (Reed, 6/13/78, T611 to 2). Such dumping was acknowledged by defendant Ventron's Bernstein and defendant WRCC's Pfeiffer (Bernstein, 9/28/78, T9-23 to T10-4; Pfeiffer, T37-2 to T38-10).

In December of 1968 the defendant Ventron's ROM reactor kettle in Building 18 blew and generated a considerable concentration of dust and vapor; a fan within the building dispersed mercury vapor and particulate to the outside of the building. (Joselow, 5/23/78, T241-14 to T245-17).

From 1968 through 1974 when the premises was sold, the defendant WRCC/Ventron knowingly discharged varying quantities of mercury through its effluent and storm sewer systems into and onto the Velsicol property and Berry's Creek. (Pfeiffer, 6/6/78, T77-6 to T79-4; W-93; W-95; W-110; W-112; W-116; W-117A; W-117B; W-120; W-170A; W-177; W-182; W-184; W-189; W-190; W-191; W-192; W-195; W-196; W-198;

W-205). The State allowed such discharges of mercury to Berry's Creek to continue despite the terms of the Clean Water Act of 1971, N.J.S.A. 58:10-23.1. The State also failed to take action to have the mercury removed from the Creek sediment or the soil although the State was legally required to do so under the 1971 Act. Dr. Joselow, the State's trial expert, was critical of the governmental reaction to mercury contamination throughout the country in the 1970's:

> [T]he problem with our government...was that they were very much compartmentalized; there was an agency concerned with water, with air, there was an agency concerned with soil waste and so on. And what was in the files of an agency was not really well known or used by other agencies...

(Joselow, 6/13/78, T28-15 to 23). This would appear to be an apt evaluation of the State's handling of the instant situation.

Dr. Joselow, prepared periodic reports of the conditions encountered during his plant inspections. The first reference by Dr. Joselow to the presence of waste piles on the Velsicol property is in his report of July 8, 1970, i.e., when defendant Ventron was operating the plant. (Joselow, 6/13/78, T17-21 to T22-12).

The defendant WRCC/Ventron not only discharged mercury as part of the plant's waste streams, but it also imposed mercury waste from defendant Ventron's mercury operation in Chicago (W-119), although knowledge of such activity was denied by the Ventron plant engineer. (Faye 10/17/78, T2-22 to T4-9).

During the period of the operation of defendant WRCC by defendant Ventron, there was a requirement that a discharge permit be secured from the Army Corps. of Engineers which would allow the continued discharge to Berry's Creek. (Faye, 10/18/78, T27-4 to T29-5).

There was no such permit requirement while defendant Velsicol owned defendant WRCC. In connection with this federal permit program, Ventron had to secure from the State a certification that defendant WRCC's discharge was acceptable to the State; the State never issued such a certification. (Faye, 10/18/78, T30-6 to 22). In completing defendant WRCC's application for the permit, the defendant Ventron acknowledged that the question on the application inquiring about the State's evaluation of the defendant WRCC's effluent was a "touchy" subject; ultimately, the question was answered by stating that the effluent had neither been approved or disapproved. (B-37; B-38; B-39; Faye, 10/18/78, T43-7 to T48-8).

In 1971 the defendant Ventron had become sufficiently cognizant of the extent of the mercury problem so as to have an in-house discussion about whether the regultory authorities would require Ventron to dredge Berry's Creek (Bernstein, 9/27/78, T97-1 to T99-6). In an internal memorandum of October 23, 1970 the defendant Ventron noed that defendant Ventron "had already suffered adverse publicity because of leached mercury discharged. (Faye, 10/17/78, T78-6 to 11).

In or about February 1972 the defendant Ventron received the Metcalf & Eddy report (P-755) which verified the presence of soil contamination. (Faye, 10/5/78, T75-5 to 10).

Dr. O'Rourke, the defendant Ventron's consultant advised the defendant Ventron against excavation of the mercury infested soil because such activity would likely increase the opportunity for mercury transport. (Bernstein, 9/16/78, T93-23 to T94-16; Derderian, 9/13/78, T63-8 to T67-1).

The defendant Ventron, unlike defendant Velsicol, came to discover that the ash residue from the still operation contained mercury. (P-754). During the Velsicol years, it was believed that the ash from the still did not contain mercury. (Cadmus, 10/12/78, T81-6 to T82-5).

Upper-lever management of defendant Ventron came to learn that certain WRCC employees were dumping debris on the Velsicol property and took no effective measures to stop such activity. (Bernstein, 9/28/78, T9-22 to T10-4; T23-2 to 9).

Ventron also carelessly left mercury sludge at the site when it sold the 7-acre site to defendant Wolf. (Longstreet, 6/27/78, T79-14 to T81-8), although in its letter of May 29, 1974 (B-5) the defendant Ventron falsely had advised the State that all chemical bearing residues had been removed from the site. On June 7, 1974 piles of mercury laden residue were discovered by the State at the plant site.

> Q. On the basis of your observation had all mercury-laden chemical bearing residues been removed from the Ventron plant before it was shut down?
>
> A. No, they had not.

(Longstreet, 6/27/78, T83-13 to 18).

The defendant Ventron's failure to abate the soil and ground water contamination at the plant site resulted in migrational contamination of the Velsicol site and its environs. The Velsicol property has to some extent served to protect Berry's Creek from contamination by soaking up mercury being discharged onto the Velsicol property from the Ventron plant site.

> Q. Is it generally true that the Velsicol property to the extent that it is exposed to surface or ground water flow containing any degree of concentration of mercury serves somewhat as a sponge and it takes up the mercury.

A. That's correct.

(Dr. Stopford, 8/23/78, T133-11 to 16).

In December of 1972 or January of 1973 Bernstein decided that the business should be sold (Bernstein, 9/21/78, T61-10 to 17). He communicated that opinion to defendant Ventron's Lauenstein, Boyer, Zolner and Politcheck (Bernstein, 9/21/78, T61-21 to 24). In December of 1972 there was a meeting on this topic (Bernstein, 9/21/78, T62-15 to 17). In February of 1973 Bernstein had a discussion about the sale with Lauenstein. (Bernstein, 9/21/78, T62-21 to 25). Bernstein recommended to Lauenstein that Ventron divide the assets of WRCC into three distinct areas and dispose of each differently: (1) the business be sold to a competitor; (2) sale of the real estate; and (3) take some equipment for Ventron's use. (Bernstein, 9/21/78, T71-18 to T72-16). Lauenstein gave Bernstein the responsibility for selling the business entity; Bob Petersen and Bernstein were given the responsibility for selling the real estate along with Derderian who had the ultimate decision (Bernstein, 9/21/78, T73-23 to T74-16). Bernstein and Petersen had joint responsibility for the disposition of the equipment (Bernstein, 9/21/78, T74-12 to 16).

In December of 1973, prior to the sale of the real estate, defendant Ventron sold the mercury business of defendant WRCC to the Troy Chemical Co. (Bernstein, 9/26/78, T2-20 to 23; T5-2 to 6). Troy Chemical purchased the name of WRCC, WRCC's customer list, WRCC's technology for the manufacture of WRCC's products which included WRCC's equipment. (Bernstein, 9/26/78, T3-1 to 6). All the plant production prior to plant shut down and subsequent to the Troy Chemical agreement, was for the account of Troy Chemical. (Bernstein,

9/26/78, T11-1 to 7). It was agreed between Troy Chemical and defendant Ventron that, when the real estate was sold, production would cease and all the equipment would be transferred to Troy Chemical. (Bernstein, 9/26/78, T11-8 to 16). In January of 1974 the defendant Robert Wolf had discussions with defendant Ventron's Derderian wherein he expressed an interest in purchasing the 7-acre tract. (Derderian, 9/17/78, T34-1 to T35-22). On February 4, 1974 the defendant Robert Wolf met with defendant Ventron's Derderian at defendant Ventron's offices in Beverly, Massachusetts (Derderian, 9/17/78, T36-1 to T39-14). A purchase option agreement was executed. (Derderian, 9/17/78, T40-5 to 9). During the discussions of February 4th, the topic of mercury was discussed (Derderian, 9/17/78, T44-1 to T51-25).

Production at the WRCC plant ceased in the latter half of March of 1974 (Derderian, 9/12/78, T39-19 to 24). By letter dated April 19, 1974 the defendants Wolf exercised their option under the purchase option agreement (H-33). On or about May 20, 1974 the closing occurred on the defendants Wolf purchase whereby defendants Wolf paid $630,000.00 for the 7-acre tract as is (H-34). On or about June 15, 1974 the defendant WRCC merged into defendant Ventron with the defendant Ventron agreeing to assume all the liabilities of the defendant WRCC (P-1079).

On June 7, 1974 the State's David Longstreet reported to the plant site to investigate a "pollution incident" and found a series of buildings in various stages of demolition, containers of various materials, "piles of material at various locations" and "water flowing over the site." (Longstreet, 6/20/78, T112-19 to T113-15). It was further observed by

Mr. Longstreet that water was moving over the site's surface onto the Velsicol property and through the existing drainage system to Berry's Creek.

Following the Wolf purchase contaminated soil was piled on the Wolf site without any protective covering thereby allowing for the contaminants to be transported by air and storm water to the Velsicol property (Longstreet, 8/24/78, T134-20 to T136-7).

Dr. Stopford testified that precautions should have been taken in connection with the demolition of the buildings on the Wolf property. (Stopford, 8/23/78, T112-12 to 23). In Dr. Stopford's expert opinion, the surface discharge of mercury during demolition/construction would have gone through the Velsicol property to Berry's Creek through the drainage system and to the extent the surface water percolated through the soil the mercury would be filtered out by the Velsicol property. ('opford, 8/23/78, T112-25 to T116-19; T117-9 to 16). The adverse environmental impact of the construction activity on the Wolf property was minimized by the sponge effect of the Velsicol tract on the mercury discharged. (Stopford, 8/23/78, T133-17 to 24).

The defendant U.S. Life Insurance Company ("U.S. Life") participated in the financing of the construction by the defendants Wolf taking title to a portion of the site as security and leasing it to defendants Wolf. Wolf, on January 10, 1975 agreed with the DEP that he would supply the DEP with the details of his proposed containment system for the contaminated soil consisting essentially of entombment of the soil under one of the two buildings on site, and enter into a formal written agreement with the DEP as to said construction before work commenced at the site. (Longstreet, 6/27/78, T90-2 to 9, T96-4). The

development of the site continued without such a written agreement (Longstreet, 6/27/78, T97-19 to 22) and on August 5, 1975 the DEP notified Wolf that he was in breach of his agreement. (P-1199). The DEP sought this agreement to prevent the spread of the contamination of developmental activity:

> we are interested in knowing how the soil was going to be removed, what would take place during the removal to prevent any runoff from the property. When you disturb the soil, you can release this material, and that was part of our concern.

(Longstreet, 6/27/78, T103-4 to 9).

The State, although alerted to the fact that the Wolf containment system was suspect, allowed the Wolf construction to proceed without performing any tests on the bottom of the containment system, the meadowmat, to determinate if it was impervious. (Longstreet, 8/24/78, T127-10 to 17). The State also permitted the demolition and excavation take place without continued State supervision. (Longstreet, 8/24/78, T137-16 to 19).

The State's expert, Dr. McCormick, testified that the Wolf containment system is not functioning as intended and is a source of mercury contamination (S-22, page 91). This is indicated by: (1) organic mercury in WI (inside foundation of building) and the dissolved mercury in WS and WE; and (2) absence of dissolved mercury in the other wells located on defendant Velsicol's property (McCormick, 8/16/78, T71-21 to T72-4). The source of the dissolved mercury, the containment system, is indicated by the gradient of concentration between the well inside the building (WI) and Wells "S" and "E". (McCormick, 8/16/78, T72-18 to

23). There is a concentration gradient of 125 ppb inside the building and 3.9 outside (McCormick, 8/16/78, T80-19 to T81-10).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PIERCING THE CORPORATE VEIL OF DEFENDANT WRCC AND IMPOSING LIABILITY ON DEFENDANT VELSICOL

I. VELSICOL'S FACTUAL ANALYSIS OF INVOLVEMENT WITH WRCC

WRCC was incorporated under the laws of the State of Nevada on or about June 13, 1960 as a wholly-owned subsidiary of Velsicol (P-529; P-526). On June 30, 1960 WRCC purchased certain of the assets of F.W. Berk & Co., Inc. which thereafter dissolved (P-513; P-514; P-517; P-519, P-524). In February, 1968 Velsicol sold WRCC to Ventron (P-756) and on or about June 15, 1974 WRCC merged into Ventron.

Velsicol's business is and was the manufacturing of hydrocarbon resins and benzoic acid and derivatives of benzoic acid (Vel-Da-Vol.2, Kirk, Dep.T7-11 to 21) which was totally dissimilar from and unrelated to the mercury processing of the WRCC plant. Velsicol lacked any expertise in the mercury processing business.

WRCC was incorporated by Velsicol for the purpose of operating the mercury business, a business in which defendant Velsicol had no prior expertise (Vel-Da-Vol.2, Kirk, Dep.T19-14 to 21) and the formalities for such incorporation were scrupulously followed. WRCC acquired a portion of the assets of Berk, not its stock (Vel-Da-Vol.2, Kirk, Dep.T20-3 to 7). During the course of negotiations for the purchase of the Berk assets, Berk assured Velsicol and WRCC that there was no mercury pollution problem of any kind at the site (VelDa-Vol.2, Kirk, Dep.T52-2 to T54-7). There is no State inspection report which reflects that this representation was not true.

For the Velsicol period of ownership the Directors of WRCC were all Velsicol personnel (Vel-Da-Vol.2, Kirk, Dep. T17-21 to T18-13). John Kirk was a Director and Vice-President of Velsicol and WRCC during the period of Velsicol's ownership. (Vel-Da-Vol.2, Kirk, Dep. T5-25 to T6-14). WRCC had monthly Board meetings in Chicago at which the general manager of WRCC, who was never a Velsicol employee, reported to the WRCC Board (Vel-Da-Vol.2, Kirk, Dep. T41-6 to 12; T41-13 to 21). The purpose of the WRCC Board meetings was to review financial results and major problem areas rather than day-to-day plant activities (Vel-Da-Vol.2, Kirk, Dep.T42-8 to 14); annually the Board, consistent with normal corporate practice, approved officers' salaries and the WRCC budget, (Vel-Da-Vol.2, Kirk, Dep.T16-18 to 23; T42-22 to T43-4), which essentially were the only matters requiring WRCC Board approval (Vel-Da-Vol.2, Kirk, Dep.T18-14 to 16). The WRCC Board did not play a role in the selection of WRCC's customers or the products it manufactured (Vel.-Da-Vol.2, Kirk, Dep.T43-7 to T43-12) and the WRCC Board never told WRCC's general manager to take any particular course of action relative to plant operations. (Vel.-Da-Vol.2, Kirk, Dep.T42-15 to 18). The WRCC Board was not Velsicol.

In connection with WRCC's acquisition of Berk's assets, WRCC retained certain of the operational staff of Berk due to Velsicol's lack of experience with mercury. (Vel-Da-Vol.2, Kirk, Dep.T27-5 to T28-1). Bill Taylor, who was general manager under Berk, served WRCC in the same capacity as he had Berk (Vel-Da-Vol.2, Kirk, Dep.T23-9 to 11; T28-16 to 23). John Bratt, another former Berk employee, was employed by WRCC as its plant manager (Vel.-Da-Vol.2, Kirk, Dep.T29-2

to T3l-7) and took over as general manager when Bill Taylor ceased to serve that function several years later. (Vel-Da-Vol.2, Kirk, Dep.T4l-l8 to 2l). Ed Clark, a former employee of Berk, was hired by WRCC as production manager. (Cadmus, l0/l2/78, T94-4 to T95-2). John Hoffman, a former Berk employee, was hired by WRCC and had plant operating responsibilities. (Vel-Da-Vol.2, Kirk, Dep.T32-l7 to T33-4). The plant clearly was operated by former Berk personnel.

Eugene Cadmus, also a former Berk employee, continued on as an employee of WRCC (Vel-Da-Vol.2, Kirk, Dep.T33-5 to l0). Cadmus, under the Velsicol years, was in charge of quality control of WRCC (Cadmus, l0/l2/78, T33-6 to 9);[18] he had several WRCC lab technicians who reported directly to him (Cadmus, l0/l2/78 T92-33 to T93-3) and he reported directly to Ed Clark and John Bratt (Cadmus, l0/l2/78, T33-ll to l3; T95-3 to l2). The day-to-day quality control records were maintained by WRCC's in-plant personnel. (Cadmus, l0/l2/78, T33-l4 to l6). Bratt was Cadmus' immediate supervisor throughout the Velsicol ownership period. (Cadmus, l0/l2/78, T93-22 to 25). The major customers of Berk and WRCC under Velsicol and Ventron ownership remained essentially the same. (Cadmus, l0/l2/78, T97-24 to T98-5). Velsicol had WRCC manufacture a couple of products for Velsicol on a fee basis just like any other customers of WRCC (Vel-Da-Vol.2, Kirk, Dep.T40-l2 to T44-23). Of necessity, the insignificant amount of Velsicol products manufactured by WRCC were manufactured pursuant to quality control specifications and analytical procedures which originated in Chicago

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[18]The trial court in its Opinion had suggested that Velsicol was in charge of quality control which is patently incorrect.

(Cadmus, 10/12/78, T33-23 to 25),[19] but as to products not manufactured for Velsicol, Velsicol was not involved. (Cadmus, 10/12/78, T37-22 to T38-3). This practice was perfectly normal and consistent with the handling of other customers.

From 1960 to 1968, no individuals were employed by both Velsicol and WRCC (Vel-Da-Vol.2, Kirk Dep.T38-11 to 17); Velsicol employees who held office and/or served on the WRCC Board did so without compensation by WRCC. Velsicol, due to the fact it lacked experience in the mercury business, relied on the former Berk operational personnel who had experience and were hired by WRCC, not Velsicol, for that reason. (Vel-Da-Vol.2, Kirk, Dep.T15-22 to T16-10; T27-5 to T28-1).

During the Velsicol period of ownership, the identity and number of officers of WRCC varied. During that time period George Taylor, John Bratt and Ed Clark served as officers of WRCC and each had formerly been employed by defendant Berk and was never in the employ of defendant Velsicol. To the extent that any Velsicol employee served as an officer, he did so without compensation by defendant WRCC. Messrs. Taylor, Bratt and Clark were the officers who were directly in charge of the day-to-day operations of WRCC and they were compensated by WRCC. The initial slate of officers of WRCC were: George Taylor (Pres.); John Bratt (V.P.); Ed Clark (V.P.); H.W. Ward (Treas. & Asst. Sec); J.B. Navarre (Sec. & Asst Treas) and Nelson Block (Asst. Sec); (H-36; Bd. Mtgs. of 6/14/60; 12/7/60 and 3/14/61). Only Mr. Block had any association with defendant Velsicol; the others

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[19] The trial court's finding of Velsicol control over quality control perhaps is a reference to quality control relative to products manufactured by defendant WRCC for sale to Velsicol which is the control that any customer would have.

never were employed by, or held an office of any kind for, defendant Velsicol. Messrs. Bratt and Clark continued to serve as officers of WRCC even after WRCC had been purchased by defendant Ventron (H-36). Until May of 1964 the number of officers of WRCC who were not also employees of defendant Velsicol equaled or exceeded those who were and throughout the period of Velsicol ownership the officers who were compensated were not employees of defendant Velsicol and were, in fact, former employees of defendant Berk (H-36). The salaries of the officers were quite properly fixed by the Board of Directors of WRCC (H-36), which is consistent with the Board's legal responsibilities. See: N.J.S.A. 14A:6-1; Eliasberg v. Standard Oil Co., 23 N.J.Super. 431 (Ch. 1952), aff'd, 12 N.J. 469 (1953). It was the Board of Directors of WRCC which approved major capital expenditures of WRCC (H36), and such action is also perfectly proper.

Velsicol had a profit plan and WRCC had a thrift plan; Velsicol's plan was non-contributory while WRCC's was contributory. (Vel-Da-Vol.2, Kirk, Dep.T140-22 to T142-3).

WRCC had its own accounting department which furnished the WRCC Board with financial summaries which is consistent with normal corporate practice (Vel-Da-Vol.2, Kirk, Dep.T37-18 to 22; P-568); to the extent that Velsicol may have assisted WRCC with any of its accounting, it did so on a fee basis (Vel-Da-Vol.2, Kirk, Dep.T38-1 to 7). All WRCC plant accountings have always been performed at Wood Ridge. (P-568). The only apparent involvement of Velsicol with WRCC's accounting procedures was that in or about January, 1967 the accounts receivable accounting to some extent were transferred to Chicago and

performed on a fee basis by Velsicol personnel (P-627); this was approximately one year prior to the sale of WRCC to Ventron. Mr. Navarre, who had no connection with defendant Velsicol, served as WRCC's accountant from 1961 through 1968, when Ventron took over (Cadmus, 10/12/78, T90-14 to T91-21). A Mr. Thomas and a Mr. Moss, both employees of WRCC, worked with Mr. Navarre in WRCC's accounting department. (Cadmus, 10/12/78, T90-18 to 24; T92-1 to 14). George Thomas joined WRCC in December, 1966 having previously worked as an accountant for A.D. Smith Mfg. Co., H. Scholtenfels, Inc. and J.H. Cooney, Inc. (P-568, at 40). As of June, 1967 he was WRCC's chief accountant (P-568 at 40) and he continued to work for WRCC after Ventron had taken over, clearly reflecting that he was not an arm of Velsicol control (H-36). It would appear that Mr. Moss joined the WRCC accounting department in February of 1965 (P-594)

It is interesting to note that in the Arthur Andersen Report (P-568) which was prepared at the behest of defendant Ventron in connection with its extensive pre-purchase investigation of defendant WRCC, it lists "key management personnel" of defendant WRCC, none of whom were ever employed by defendant Velsicol; five had been employed by defendant Berk and all of them, except George Taylor, continued to work for defendant WRCC after the defendant Ventron's purchase. Clearly, this does not bespeak Velsicol's control over the day-to-day operations of defendant WRCC. Morever, it is unlikely that defendant Ventron would have purchased defendant WRCC, if the operational personnel were Velsicol employees.

In the 1970's, after Velsicol had sold WRCC to Ventron, environmentalists became increasingly aware of the environmental impact of

mercury. During the Velsicol years, the indisputable fact is that mercury pollution was not specifically earmarked as a pollution problem at the WRCC plant and the State's concern during those years was exclusively in the area of traditional sewerage treatment.

To the extent that WRCC (Velsicol) had any water pollution problems, the problems were not related to mercury. (Vel-Da-Vol.2, Kirk, Dep.T109-3 to T111-15). There was an instance when the State was concerned about a high biological oxygen demand (BOD) due to the presence of nitrates in the effluent and WRCC worked with the State to resolve this problem (Vel-Da-Vol.2, Kirk, Dep.T50-8 to T53-2). During Velsicol's involvement, the State had an inspector at the plant regularly and WRCC's John Bratt, not employed by Velsicol, had the responsibility of resolving pollution problems as they arose (Vel-Da-Vol.2 Kirk, Dep.T50-2 to T52-1). When necessary, pollution expenditures unrelated to mercury were made by WRCC during the period of Velsicol ownership (Vel-Da-Vol.2, Kirk, Dep.T50-2 to 7).

There did not exist among the State surveillance reports at the time of WRCC's asset purchase any reference to the presence of mercury in the plant effluent (H-40). In connection with this knowledge issue it is interesting to note that Velsicol relied upon a State surveillance report received prior to purchasing Berk's assets wherein the State with all its expertise stated that there was no mercury being discharged in Berk's effluent. Prior to the WRCC transaction, Berk had given Velsicol (P-660) a copy of the State's inspection report of February 4, 1960 (N-20) and the State's transmittal letter of March 4, 1960 (N-41) The report expressly stated that the State found no mercury in Berk's effluent: "Toxic mercuric compounds were absent from all three

individual effluents [Bldgs. 9, 13 and 18] and from the combined effluent" (N-20, page 3). The transmittal letter of the State placed particular emphasis on the fact that mercury was not found in the plant effluent: "Toxic mercury compounds were absent". (N-41, para. 2). This report was relied upon by Velsicol, it supported Berk's claim that there was no mercury problem and supports Velsicol's contention that it did not know that the plant operations involved the discharge of mercury. Perhaps it was discharging mercury but it was not known to Berk, WRCC, Velsicol or the State at that time. Approximately six months after WRCC purchased the Berk business, the State did an inspection of the WRCC effluent and, under spectrographic analysis discovered traces of aluminum, copper, lead, silica and tin, but no mercury. (N-29). Such reports by the State are indicative of the lack of awareness of any mercury problem by all the parties involved. The State's argument, if indeed it makes the argument, that Velsicol knew of a mercury problem at WRCC is clearly belied by the State's own reports and the State's own ignorance of the problem if, in fact, such a problem existed. If the State's periodic inspections of WRCC's operations did not detect the problem, how could Velsicol discover it from its headquarters in Chicago and favorable State reports. There is no reference to the presence of mercury in the plant effluent of Berk or WRCC (Velsicol) in any State inspection report covering the period of those operations. From at least as early as 1956 through February, 1968, the State monitored, sampled, and analyzed the effluent of Berk with no finding of or caution about mercury in the effluent, but instead, expressed concern about such traditionally sewerage system concerns as BOD, turbidity, Ph, etc.

The State admitted early on in this litigation in response to written interrogatories that the State had no documentary evidence of mercury discharged from the 7-acre plant site (the present Wolf property) during the period that WRCC operated the plant under Velsicol's ownership:

> Question 227: The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of mercury.
>
> Answer: Admitted.
>
> Question 228: The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of any of the hazardous substances which are the basis for plaintiff's action herein.
>
> Answer: Admitted.

During the Velsicol years the oral reports from WRCC's general managers were that the State inspectors had found no mercury pollution (Vel-Da-Vol.2, Kirk Dep. T53-4 to 10) and the WRCC Board was assured that:

> all of the waters, wash waters, cleanup waters when they scrubbed the floors down, went to a pit, where it, the mercury, was precipitated to settle down, and periodically the muds from the pit were taken out and put through a recovery process to recover the mercury values, and they told us that based on their analytical work, and the analytical work of the State inspector, that these pits recovered all the mercury that was lost, and that none was going out of the plant.

(Vel-Da-Vol.2, Kirk, Dep.T53-13 to T54-3). This is consistant with the State's own records. As far as the WRCC Board was concerned, mercury pollution was not a problem and the same can be said for the plant

personnel of WRCC and the State's environmental personnel. Awareness of the problem, assuming it existed, was irrefutably nil on the part of all the parties involved, including the State.

Neither the defendant Velsicol, nor the defendant WRCC Board had direct contact with the State or federal regulatory agencies. (Vel-Da-Vol. 2, Kirk, Dep.T55-15 to 18). Nothing was ever submitted to the WRCC Board by federal or State agencies during the period of 1960-68 concerning pollution or pollution control at WRCC. (Vel-Da-Vol.2, Kirk, Dep.T55-19 to 24).

Velsicol had no knowledge regarding WRCC's utilization of the adjoining vacant property as a dump site for some of its waste and/or by-products (Vel-Da-Vol.2, Kirk Dep.T58-13 to 20), neither did the State's surveillance team. As far as Velsicol knew, WRCC had no materials to dump. (Vel-Da-Vol.2, Kirk, Dep.T59-6 to 9). The general manager of WRCC was responsible for and in charge of the adjoining vacant landfill during Velsicol's ownership of WRCC. (Vel-Da-Vol.2, Kirk, Dep.T59-13 to 16).

Velsicol never became aware of any mercury soil contamination (Vel-Da-Vol.2, Kirk, Dep.T65-16 to 21) and the reports to the WRCC Board from operational personnel indicated that there was no problem of that type. (Vel-Da-Vol.2, Kirk, Dep.T66-6 to 16). There is nothing in the State's inspection reports to suggest to the contrary. Velsicol was not aware of any soil tests or ground water tests by WRCC during the period of Velsicol's ownership and the State's records do not reflect or indicate any such tests. (Vel-Da-Vol.2, Kirk, Dep.T66-17 to 23).

During the period of Velsicol's ownership, WRCC had two outside consulting firms, Edward R. Grich, Inc. and Bogert Associates, study-

ing the plant's effluent and attempting to devise a treatment geared to admission of the effluent to a local sewerage treatment plant. (Cadmus, 10/16/78, T43-16 to 24). Again, the concern at that time was strictly in terms of traditional sewerage pre-treatment and not mercury and, therefore, the sampling and analysis by these consultants did not concern mercury during the Velsicol years. (N-18; S-42; Cadmus, 10/19/78, T52-9 to T54-19).

About a year before WRCC was sold to Ventron, Velsicol reached the conclusion that WRCC was not going to attain the growth in the business that originally had been contemplated when Velsicol incorporated WRCC and WRCC purchased the assets of Berk (Vel-Da-Vol.2, Kirk, Dep.T46-9 to 16). WRCC simply did not perform up to expectation; WRCC's sales and profits did not increase despite the WRCC Board's encouragement. (Vel-Da-Vol.2, Kirk, Dep.T48-10 to 21). Velsicol, as 100% owner of WRCC, thought it could realize a better return of its investment elsewhere and looked to sell the corporation. (Vel-Da-Vol.2, Kirk, Dep.T48-22 to T49-1). Pollution problems and/or regulation had nothing whatsoever to do with Velsicol's decision to sell. (Vel-Da-Vol.2, Kirk, Dep.T152-22 to 23). In this regard, it should be noted that there was no State or federal inspection report issued prior to Ventron's acquisition of WRCC wherein mercury was cited by the State or federal government as a source of pollution.

The Ventron/Velsicol negotiations relative to the sale of WRCC transpired over a period of six to eight months. (Vel-Da-Vol.2, Kirk, Dep.T46-18 to 20). Ventron did not enter into its agreement to purchase WRCC until every aspect of WRCC's operations had been thoroughly scrutinized, including pollution problems, and the detail of this survey

is best illustrated by quoting the following lengthy request for information contained in Ventron's letter of June 23, 1967, approximately seven months prior to closing the transaction (N-11):

> Ventron's purchase of Wood Ridge will be a major undertaking for us, to be executed only after a careful evaluation of the business. Essentially, we want to learn just as much as we possibly can before making the move. Following is a schedule of specific additional imput that we feel would answer our questions:
>
> 1. General:
>
> A. We must arrange to meet the key people at P.R. Mallory and evaluate our prospects there. To avoid any unnecessary disturbance, this can be scheduled as the very last undertaking, but must be done. It seems to me that we could jointly approach Mallory with the thought that a Ventron/Wood Ridge merger makes more economic sense with out two companies involved in inorganics and metals and point out to them all the other pluses in such a deal. We can point out that Ventron is seeking Wood Ridge from you providing there is no reason to expect that Mallory contemplates any change that would negatively affect this business.
>
> B. Facilities:
>
> 1. Copy of American Appraisal Co.'s report of 1960-61.
>
> 2. Permission for Frank H. Wilson, our Chief Engineer, and a consultant of his choice to go over that report, maintenance records and the existing facilities carefully.
>
> C. Other Assets:
>
> We shall examine patents; technical developments to date, especially the new mercuric oxide red processes. (We will be willing to sign secrecy agreements).
>
> D. People:
>
> The Wood Ridge General Manager and Technical Manager should come here to visit Ventron and then some of our people would go to Wood

Ridge to meet the rest of the Wood Ridge management.

E. Contracts:

Copies of all existing contracts should be made available for examination. This should cover employment, union (including up-dates on existing negotiations), purchases, sales, leases and so forth.

F. A copy of the Charles H. Kline & Co., Inc. report.

G. An agreement providing for continuing sales and terminating services to Velsicol for five years, giving full effect to provision No. 3 of the proposal, of course, and providing for a reasonable profit thereafter.

2. Financial:

A. An audit prepared by Arthur Andersen and Company with full access to their working papers generated in work they have done for Wood Ridge in the past. Much of the following will probably be available to Arthur Andersen and covered in their audit, but in the event some of it is outside the scope of their efforts, we would like to know about it.

B. As complete a picture as possible of mercury trading activities in the past five years.

C. Guarantees of accounts receivable, accounts payable as well as all prepaids and customer advances and also of all Federal and New Jersey tax returns from the date of the last Revenue examinations. Along this line, we should also be aware of any warranties that you may be liable under the guarantees against loss up to the time we take over.

D. Any cash, profit plan, etc., forecast that may be available.

E. List of various insurance carriers - compensation, liability, fire, etc., and permission to talk with them and get any recommendations they have concerning improvements of safety, rates, etc.

F. Whatever additional information may be necessary to understand fully where profits come from.

3. Marketing:

A. Meet Sales Manager and his people.

B. Account Analysis:

1. Number of customers each year over last three years.

2. Names and records of all customers accounting for more than $5,000 in sales per year over the last three years.

C. Records of product mix over the past four years.

D. Any forecasts - sales, customers, product mix, etc.

This does not appear to me to be very difficult and I believe that Arthur Andersen can develop in the course of the audit many of the requested items, and Jack Curtis and Bill Zolner, our Treasurer, can dig out the balance in several days at Wood Ridge. Another couple of days of meeting people and examining facilities and then if in accord to that point, a day or so at Mallory should be the total extent of the time requested.

Obvio' 'y, Ventron's investigation of WRCC was exhaustive and by the time of purchase, defendant Ventron was very familiar with even the smallest detail of WRCC's operation. Ventron did not insist then that Velsicol indemnify WRCC or Ventron for liability arising out of prior conduct of Velsicol; nor did Ventron secure an agreement from Velsicol that it would be liable for WRCC for the period of Velsicol ownership. Instead, Ventron purchased WRCC with full knowledge of its assets and liabilities with WRCC remaining liable for any prior conduct. Presumably, the purchase price would have been higher if Velsicol was to assume some liability of WRCC for its ownership years. The trial court, for "public policy" reasons, altered the terms of the sale agreement by imposing on defendant Velsicol liability for defendant WRCC, but gratuitously neglected to provide any additional compensations to Velsicol on the stock sale.

The extent of the Velsicol disclosures to Ventron were so complete that on July 11, 1967 Velsicol and Ventron entered into a Secrecy Agreement so that Ventron could have access to even confidential matters of WRCC. (P-756, Art. 10(a), Vel-Da-Vol.2, Kirk, Dep.T64-6 to 7). Velsicol, thereafter, permitted Ventron total access to any information it desired (Vel-Da-Vol.2, Kirk Dep.T46-21 to T47-1).

> Full access during normal business hours from the date hereof to the Closing Date to all of the plants, offices, properties, books, contracts and records of Wood Ridge, it being understood that all information obtained by Ventron pertaining to the business and properties of Wood Ridge... (P-756, Art. IV, 4(a)).

In connection with Ventron's intensive pre-purchase investigation of WRCC (N-11), the independent public accounting firm of Arthur Andersen & Co. was retained at Ventron's request (N-12) to render an overall report on the condition and history of WRCC as of July 31, 1967 and this report revealed to Ventron the total picture of WRCC. The report of this highly regarded accounting firm notes that WRCC "is a separate entity having its own sales, production and accounting functions" (P-568). Ventron acknowledges receipt of the Arthur Andersen report in the stock purchase agreement (P-756, Art. I(1)(d)) and Ventron's letter of November 24, 1967 (N-13).

Ventron argued in its letter of November 24, 1967 (N-13) that Ventron's offer to purchase WRCC is a reasonable one in light of "the potential costs of tighter control on air and water pollution on which Ventron's people have spent considerable time". It is clear that Ventron bought WRCC with full knowledge of potential pollution problems and made a lower offer because of that projected and anticipated expense.

In a letter dated January 3, 1968 (N-14) Ventron's Lauwenstein made his final offer and persisted in utilizing the anticipated costs of pollution control as a strong Ventron bargaining point:

> My letter of November 24, like this one, was written as you requested, telling you what Wood Ridge appears to be worth to us rather than as a basis from which to begin haggling. I realize that the figures in both letters are low in relation to book value and past earnings. Initially, as you know, we thought it would be worth more to us. But considering the potential reduction in the Mallory business, the potential expenses involved in pollution control and safety programs, the outlook for mercurials, and the amount of management attention which will be required, we are definitely not interested in Wood Ridge at a higher price. (Emphasis added).

During the course of Ventron's pre-purchase investigation of WRCC, Ventron personnel went to Wood Ridge and discussed the plant operations with WRCC employees such as Eugene Cadmus. (Cadmus, 10/12/78, T86-9 to T88-19). It is extremely inportant to note that there is nothing to indicate that mercury pollution was a problem; the discussions related to traditional sewerage treatment.

In the stock purchase agreement between Velsicol and Ventron dated February 1, 1968 (P-756), Schedule "A" entitled "Material Litigation", expressly advises Ventron that WRCC is subject to federal, state and local laws and regulations designed for "the prevention and control of environmental pollution, which the parties have previously discussed." This schedule goes on to state that "Velsicol expressly disclaims any warranty that operation of the Wood Ridge plant will not at some time entail alterations or other steps to comply with applicable federal, state or local laws and regulations." This, as stated, was well known to Ventron which used such exposure to whittle down the purchase price and fully assumed all future liability. Ventron, presumably

with knowledge of its significance, elected to purchase the stock of WRCC rather than merely its assets.

When defendant Ventron acquired defendant WRCC from defendant Velsicol, the defendant Ventron claims it anticipated that there would be some soil contamination in precisely the amount ultimately discovered and willingly assumed full responsibility for whatever was there. Witness the following trial testimony from Ventron's Derderian:

> Q. Now was it not your testimony that during your tenure as general manager for the chemical plants in Massachusetts that it came to your attention directly or indirectly that during the day-to-day operations of the plant there were occasions when chemical product would spill or in some fashion get into the soil?
>
> A. That is correct.
>
> Q. And you were aware of that.
>
> A. Yes, I was.
>
> Q. And you were aware of that while you were engaged in the peformance of your job as general manager.
>
> A. Yes, sir.
>
> Q. That would have been prior to 1962 then when you terminated that function.
>
> A. Yes, sir.
>
> Q. So at the time you executed, and you did execute the purchase agreement on behalf of Ventron in February, 1968, you had a general awareness, I believe your testimony was, that a chemical processing plant in your opinion, rightly or wrongly, would result in some disposition of the chemical product being used or manufactured into the soil.
>
> A. That is correct."

(Derderian, 9/18/78, T47-5 to T48-1)

* * *

Q. When you executed the purchase agreement on behalf of Ventron in February, 1968, you had an understanding or a belief at least that there was some mercury in the soil at the plant site. Am I correct on that?

* * *

Q. Based upon your prior experience as general manager of the Massachusetts operations.

A. An understanding, I don't know what that means.

THE COURT: Mr. Neary I think was very careful to avoid any comment about quantum or any question of contamination. Did you anticipate when you acquired the Wood Ridge operation that there would be some mercury in the soil?

THE WITNESS: I never gave it much thought. I cannot recollect.

Q. You have already testified that prior to February, 1968 it was your general understanding based upon your experience as a general manager of the Ventron Chemical plant operations in Massachusetts that if you had a chemical processing operation you were going to get some of the chemical in the soil.

A. That is correct.

Q. I assume that at the time you executed the purchase agreement your opinion had not changed.

A. No one asked me for that opinion.

Q. My question is this:

THE COURT: Did it change?

THE WITNESS: No sir.

THE COURT: Mr. Neary.

Q. When you first had the opportunity to review the Metcalf and Eddy and the Craig Laboratory reports, that was the point in time, am I correct,

when you first became aware to some extent of the quantities of mercury that were in the soil at the plant site?

A. That is correct.

* * *

Q. You refer, Mr. Derderian, at page 208 [of his deposition] to the Metcalf & Eddy report having confirmed your prior perception as to the percent of mercury in the soil at the Wood-Ridge Chemical Corporation plant site. Can you tell us what that perception was and when you formulated it?

A. As I have testified earlier, generally speaking, most chemical plants have some of the product that they are manufacturing if they are in the business long enough, some of it is in the ground. And --

Q. May I interrupt you then? In response to my question as to when you formulated that perception, it would have been prior to 1962 when you terminated your involvement with the plant operations.

THE COURT: No, that is not fair. He could not make a perception about the Ventron property before they acquired it. Maybe the knowledge was acquired, but why don't we let him answer the question and we will see where we are going.

A. My perception is that any soil that contains some chemical from a chemical processing plant must contain some of that product which is in an amount greater than would be present in its natural state if that plant site had not been operating on that particular site.

A. That when I referred to or had made references to possible soil contamination what I am saying, at least from my perception is that there is a greater amount and if we are specific about this particular site there would be a greater amount of mercury in the soil in there, whenever I said that, then there would have been 200 years earlier.

* * *

THE COURT: Had you thought about it or raised that perception with any other individual in Ventron or any other individual involved in this litigation after 1968?

THE WITNESS: Yes. At the time that this technical report came to my attention.

THE COURT: The Metcalf & Eddy report?

THE WITNESS: Yes, sir.

THE COURT: And before that it had not been discussed and perhaps not even thought about. Am I correct?

THE WITNESS: Yes, sir; as far as I am concerned that is a correct statement.

MR. NEARY: Your Honor--

THE COURT: I am not binding you when I say not even thought about. I am referring to his own testimony.

MR. NEARY: I will ask the question.

Q. Mr. Derderian, am I not correct that the factual basis for your perception, whatever it was, to which you make reference in your testimony, were all known to you in February, 1968 when you executed the purchase agreement?

MR. HILL: May I have the question read back.

THE COURT: You knew what the nature of the Wood-Ridge operation was when you bought it.

THE WITNESS: Yes.

THE COURT: And the thought which you formulated concerning the Massachusetts plants of Ventron you had formulated some years before, those opinions.

THE WITNESS: Yes.

THE COURT: And the opinion had not changed.

THE WITNESS: Yes.

THE COURT: Do you want him to make the conclusion?

MR. NEARY: No, your Honor.

THE COURT: Or do you want me to make it?

Q. Getting to the quantities reflected in the Metcalf & Eddy report, those quantities am I correct, you testified again at the bottom of page 208, confirmed

your prior perception.

A. That is correct.

(Derderian, 9/18/78, T56-5 to T64-25). The defendant Ventron thus purchased the Defendant WRCC fully expecting that the soil pollution ultimatelyfound to exist would be there and, despite that, assumed the liability for same.

When the Metcalf and Eddy report (H49) was received by Ventron in 1972 there is nothing in the record which indicates any surprise by Ventron as to the quantity of mercury in the soil as reflected in this report. There is no evidence of outrage against Velsicol or any suggestion that anyone other than WRCC/Ventron was responsible. Throughout the period when WRCC/Ventron pursued the question of leaching of residue in the pipes and soil infiltration there is no evidence that Velsicol was consulted or charged with any responsibility for same. Mr. Derderian's testimony makes it abundantly clear that when Ventron purchased WRCC he knew from past experience that chemical processing plants tend to generate soil contamination and, when he saw the quantity figures in the Metcalf and Eddy report, they confirmed his prior perception. Ventron's Derderian admitted that it was his opinion as general counsel to WRCC that there were no restrictions imposed by law upon WRCC's plant operations insofar as ground contamination was concerned. (Derderian, 9/12/78, T18-7 to 13; Derderian, 9/18/78, T81-4 to 11). Judge Lester obviously disagreed, but clearly Velsicol should not be held accountable for Mr. Derderian's mistake in judgment.

The stock purchase agreement between Velsicol and Ventron (P-756) in Schedule "A", refers to the fact that WRCC is subject to various laws and administrative regulations at various times from federal, state

and local governmental agencies. The only individual whom Ventron produced at trial having any involvement with the purchase of WRCC was Mr. Derderian and he admitted seeing that statement, but disclaimed any knowledge of whether Ventron contacted those agencies. (Derderian, 9/18/78, T53-15 to T54-4).

At no time did Ventron ever seek to rescind or otherwise express any dissatisfaction with the purchase transaction on the basis of Velsicol control, pollution or for any reason whatsoever from the time of purchase to very late in the instant litigation when substitute counsel moved to amend its answer to assert such a claim.

It perhaps is significant to note that WRCC merged into Ventron on June 15, 1974, with Ventron receiving all the assets of WRCC. (P-1079). In doing so, Ventron voluntarily assumed all of WRCC's liability without regard to prior ownership. It is a matter of record that WRCC/Ventron knew that there was some amount of soil infiltration but, more than that, two days prior to the merger Ventron was advised by Mr. Wolf of precisely the problem the DEP found at the site and for which WRCC and Ventron seek, belatedly, to shirk legal responsibility. Mr. Wolf testified as follows:

> Q. When you first learned that there was a problem with mercury in the soil, and I believe you indicated that was by virtue of some conversation with Mr. Longstreet--
>
> A. Yes.
>
> Q. --Did you have any contact immediately thereafter with Ventron?
>
> A. I certainly did.
>
> Q. And whom did you talk to?
>
> A. Mr. Derderian.

Q. What did you say?

A. What was that?

Q. When was it and what was said?

A. Once I found out from Mr. Longstreet what the problems were I immediately called Mr. Derderian and--

MR. HILL: May we fix a date your Honor?

THE COURT: If you can, Mr. Wolf.

THE WITNESS: At the meeting--as a matter of fact, the afternoon of that meeting I had with Mr. Longstreet, which I believe it was June 13.

Q. June 12, 1974 at 8:30, that meeting.

A. Let me look at my diary again to be sure rather than to speculate. The 12th is correct at 8:30.

THE COURT: You said that afternoon you called Mr. Derderian.

THE WITNESS: I most certainly did, sir.

THE COURT: Next question.

Q. What was said?

THE WITNESS: Mr. Neary, there are two women in the room. I can't use the words that I used.

THE COURT: You may, Mr. Wolf and you should. To the best of your ability relate the conversation in the language and in the manner it was then stated.

THE WITNESS: Thank you, your Honor.

THE COURT: You may proceed.

A. Mr. Neary, I asked Mr. Derderian why he had not disclosed to me heretofore that he had problems with DEP, EPA, or any other governmental agency.

His words to me were that there was no reason for him to disclose it because he was not concerned about it. Apparently he was poohpoohing the issue.

I said, Mr. Derderian, I'm not an attorney; apparently you are. But don't you realize that this is a fraud? Don't you realize that you have caused a problem here? We have got to resolve this situation and resolve it now. I know you are obviously in the mercury field directly or indirectly can you assist us in some way, shape or form in resolving the issue?

He said no, there's nothing we can do; but if you would like I can suggest you call Phillips Brothers which is a division of Engelhard Industries.

Q. Was that the end of the conversation?

A. That was the gist of the conversation.

Q. You indicated then to the extent you were complaining, you were complaining that Ventron had not advised you prior to the purchase that they had some problems or dealings with the EPA and the DEP.

A. I will give it to you specifically, sir. When Mr. Longstreet told me that the Ventron Corporation, Wood Ridge Chemical et al knew of the problems, I told Mr. Derderian he had a colossal nerve in not telling us about the problem that he had.

Q. And that problem was what?

A. Contamination of the soil.

Q. And did Mr. Derderian say anything to you concerning his knowledge of the problem with mercury in the soil other than that he did not seem too concerned about it?

A. Other than the fact that he referred me to Phillips Brothers.

Q. Did he indicate one way or the other that he knew that there was a problem with mercury in the soil?

A. He told me that there was a problem but he was minimizing the problem to the point where it was a passing minimal problem.

My words to him were, yes, Mr. Derderian, you may think it is minimal; but I have the EPA, DEP and everybody and his uncle on my back on this thing. I don't think it is minimal at all. Now I've got a problem here and I am going to have to lick it somehow.

(Wolf, 11/6/78, T62-11 to T65-12). This conversation occurred prior to the Ventron merger. Therefore, Ventron assumed full liability for WRCC after the full magnitude of the soil contamination was known with no attempt to limit the assumption of liability or cancel the merger. Obviously, WRCC/Ventron thought it had successfully unloaded the problem on Wolf.

Any suggestion by the State or Ventron/WRCC that Velsicol should be liable for the acts of WRCC seemingly is predicated on an improper exercise of control over WRCC. There is absolutely no factual basis for such assertions.

Both Eugene Cadmus and Harry Pfeiffer, the only two trial witnesses who were employed by both Berk and WRCC, erroneously testified that the plant operated under the name "Wood Ridge Chemical Corp." for approximately two years as a result of a simply change in name with no change in ownership. (Pfeiffer, 6/6/78, T59-4 to 9; Cadmus, 10/16/78, T56- to 13). We do not doubt that that was genuinely how they perceived it to be, but that clearly was not the case because there had been an ownership change; Velsicol was the owner, but the absence of control was such that an ownership change was not apparent to operational personnel. Cadmus did not even know who the officers and directors of WRCC were during the period of Velsicol's ownership. (Cadmus, 10/16/78, T29-12 to 18). There could be no greater proof of a lack of undue control then testimony that, as perceived by WRCC's operational personnel, absolutely no control by Velsicol was observed and this testimony is even more startling when we realize that Eugene Cadmus is now employed by Ventron and was brought to Court to testify on behalf of Ventron and <u>against</u> <u>Velsicol</u> on this very corporate issue. WRCC is

a party to this action duly represented by counsel and, if the very corporation alleged to have been controlled by Velsicol is capable of presenting such a factually weak case despite total access to records and personnel, it is obvious that such control was lacking. In this regard, it should be noted that this is not the traditional contract case or "alter ego" case wherein the party charged (Velsicol) with excessive control has access to the allegedly controlled corporation's (WRCC's) files because WRCC/Ventron, not Velsicol, has the files and therefore, Velsicol was at an obvious disadvantage.

All the corporate formalities were punctiliously complied with by Velsicol as is demonstrated by WRCC corporate minutes for the period of Velsicol's ownership (H-36); there are minutes for each meeting, the meetings actually occurred, were properly conducted, resolutions were properly approved and in their entirety the minutes reflect an on-going recognition of the separateness of WRCC from Velsicol rather than a disregard of WRCC's identity as a subsidiary. These corporate minutes establish that the Velsicol personnel, who served as directors and officers of WRCC, served WRCC in a commendable fashion, in furtherance of the best interests of WRCC and without compensation. The State and Ventron/WRCC improperly construed the actions of these Velsicol individuals who served as directors of WRCC as impermissible, meddling interference or dominance by Velsicol rather than perfectly proper action by members of the Board of WRCC which Board is charged by law to monitor and supervise WRCC in precisely the manner and to exactly the extent that it did. The Board members would have been derelect to have done less. Although it may be convenient to Velsicol's adversaries to equate Velsicol with the Board of Directors of WRCC, it must be noted that there is a legal distinction to be made. There is

nothing improper about Velsicol personnel comprising the Board of Directors of WRCC and, if we agree on that, it is simply ludicrous to suggest that one appointed to the Board of WRCC cannot perform the usual functions of a director without committing some egregious act of fraud; such an argument sanctions and encourages non-feasance of corporate directors and exposes the individual directors (not their employer) to liability to their company.

The Stock Purchase Agreement between Velsicol and Ventron (P-756) is in itself proof positive that WRCC was not a dummy corporation or mere conduit for Velsicol. As stated in the purchase agreement:

(A) WRCC during the period of Velsicol's ownership had its own insurance coverages (Schedule "F"):

(1) Merchandise in Transit:

A. Providence Washington Insurance Co. Policy No. IM 22 34 68 (15%) 6/30/65 to (Continuous until cancelled)

B. Potomac Insurance Company (50%) Policy No. IF 1-036308 3/16/67 to (Continuous until cancelled)

C. Maryland Casualty Company (35%) 3/16/67 to (Continuous until cancelled)

(2) Workmen's Compensation and Outside Salesmen:

A. New Jersey Manufacturers Ins. Co. Policy No. W 409856 9/1/67 to 9/1/68

(3) General Liability and Auto Liability:

A. General Accident Fire and Life Assurance Co., Ltd. Policy No. GLA 36-850-63 10/10/67 to 10/10/68

H. WRCC had approximately seven acres of real estate. (Schedule "B").

I. WRCC had physical inventory which was reviewed by Arthur Andersen & Co. (Art. III).

J. WRCC had working capital (Art. III).

Obviously, WRCC was far from a sham corporation, a mere vehicle or puppet for Velsicol's activities. Ventron, during its intensive investigation of WRCC, would have quickly realized that WRCC had no identity of its own if that were the fact but, instead, Ventron realized that it was an independent corporation with substantial assets and growth potential. Ventron was sufficiently impressed by the identity of WRCC as to agree to purchase the corporation rather than its assets and to continue operating WRCC under that name until it ultimately merged with defendant Ventron. Ventron did not purchase a sham, conduit or instrumentality, although for all intents and purposes Ventron reduced WRCC to precisely that following its purchase. Arthur Andersen & Co. did not find WRCC to be a mere instrumentality either (P-568). In 1966, according to Arthur Andersen & Co., WRCC had cash assets of $155,786, marketable securities valued at $299,510, account receivables of $244,534, an inventory valued at $1.1 million and property, plant and equipment valued at $809,637. (P-568) In 1967, $58,833 in cash, $501,774 in receivables, an inventory valued at $953,764 and property, plant and equipment valued at $764,204. (P-568) As of July 31, 1967 WRCC had four bank accounts: Continental Illinois Bank (Reg. Acct); Manufacturers Hanover Trust Co.; Wood Ridge National Bank; First National City Bank. (P-568). It is also noted in the July, 1967 Arthur Andersen report (P-568) that WRCC had been examined by the Internal Revenue

Service through 1964 (at page 46). As of July, 1967 WRCC had a labor force of 64 individuals and the following management personnel, all of whom except Blalock and Thomas, held management positions with Berk: John Bratt - Vice Pres. and General Manager; Edward Clark - Vice Pres. and Plant Engineer; John Blalock - Sales Manager; John Hoffman - Production Supervisor; Eugene Cadmus - Technical Director; George Thomas - Chief Accountant; Bill Taylor - Dir. of Intercompany Relations. (P-568). Also, as of July, 1967, WRCC had a sales organization comprised of a sales manager, two full time salesmen and one agent (P-568), and in 1965 WRCC had selling expenses of $55,000, in 1966, $72,000 and in the first seven months of 1967, $49,000. Ventron purchased this substantial corporation and took for itself WRCC's substantial assets.

Ventron's Cadmus, testified that to the extent he had any contact with Velsicol personnel, that contact was beneficial to WRCC. (Cadmus, 10/16/ , T31-19 to T33-19). That being so, how can anyone have cause to complain? Certainly, the State and WRCC/Ventron have no legitimate grievance if Velsicol's assistance in marketing, sales or accounting saved money for WRCC. There is no suggestion of commingling or misappropriation, but simply evidence of the typical parent-subsidiary relationship. Moreover, Cadmus denies that he had any communication with Velsicol personnel concerning mercury in the plant effluent. (Cadmus, 10/16/78, T69-7 to T70-14). There is not a shred of evidence that Velsicol or WRCC or the State for that matter were aware of any mercury pollution problem during the period of Velsicol's ownership of WRCC.

The present Velsicol property is a vacant tract of land which has never been the site of a chemical plant (Vel-Dal62) and Velsicol has never held title to what is currently the U.S.Life/Wolf property and formerly was the site of the Berk/WRCC/Ventron chemical plant. The history of ownership of the former plant site, the present Wolf tract, reflects that Velsicol never had a direct ownership interest therein, and is as follows: Prior to 4/20/29 - Eldorado Construction Co. (P-16); 4/20/29 - 12/28/43 - Carlstadt Dev. & Trading Co. (P-18); 12/28/43 - 6/30/60 - F.W. Berk & Co., Inc. (P-19); 6/30/60 - 5/7/74 - WRCC; 5/7/74 - to date - Robert & Rita Wolf

Velsicol acquired its present 33 acres from WRCC on June 28, 1967 (P-24) and the State claims ownership of this property in the matter of "Velsicol Chemical Corporation v. State of New Jersey, Department of Environmental Protection", pending in the Law Division, Bergen County, under Docket No. L-4853-73. Velsicol is contesting the claim and the issue of title was tried before Judge Petrella and is now on appeal.

The first written request of the State issued to Velsicol to abate pollution was the State's Amended Complaint (Vel-Da172) and, when questioned as to why the State was seeking to hold Velsicol liable for the alleged pollution stemming from the defendant Wolf's property, the State indicated that the sole basis for any such liability was the State's misconception that Velsicol was in the chain of title on the Wolf site:

> Interrogatory 12(a): Are you contending in this action to hold Velsicol responsible for deleterious discharges on premises other than premises of which Velsicol currently is record owner?
>
> Answer: Yes.
>
> Interrogatory No. 12(b): If so, identify by lot and block numbers all such premises and the nature of the deleterious substances being discharged?

> Answer: Block 229, Lots 10A and 10B [Wolf/U.S. Life tract].
>
> Interrogatory No. 12(c): State the factual basis for holding Velsicol responsible for deleterious discharges on such premises.
>
> Answer: During the time that Velsicol was the previous owner of the aforementioned property, it conducted activities thereon which contributed to the contamination which is presently resulting in unlawful discharges into the waters of the State.
>
> Interrogatory 12(d): When did you first have knowledge of such discharges on such premises and state the manner in which such information initially was communicated to you and by whom.
>
> Answer: On or about April, 1956 (which is the first dated correspondence presently available to the Department) when the Department of Health was believed to have begun monitoring the site in question.

As shown earlier, Velsicol never owned that property and, therefore, Velsicol can have no liability since that was the State's sole theory of recovery against Velsicol in that regard.

The State makes it quite clear in answering the following Interrogatory that Velsicol liability, if any, is limited to the soil contamination occurring after it acquired ownership in the subject premises and, since it never owned any of the subject properties except for that currently owned and acquired in June, 1967, Velsicol's liability, if any, is confined to contamination of its property (33 acres) after June, 1967:

> Interrogatory 32: Do you in this action seek to hold Velsicol responsible for soil contamination which preceded Velsicol ownership of the premises? If so, state the factual basis for such alleged liability.
>
> Answer: No.

Contamination of the Velsicol property after June, 1967 could have occurred only as the result of WRCC (6/67 to 2/68) or WRCC/Ventron

(2/68 to 5/74) both of whom are party defendants in the within action; there is no evidence of such soil contamination by Velsicol.

If the purport of the "control" theory of the trial judge is to suggest Velsicol knowledge of mercury contamination, there simply is no evidence that Velsicol was aware of any mercury pollution problem. Cadmus never discussed his work on the effluent with John Kirk (Cadmus, 10/16/78, T72-1 to 4). There are absolutely no records relating to the sampling of WRCC's effluent for mercury during the period of Velsicol's ownership. Also, Cadmus, who was at the site on a daily basis during the period of Velsicol's ownership, disclaimed any knowledge of dumping by WRCC on the Velsicol property. (Cadmus, 10/12/78, T78-18 to 25; T79-18 to 23). If Cadmus did not know, Kirk's testimony of a lack of such knowledge is most credible since he was at the site only twice a year. Further in this regard, Cadmus testified that the still residue was tested twice a month and most of the time the test results were negative for mercury and, on those occasions when mercury was discovered in the ash, it was run through the still a second time. (Cadmus, 10/12/78, T81-1 to 3; T81-18 to T82-5). If Cadmus, a chemist fully familiar with plant operations, knew of no mercury in the final ash, certainly Velsicol could not have known. The State certainly never expressed any concern about the ash. Is Velsicol as a stockholder, to be held to a higher standard of knowledge than both WRCC and the State, both of which had constant involvement and greater expertise in the field of mercury?

It is interesting to note that Dr. Joselow, the State's expert, worked at WRCC under the regimes of Velsicol and Ventron and during that period he had a more-than-average awareness of the environmental

hazards of mercury. Despite this "awareness" his written reports, which purport to cover his significant findings and those which he anticipated, make no mention of the danger of soil infiltration of mercury or its potential impact on ground and surface waters. (See Joselow reports, P-502 to P-510; P-502A to P-510A). Dr. Joselow does not even mention the presence of waste piles at the site until his final report of July 8, 1970 (P-510A). (Joselow, 6/13/78, T17-21 to T22-12). At no time did Dr. Joselow take any sludge or water samples. (Joselow, 6/13/78, T41-3 to 11).

The trial court's instrumentality claim against defendant Velsicol mistakenly assumes that a showing of some degree of control per se is sufficient to impose liability. The sale of WRCC to Ventron occurred approximately 8 years prior to suit. The arms-length acquisition of defendant WRCC by the defendant Ventron negates the idea that as of that time the defendant WRCC was merely a shell or sham corporation being manipulated by defendant Velsicol. It was a going concern. The defendant WRCC, after its sale to defendant Ventron, was absorbed by the defendant Ventron with defendant Ventron thereby assuming its liabilities as well as its assets. In the instant action the defendant WRCC has appeared and is defending via joint counsel with defendant Ventron. Any undue control exercised by defendant Velsicol at some point in time prior to selling defendant WRCC is totally irrelevant to the State's case. How has the State been harmed by such control? The allegations of undue control have no relationship to the plaintiff's pollution case. Accordingly, under the facts of the instant case, where the subsidiary, defendant WRCC, during defendant Velsicol's ownership was adequately capitalized, fully solvent and an ongoing entity, it is inappropriate

to pierce the corporate veil and the legal discussion to follow amply supports that contention.

The plaintiff State argues that defendant Velsicol is liable for WRCC for the period of its ownership interest as if to suggest to the court that some attempt would be made to apportion or allocate the damages (condition of pollution). The State made no such attempt to allocate damages but instead sought to hold defendant Velsicol and all the other defendants liable for 100 percent of the damages. The "control" argument implicitly recognizes that the vicarious liability would at most be delimited by the control period and, therefore, the State's failure to define the extent of pollution during the alleged Velsicol control period prevents the State from recovering any relief from defendant Velsicol.

The defendants WRCC and Ventron each asserted a claim against the defendant Velsicol seeking to recover indemnification and contribution on the "alter ego" or "instrumentality" theory. The trial court, quite properly, denied both defendants any relief on said Crossclaims. Such denial of relief, we contend, bespeaks an acknowledgment on the part of the trial judge that there was no improper exercise of control by defendant Velsicol and that WRCC and Ventron by virtue of the merger are primarily liable for the acts of pollution of WRCC. Despite the trial judge's denial of the WRCC/Ventron Crosslcaim against defendant Velsicol and the lack of even the slightest suggestion that WRCC/Ventron was incapable of satisfying any judgment in favor of the State the trial judge inexplicably imposed 50% of WRCC's liability on the defendant Velsicol in a primary sense. The fact that defendant Ventron retains the benefit of the defendant WRCC's substantial assets was ignored.

The defendant WRCC, during defendant Velsicol's ownership, was not used by defendant Velsicol as a sham or decoy or a conduit to injure, defraud or defeat the rights of the State or anyone else. The contrary is not even alleged. The independent corporate identities of Velsicol and WRCC were fully observed. The trial judge found that a showing of a "public interest" will suffice to impose liability on defendant Velsicol. This requirement is so broad as to be of little assistance in evaluating Velsicol liability and the court's grasping at such a vague and amorphous concept and ignoring the plethora of cases which detail the appropriate criteria is indicative of an absence of proof to sustain liability under the traditional instrumentality rule. What is the "public interest" which warrants the imposition of liability on WRCC and Velsicol, as a former stockholder of WRCC? The court seems toargues simply that polluters, not the general public, should remedy their wrongdoings and that the "ends of justice" require it. The argument is somewhat lacking and circular. If WRCC did the polluting then it, as a polluter, would be responsible for remedying its pollution. WRCC is a party to this case which has appeared and vigorously defended itself. The issue is: Why should the stockholder of a polluter corporation be liable for the pollution of the polluter corporation? The trial judge has not addressed himself to this issue.

Is Velsicol, because of its alleged control over WRCC, to be liable for Berk, WRCC and Ventron? There is no law to substantiate such liability on the part of a stockholder and the State has cited no legal authority to that effect. The State acknowledges that, viewed in its best light, its claim against Velsicol is that Velsicol is secondarily liable for the pollution of WRCC/Ventron:

> It is WRCC, the corporation, that is primarily liable, not its stockholders. By purchasing its stock in 1968, Ventron acquired control of WRCC's assets and liabilities solely in its capacity as a stockholder. However, when Ventron chose to merge WRCC into Ventron, it became legally responsible as a matter of law for all of WRCC's liabilities regardless of when they arose. (Emphasis added).

(Vel-Da-189). If Velsicol is secondarily liable to some extent for WRCC, as the State suggests, and Ventron's liability is that of WRCC by virtue of the merger, then Velsicol, assuming the legitimacy of the factual and legal arguments of the State, has no liability to the State unless WRCC/Ventron are unable to satisfy a judgment against them.

The State's control argument is belied by the fact that the State had absolutely no dealings with Velsicol and did not know its involvement with WRCC until after the legal action was started. Note that WRCC and Ventron were original defendants in the case and Velsicol was first made a defendant in the State's first amended complaint and then it was for the purpose of bringing Velsicol in as a property owner and not as a former stockholder of defendant WRCC. Why are not the stockholders of Velsicol liable as well and, if a corporate shareholder, its shareholders, ad infinitum. Why are not Ventron's stockholders liable and what of Bill Taylor who owned 100% of Berk? The answer is that the State did not contemplate any control argument against any party when the complaint, amended complaint, or second amended complaint were filed except possibly for Ventron with which it had considerable dealings on the mercury pollution issue. The State could not have contemplated a control claim against Velsicol because it did not even know that Velsicol had owned WRCC. The pleadings suggested no such allegation.

II. THE GENERAL RULE - NO STOCKHOLDER LIABILITY

It is axiomatic that a corporation, no matter how its stock is held, is an independent entity separate and distinct from its stockholders. See generally, Anderson v. Abbott, 321 U.S. 349 (1944); Taylor v. Standard Gas Co., 306 U.S. 307 (1939); Boyle v. United States, 355 F.2d 233 (3rd Cir. 1965); Bound Brook Water Co. v. Jaffe, 284 F.Supp. 702 (D.N.J. 1968); LaChemise LaCoste v. General Mills, Inc., 53 F.R.D. 596 (D. Del 1971); Fawcett v. Missouri Pacific R. Co., 242 F.Supp. 675 (W.D. La 1965); Frank v. Franks, Inc., 9 N.J. 218, 223-24 (1952); Jackson v. Hooper, 76 N.J.Eq. 592 (E&A 1909); Fortugno v. Hudson Manure Co., 51 N.J.Super. 482, 500 (App. Div. 1958); Goldman v. Johanna Farms, Inc., 26 N.J.Super. 550 (L. Div. 1953); Cohen v. Dwyer, 133 N.J.Eq. 226 (Ch. 1943), aff'd. 134 N.J.Eq. 350 (E&A 1944); Yacker v. Weiner, 109 N.J.Super. 351 (Ch. 1970); Schmid v. First Camden National Bank & Trust Co., 130 N.J.Eq. 254 (Ch. 1941).

The separateness of the corporate stockholder from the corporation is respected in the law even if the stockholder is another corporation. LaChemise LaCoste v. General Mills, Inc., supra; Fawcett v. Missouri Pacific R. Co., supra.; Segall v. Food Fair Stores, Inc. 185 F.Supp. 81 (E.D. Pa. 1960); Ross v. Pennsylvania Co., 106 N.J.L. 536 (E&A 1930); 13A Fletcher, Cyc. of Corporations (1961 ed) §6222.

By virtue of the separateness of the corporate entity and its stockholders, it is a fundamental principle of corporate law that, absent some constitutional, statutory or charter liability, a stockholder is not liable for the conduct of its corporation. This insulation from liability extends to both contract and tort obligations of the corporation.

> Unless the liability is expressly imposed by constitutional or statutory provisions or by the charter, or by special agreement of the stockholders, stockholders are not personally liable for debts of the corporation either at law or in equity. The reason is that a corporation is a legal entity or artificial person, distinct from the members who compose it, in their individual capacity; and when it contracts a debt, it is the debt of this legal entity or artificial person - the corporation - and not the debt of the individual members.

13A Fletcher, Cyc. of Corporations (1961 ed) §6213, at 15-18; accord: 19 Am. Jur.2d, Corporations §716.

> The stockholders of a corporation are not individually liable for its torts, whether they consist in misfeasance, malfeasance or nonfeasance, if they have not in any way participated therein, unless they are made liable by some express charter, statutory or constitutional provision.

13A Fletcher, Cyc. of Corporations (1961 ed) §6214 at 19-20; accord: 18 C.J.S., Corporations §580; 19 Am. Jur. 2d, Corporations §717.

The right of an individual, including a corporation, to operate a particular business venture through a corporate entity, rather than directly, is a right guaranteed by law. In the case of Irving Investment Corp. v. Gordon, 3 N.J. 217 (1949) the Supreme Court of New Jersey correctly held that individuals have the right to form a corporation to serve their individual interests and insulate themselves from individual liability.

> It is argued that the two corporations are but instrumentalities...set up to serve their personal interest. That argument defeats itself. [The individual] operates through corporate structures in order that he may have the resulting advantages, one of which is the freedom of separate personal assets from corporate liabilities. The disadvantages go with the advantages. The corporate form is recognized by equity as well as by law, and a court of equity is bound by the laws governing the conduct of the corporate action.

Id. at 23; accord: 2 G. Hornstein, Corporate Law & Practice, §751; 18 C.J.S., Corporations §581. Therefore, it cannot be argued properly that the corporate advantage of limited stockholder liability is lost merely on the ground that the corporation was incorporated to serve the interests of the stockholders, including the interest of avoidance of individual liability.

The legal separateness of the corporation and its stockholders and the consequent non-liability of the stockholder for the tortious and/or contract liability of the corporation is unimpaired by the fact that all the stock is held by a single stockholder. 13A Fletcher, Cyc. of Corporations §6216. It is thus the general rule that a parent corporation has no liability for the obligations of its wholly-owned subsidiary regardless of whether the subsidiary's obligations are founded in tort or contract.

III. THE EXCEPTION - THE INSTRUMENTALITY RULE

There is an exception to the aforesaid general rule of stockholder immunity and that is that, when a parent corporation abuses the corporate fiction of its subsidiary so as to inflict a wrong on a particular claimant, then the corporate fiction, in order to do justice, will be disregarded. See, American Trucking & Production Corp. v. Fischbach, 311 F.Supp. 412 (N.D. Ill. 1970); Mueller v. Seaboard Commercial Corp., 5 N.J. 38 (1950); Ross v. Pennsylvania R.R. Co., 106 N.J.L. 536 (E&A 1930). It would appear from a review of the pertinent case law and legal texts that, generally speaking, the courts have imposed liability on corporate stockholders by piercing the corporate veil when each of the following three criteria are met:

(1). The stockholder must exercise such a degree of dominance over the corporation that, with respect to the corporation's conduct allegedly injuring the claimant, the corporation is a mere instrumentality or conduit;

(2). The stockholder's conduct under attack and which allegedly resulted in some injury to the claimant must be in contravention of the claimant's rights and committed by the stockholder through the corporation; and

(3). The wrongful conduct by the stockholder must proximately result in an unjust loss or injury of which the claimant complains. See generally, Bendex Home Systems, Inc. v. Hurston Enterprises, Inc., 566 F.2d 1039 (5th Cir. 1978); Allegheny Airlines, Inc. v. United States, 504 F.2d 104(7th Cir. 1974), cert. denied, 421 U.S. 978 (1975); Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160 (7th Cir. 1963); Fisser v. International Bank, 282 F.2d 231 (2nd Cir. 1960); Japan Petroleum Corp. v. Ashland Oil Inc., 456 F. Supp. 831 (D. Del 1978); United Paperworkers International Union v. Penntech Papers, Inc., 439 F.Supp. 610, (D. Me. 1977), aff'd, 583 F.2d 33 (1st Cir. 1978); Omaha Pollution Control Corp. v. Carver-Greenfield Corp., 413 F.Supp. 1069 (D. Neb 1976); Johnson v. Warnaco, Inc. 426 F.Supp. 44 (S.D. Miss. 1976); California v. Coca-Cola Company, 326 F.Supp. 540, 541 (N.D. Ill. 1971); Noto v. Cia Seculin di Armentento, 310 F.Supp. 639, 646 (S.D.N.Y. 1970); American Trading & Production Corp. v. Fischbach, & Moore, Inc., 311 F.Supp. 412, 416 (N.D. Ill. 1970); Whayne v. Transportation Management Service, Inc., 252 F.Supp. 573 (E.D.Pa. 1966) National Bond Finance Co. v. General Motors Corp., 238 F.Supp. 248 (W.D. Mo. 1964); I. Fletcher, Cyc. of Corporations (1974) §43 at 209;

Fletcher, Cyc. of Corporations, (1961 ed) §43 at 209; Annot. 7 A.L.R.3d 1343, 1355 (1966). This rule, sometimes referred to as the "identity", "instrumentality" or "alter ego" rule, was defined by the federal court in the Fisser case, supra., as follows:

> Restating the instrumentality rule, we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:
>
> (1) control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) such control must have been used by the defendant to commit fraud or worse, to perpetuate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights;
>
> (3) the aforesaid control and breach of duty must proximately cause the injury or unjust lost complained of.

Fisser v. International Bank, supra., 282 F.2d at 238, quoting Lowendahl v. Baltimore and Ohio R.R. Co., 247 App. Div. 144, 287 N.Y.S. 62, 76 (1936), aff'd. 272 N.Y. 360, 6 N.E.2d 56 (1936) (Emphasis added). As can be seen, each of the instrumentality critera must have a bearing on the conduct causing the claimant's alleged injury and, therefore, none of the criteria can be analyzed in the abstract but only in relation to the claimant's claim; control, per se, is not actionable. The claimant must demonstrate how it would be unfair to him for the Court to follow the general rule of non-liability and recognize the separate existence of the stockholder and corporation.

The claimant seeking to impose liability on a stockholder under the instrumentality rule has the burden of proving that all the criteria have been met:

> He who seeks to have the court apply the exception to the rule rather than "the fundamental principal" that a corporation is a separate entity, has the burden of proof and must demonstrate the misuse of the corporate form and the necessity of disregarding it to do equity.

Kugler v. Kascot Interplanetary, Inc., 120 N.J.Super., 216, 254 (Ch. 1972); accord: Schmid v. First Camden National Bank & Trust Company, 130 N.J.Eq. 254, 261 (Ch. 1941); Zubik v. Zubik, 384 F. 2d 267 (3rd Cir. 1967), cert, denied, 390 U.S. 988 (1967); Corgell v. Chipps, 128 F.2d 702,704 (5th. Cir. 1942), aff'd, 317 U.S. 406 (1943); De. Witt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th. Cir. 1976); Amco Automatic Transmissions, Inc. v. Taylor, 368 F. Supp. 1283, 1299 (E.D.Pa. 1973); In re Sheridan's edition, 226 F. Supp 136, 139 (S.D.N.Y.1964). The judicial power to pierce the corporate veil is to be exercised reluctantly and cautiously. De Witt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F2d. 681, 683,(4th. Cir. 1976). In evaluating the propriety of piercing the corporate veil in a particular instance, the courts should be mindful of the admonition of the Circuit Court of Appeals for the Third Circuit: "Care should be taken on all occassions to avoid making the entire theory of corporate entity...unless."

Zubik v. Zubik, 384 F.2d 267,273 (3rd. Cir. 1967), cert denied, 390 U.S. 988 (1967).

A. EXCESSIVE CONTROL

The requisite quantum of stockholder control sufficient to meet the control criterion of the instrumentality rule, although somewhat amorphous, is not without some judicial guidelines. One can readily glean from a review of the texts and cases an understanding of the general

characteristics of this standard and certainly determine that "control" which is permissible and which will not invoke stockholder liability. The cases reflect a fairly universal recognition that a certain amount of control or influence is inherent in the mere ownership of stock and that such control is magnified when all the stock is owned or controlled by a single stockholder,but it remains nonetheless permissible. The courts have allowed such control as a practical consequence of stock ownership. Purdo v. Wilson Line of Wasington, Inc., 414 F.2d 1145 (D.C.Cir 1969); Merkel Association Inc., V. Bellofram Corp, 437 F.Supp. 612,617, (W.D.N.Y. 1977); Woodland Nursing Home Corp. v. Weinberger, 411 F.Supp. 501,505 S.D.N.Y. 1976); Country Maid, Inc. v. Haseotes) E.D.Pa 1969), 299, F. Supp. 633 637 (E.D. Ca. 1969).

The laws of New Jersey permit 100% of the stock of a corporation to be held by a single stockholder, one-man corporations, and that fact alone would appear to be decisive on the issue of whether a total concen' tion of the stock per se would translate into impermissible control and consequently liability. See N.J.S.A. 14A:2-6; N.J.S.A. 14A:6-2; White v. Evans, 117 N.J.Eq. 1 (E&A 1934); Goldmann v. Johanna Farms, Inc., 26 N.J.Super. 550, 558 (L. Div. 1953); Hackensack Trust Co. v. City of Hackensack, 116 N.J.L. 343 (Sup. Ct.1936); Kessler, New Jersey Close Corporations (1970) §§1.01, 14.01-14.03.

The case of Mingin v. Continental Can Company, 171 N.J.Super. 148 (L. Div. 1979) is worthy of consideration. In the Mingin case, the plaintiff was injured in the course of his employment while operating a machine manufactured by the Urbana Tool & Die Co. After recovering workers' compensation benefits, the plaintiff instituted suit against Urbana and its parent corporation, Continental Can Co. As it turned

out, the plaintiff's employer was also a wholly-owned subsidiary of Continental and both the employer and manufacturer were covered under the same compensation insurance policy covering all of Continental's subsidiaries. Continental agreed that the manufacturer was part of the single operation and, therefore, there could be no recovery beyond worker's compensation. The court, in denying Continental's motion for summary judgment, held that it found no basis for disregarding the separate corporate existence of the subsidiary corporations.

> The temptation to disregard the corporate form and to "pierce the corporate veil" has become much greater since the General Corporation Act was amended to permit the sole ownership of all the capital stock of the corporation by one person... now N.J.S.A. 14A:2-6. The statute now permits one person to function as a corporation...places upon the court the duty to realize that this procedure is lawful and that the corporate form may not be disregarded except in the case of actual fraud. Frank v. Frank's Inc., 9 N.J. 218 (1952); Yacker v. Weiner, 109 N.J.Super. 351, 356 (Ch. Div. 1970), aff'd, 114 N.J.Super 526 (App. Div. 1971). The Court may not bastardize by construction that which the Legislature has legitimized by statute.

Id. at 151-52.

This is far from the minority viewpoint; itIt has been universally held that ownership of 100% of the stock of a corporation is not such control as to a result in stockholder liability.

> A stockholder is not liable for corporate debts merely because he owns all or a majority of the capital stock, and the rule applies equally well to liability for torts of the corporation.

13A Fletcher, Cyc. of Corporations, (1961 ed), §6216 at 22; accord: Walker v. Newgent, 583 F.2d. 163 (5th.Cir. 1978), cert. denied, 441 U.S. 906 (1979); Steven v. Roscoe. Turner Aeronautical Corp., 324 F.2d 157,161 (7th. Cir. 1963); Spears V. Transcontinental Bus System, 226 F.2d 94,98 (9th Cir. 1955) cert. denied, U.S. 950 (1966); Califf v.

Coca-Cola Company, 326 F.Supp. 540, 541 (N.D. Ill. 1971); Noto v. Cia Secula di Armaninto, 310 F.Supp. 639, 646 (S.D.N.Y. 1970); Gordon v. International Telephone & Telegraph Corp., 273 F.Supp. 164, 166 (N.D. Ill. 1967); Lucas v. Mobil Oil Corp., 331 F.Supp. 957 (N.D. Tex. 1971); Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F.Supp., 841, 854 (N.D.Calif. 1979); 18 C.J.S. Corporations §581 at 1307; 19 Am. Jur.2d Corporations §716. That is the rule regardless of whether the stockholder is a corporation or an individual:

> [E]xactly the same rule applies where the stockholder is a parent company and where the corporation is a subsidiary corporation, if there is nothing to be considered except their mere relationship of parent and subsidiary, i.e., the mere ownership of stock. In other words, it is well settled that the mere ownership by one corporation, whether or not designated as the parent corporation, of stock in another corporation or even of a controlling interest or of all of the stock, does not, of itself, make the stockholder or parent corporation liable for the debts or acts of the corporation in which it holds stock, generally called the subsidiary company.

13A Fletcher, Cyc. of Corporations (1961 ed) §6222 at 33-34.

> [T]he rule of law is that a corporation continues to exist as a separate legal entity until legally dissolved, and the corporation and its stockholders are not one and the same, even though the number of stockholders be reduced to one person. The same is true where the owner of the entire capital stock is another corporation....So generally speaking, a sole stockholder receives the same protection and immunities that stockholders of multi-owner corporations enjoy and he is also subject to the same disadvantages.

13A Fletcher, Cyc. of Corporations, (1961 ed) §25 at 107-08; Lehigh Valley Industries, Inc. v. Birnbaum, 389 F.Supp. 798 (S.D.N.Y. 1975), aff'd, 527 F.2d 87 2nd Cir. 1975);

The prohibited "control" is such control that the subsidiary has become a mere instrumentality of the parent corporation, a sham, and that the properties or affairs of the two corporations are so intertwined

as to prevent segregation with respect to the particular transaction in suit. 13A Fletcher, Cyc. of Corporations, §6222 at 25. Such excessive control has been otherwise expressed as follows:

> The control...is not mere majority or complete stock control, but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.

1 Fletcher, Cyc. of Corporations (1974) §43 at 209. The proscribed control must be such that the subsidiary is merely "an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fiction and the immunity that it carries." LaChemise LaCoste v. General Mills, Inc., 53 F.R.D 596, 603 (D. Del. 1970). The domination must be complete and not merely general supervision and sporadic participation in the affairs of the subsidiary:

> [T]he exercise of some degree of supervision by a parent corporation over its wholly-owned subsidiary is not sufficient in itself to render the subsidiary the parent's instrumentality or alter ego, where participation in the subsidiary's affairs does not amount to the domination of day-to-day business decisions. In other words, a showing of complete domination of the finances and business practices of the subsidiary is necessary to sustain application of the instrumentality rule, and mere proof of a parent corporation's potential to control or dominate its subsidiary is insufficient.

13A Fletcher, Cyc. of Corporations §6222 (Supp. 1974) at 29.

The fact that the parent corporation has the same corporate officers and occupies the very same corporate offices is not excessive control, but is consistent with normal corporate practice and procedure. 13A Fletcher, Cyc. of Corporations (1961 ed) §6222 at 36; accord: Fawcett v. Missouri Pac. R. Co., 242 F.Supp. 675 (W.D. La 1965), aff'd. 347 was not equivalent to the requisite domination of the day-to-day operations of the subsidiary necessary to establish the

F.2d 233 (5th. Cir. 1965); Jones Lincoln-Mercury, 524 F.2d 162 (10th Cir.1975); American Trading & Prod. Corp.v. Fischbach & Moore, Inc., 311 F.Supp. 412 (N.D. Ill. 1970); Reul v. Sahara Hotel, 372 F.Supp. 995 (S.D. Tex 1974); Matter of Bowen Transports,Inc, 551, F.2d 171, (7th.Cir. 1977). It is also acceptable for the parent corporation to finance its subsidiary. 13A Fletcher, Cyc. of Corporations, (1961 ed) §6222 at 36; accord: Miller v. Bethlehem Steel Corp., 189 F.Supp. 916 (D.W.Va.1960); Owl Fumigating Corp. v. California Cyanide Co., Inc., 24 F.2d 718 (D.Del.1928) aff'd 30 E.2d 812 (3rd.Cir.1928); Kimberly Oil Co. v. Douglass, 45 F.2d 25 (6th. Cir. 1930).

It is more difficult, rather than less so, to establish excessive control when you are dealing with a parent/wholly-owned subsidiary relationship wherein the directors and officers[20] of the parent and subsidiary are identical.

> the agency concept is especially troublesome. Although a corporation acts on behalf of its stockholders, it is not by that fact their agent, since the relation neither arises by mutual consent nor gives the stockholders the right to detailed control over the business. Even if the directors or officers are amenable to the wishes of a sole controlling stockholder, a consensual arrangement independent of the stock-control relation should be shown to warrant a finding of agency. If agency is to be inferred solely from the ownership of all or a controlling block of stock and from the practical advantages which that confers, an owner of a controlling interest in a corporation would never be assured of limited liability. It is in the case of a wholly-owned subsidiary having directors and officers identical to those of the parent that is conceptually most difficult to find an independent consensual relationship.

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[20] In the instant dispute, the officers and directors of defendant WRCC and Velsicol were not identical but there were certain individuals who held an office or directorship for WRCC and Velsicol.

Oleck, Modern Corporation Law (1960) §1813 at 140. It must be recognized that, when the subsidiary is a wholly-owned subsidiary of the parent, the parent, as an incident of stock ownership, will be able to elect officers and directors of the subsidiary and unquestionably will exhibit an interest and wield a degree of permissible influence in the corporation's affairs. See generally, Hazeltine Corp. v. General Electric Co., 19 F.Supp.898 (D. Md. 1937); Nichols & Co. v. Secretary of Agriculture, 131 F.2d 651 (1st. Cir.1942); Henry v. Dolly, 99 F.2d 94 (10th Cir. 1938). Such control, which is incident to stock ownership, and has its parallel in the "one-man corporation", does not constitute the proscribed type of domination which is evinced by a total disregard by the parent of the separate existence of the subsidiary such that assets are intermingled and corporate formalities ignored; it is only such conduct which will result in a disregard of the corporate fiction. Proof of control as mere incident of stock ownership is insufficient to result in the imposition of liability.

> [T]o justify judicial derogation of the separateness of a corporate creature, an aggrieved party must prove something more than a parent's mere ownership of a majority of even all of the capital stock and the parent's use of its power as an incident of its stock ownership to elect officers and directors of the subsidiary.

Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991 at 994 (5th Cir. 1972). The Berger decision is worthy of note on the control issue because of the Court's reasoned approach to the issue and its practical evaluation of the evidence in light of customary inter-corporate procedures. The Court observed that the trial judge's determination of excessive control was premised on the findings that: (a) the Board of Directors of the subsidiary of the defendant CBS consisted solely of

employees of the defendant CBS; (b) the organizational chart of defendant CBS included its subsidiary; and (c) all corporate decisions of the subsidiary had their genesis in the Board of Directors of defendant CBS. The Circuit Court, noting the significance between the permissible control incident to stock ownership and excessive or impermissible control, ruled that such control was allowable.

> Comparing these several facts to the requisite quantum of proof necessary to satisfy [the necessary] "control" element, we think it is obvious that these factual determinations, standing alone, are insufficient to sustain application of the instrumentality rule. Moreover, an independent examination of the records in this case convinces us that the evidence adduced below concerning the relationship between the defendant and [its subsidiary] could not sustain any finding that the defendant completely dominated not only the finances, but the policy and business practice of [its subsidiary].

Id. at 995.

In the Fischback case, supra., the Court similarly acknowledged that parental guidance and supervision and requiring the subsidiary to submit financial reports and consult with the parent prior to markups on large jobs was not equivalent to the requisite domination of the day-to-day operations of the subsidiary necessary to establish the subsidiary as a mere alter ego with no business life of its own:

> It is clear...that the parent does not "operate" the business. It does not compute bids, negotiate contracts or purchase goods and services for the subsidiary. It does not supervise the manner in which the subsidiary's contracting jobs are performed, and it does not use its own goods, equipment or employees in the subsidiary's business operations. Exercise of some degree of supervision by a 100% stockholder is not sufficient to render the subsidiary its instrumentality or alter ego...Such participation in a subsidiary's affairs does not amount to the domination of day-to-day business decisions and disregard of the corporate entity necessary to impose liability on a parent.

Id. at 415.

In the case of Garden City v. Burden, 186 F.2d 651 (10th Cir. 1951), the Court stated that

> the fact that one corporation owns all the stock of another and thereby selects from its own directors and officers a majority or all of the directors of the other, or that a parent finances a subsidiary is, without more, not sufficient to warrant disregarding the separate legal entity and treating them as one.

Id. at 653. The comingling of the business and assets of the two corporations to the detriment of a third party, the Court held, would have been impermissible.

The case of Johnson v. Warnaco, Inc., 426 F.Supp. 44 (S.D. Miss. 1976) closely parallels the Berger decision, supra., and dealt with the following indicia of corporate control by a parent over its subsidiary:

> It is true that certain facts developed at the trial of this case to show [the parent corp.'s] control of [its subsidiary]. The subsidiary was required to obtain financing through [its parent]; long range plans were required to be submitted to [the parent] for approval, employees' salaries above $25,000 were required to be approved by the parent; employee bonuses were similarly controlled; auditing procedures were prescribed by [the parent]; the Board of Directors of the two corporations were for the most part identical and the board meetings of the subsidiary were held at the corporate offices of the [parent]...

Johnson v. Warnaco, supra. 426 F.Supp. at 50. The Court properly concluded, however, that "these facts without more fall far short of indicating the level of control and domination necessary for this court to disregard the separate corporate identities of these corporations." Id. at 50. (Emphasis added). The Johnson court, cognizant of the fact that a degree of control is a permissible incident to stock ownership, observed that the corporate formalities were scrupulously adhered to in

that the subsidiary operated as a separate legal entity, maintained a board of directors, elected officers, maintained minutes of its board meetings and the subsidiary was well financed, i.e., the subsidiary had a separate legal existence. Of particular note was the Court's finding that the parent's "service of purchasing insurance for its subsidiary was not an indication of undue control." Id. at 51. In upholding the separateness of the two corporations, the Court focused on the distinction between supervisory participation and dominance over the daily operations of the subsidiary and concluded:

> The common direction and supervision between [the parent and its subsidiary] was nothing more than parent and subsidiary often have. [The parent] had a group vice president who generally supervised and monitored the [subsidiary's] activities but the actual direction and control of the day-to-day, month-to-month and year-to-year activities of the [subsidiary] was exercised by [the subsidiary's personnel].

Johnson v. Warnaco, Inc., supra., 426 F.Supp. at 52.

The reported decisions of the State of New Jersey concur completely with the foregoing in requiring that the controlled corporation be a mere "puppet" or "alter ego" of its stockholders. For example, in the case of Ross v. Pennsylvania R. Co., 106 N.J.L. 536, 148 A.741 (E&A 1930), the defendant railroad totally ignored the separateness of its subsidiary and held itself out to the public, including the plaintiff, as being one and the same with its subsidiary; the subsidiary even used the parent's name. The excessive nature of the control was patent and the connection with the plaintiff's claimed loss was equally obvious because the plaintiff was led to believe that he was dealing with the parent corporation. The Ross court noted, quite properly, that "participating in the affairs of the other corporation, in the normal and usual manner" would have been permissible. Id. at 539.

Adherence to the appropriate corporate formalities, has universally been recognized as an important factor which indicates a separate corporate existence and that the separate corporate identity should not be disregarded to impose liability on the parent corporation. See, e.g., American Trading & Prod. Corp. v. Fischback, Inc., 311 F.Supp. 412 (N.D. Ill. 1970); see also, Annot. 7 A.L.R.3d 1343, 1355 (1966). The State, we anticipate, will seek to rely to some extent on one or two isolated internal accounting sheets which refer to WRCC as both a "division" and "wholly-owned subsidiary". How such records would support the State's claim of excessive control is difficult to discern in light of the reference to WRCC as a "subsidiary", but assuming the "best case" and that the document simply referred to WRCC as a "division", the "evidence" is of no value to the trier of fact. In the Berger case, supra., testimony was presented that a "subsidiary" was a "division". The trial judge was impressed and interpreted the testimony as a statement of excessive control. The Court of Appeals held that such descriptive characterizations were meaningless and were no substitute for a judicial determination that all the criteria for imposing liability were present:

> ...[C]ourts have employed various labels or metaphors to describe those certain corporate relationships in which the underlying facts reveal that a parent corporation has completely dominated the business practices of its subsidiary. For such purposes epitomical terminology is useful. But when a lay witness testifies that one corporation is a division of another, then individual thought indeed becomes enslaved for a court to assume that the use of a descriptive term, by some process of testimonial osmosis, automatically introduces into evidence a composite of facts tending to show a community of management. Just as siameseing is a biological fact, so must corporate umbilication be anatomically demonstrated... For purposes of appli-

> cation of the instrumentality rule, descriptive characterization is simply not an adequate alternative to a factual showing of the essential "act of operation."

Id. at 996.

We have heretofore been attempting to define the nature of the stockholder control which is impermissible and which will lead to liability under the instrumentality rule. The trial court held as a matter of law that, regardless of whether defendant Velsicol actually exercised any control whatsoever over defendant WRCC, defendant Velsicol is nonetheless liable for the actions of defendant WRCC because inherent in the relationship between a parent corporation and its wholly-owned subsidiary is the potential for such control, which in the view of the trial court, should have been exercised in order to prevent pollution by the subsidiary. (Vel-Da-38). The trial judge's determination in this regard constitutes a gross distortion of the law. It is a position that was never even argued by any of the litigants. Indeed, as expressed hereinabove, the law is universally to the contrary, i.e., there is no legal authority whatsoever which endorses the proposition that the mere ownership of all the stock of a corporation results in stockholder liability. The trial judge has cited no such authority. As stated by our highest court in Ross v. Pennsylvania R.R. Co., supra., "ownership alone of capital stock in one corporation by another, does not create any relationship that by reason of which the stockholder company would be liable for torts of the other." Id. at 538. There is no reported case by the Courts of this State to the contrary.

The imposition of Velsicol liability on the basis of the mere potential for the control of the activities of defendant WRCC evinces the extent to which the trial judge was compelled to reach (we submit

"overreach") in order to impose liability on defendant Velsicol in this matter. The irony is that defendant Velsicol was found liable by the trial judge for both excessive control over defendant WRCC and for not exercising its potential for control so as to prevent pollution by defendant WRCC. If defendant Velsicol interjected itself into the daily routine of defendant WRCC, it would be liable for excessive control and, if it did not, it would be liable because it should have exercised such control so as to prevent defendant WRCC's alleged pollution.

Potential for control clearly can serve as no basis for liability and the Fifth Circuit Court of Appeals dealt specifically with such potential in the Berger decision, supra., and held that it was an impermissible basis for liability and in conflict with the separate legal existence of the subsidiary:

> [T]he findings of the district court deal exclusively with the existence of the defendant's potential to control or dominate its subsidiary...In our opinion complete stock ownership, common officers and directors, and the use of organizational charts illustrating lines of authority are all business practices common to most parent-subsidiary relationships and such proofs of a parent's potential to dominate its subsidiary is precisely the kind of evidence that New York courts have consistently rejected...

Id. at 995; accord: 13A Fletcher, Cyc. of Corporations (1961 ed) §6222 at 36.

Similarly, in the case of Quarles v. Fuqua Industries, Inc., 504 F.2d 1358 (10th Cir. 1974) the Court noted that "the exercise of, not the opportunity to exercise, control is determinative." Id. at 1364; accord: Whayne v. Transportation Management Service, Inc., 252 F.Supp. 573,577 (E.D.Pa. 1966); Miller v. Bethlehem Steel Corporation, 189 F.Supp. 916,917 (S.D.W.Va 1960).

The trial court in the matter sub judice in analyzing the control question adopted a reasoning which suffered from ignoratio elenchi in that the court wrongly concluded that proof of normal stockholder control or influence was the type of total dominance actually required under the instrumentality rule.

B. THE EXCESSIVE CONTROL MUST BE USED TO COMMIT A FRAUD OR VIOLATE A DUTY OWED TO THE PLAINTIFF.

The wrongful conduct on behalf of the corporate stockholder must be such that the stockholder has used the corporate entity "for the purpose of evading the law, or for the perpetuation of fraud." Fortugno v. Hudson Manure Co., 51 N.J.Super. 482, 500 (App. Div. 1958); Schmid v. First Camden National Bank, etc., Co., 130 N.J.Eq. 254 (Ch. 1941); Martland Holding Co. v. Egg Harbor, etc., Bank, 123 N.J.Eq. 117 (Ch. 1938); Goldman v. Johanna Farms, Inc., 26 N.J.Super. 550 (L. Div. 1953). In the case of McFadden v. MacFadden, 49 N.J. Super. 356 (App. Div. 1958); certif denied, 27 N.J. 155 (1958) the Appellate Division defined the type of conduct which is a prerequisite to liability:

> In Irving Investment Corp. v. Gordon, 3 N.J. 217, 223 (1949) the court said:
> "It is where the corporate form is used as a shield behind which injustice is sought to be done by those who have the control of it that equity penetrates the veil."
> That statement connotes merely that there must be equitable fraud present to permit such action. Fraud, in the sense of a court of equity, includes all acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and are injurious to another or by which an undue or unconscientious advantage is taken of another.

Id. at 360; accord: Yacker v. Weiner, 109 N.J.Super. 351 (Ch. 1970)

The New Jersey Supreme Court in the case of Schipper v. Levitt & Sons, Inc., 44 N.J. 70 (1965) correctly observed that in order to impose liability on a stockholder, there must be proof "that the corporate cloak is being used to achieve injustice." The court further stated that because "there was no suggestion that there would be difficulty in obtaining satisfaction of any judgment rendered against [the subsiduary]" there was no basis for liability. Id. at 96.

In the case of Chengele v. Cenco Instruments Corp., 386 F.Supp. 862 (W.D. Pa. 1975), aff'd mem., 523 F.2d 1050 (3rd Cir. 1975), the plaintiffs had entered into three contracts with Chemline Corp. which plaintiffs knew to be a wholly-owned subsidiary of defendant Cenco Instruments Corp. The suit was filed against both Chemline and Cenco arguing that Chengele was Cenco's "alter ego". The trial judge held that, assuming "alter ego" status, there was no evidence that the subsidiary was used as a tool to commit a fraud or to commit an injustice akin to a fraud.

> There is abundant evidence in the record to show a close relationship between Cenco and Chemline. We do not reach the question of whether the evidence is sufficient to establish the "alter ego" relationship argued for by plaintiffs, however, because there is no proof that the corporate form of the subsidiary was used by the defendant to perpetrate a fraud or promote an injustice akin to a fraud. Absent the element of fraud or injustice akin to fraud, we cannot disregard the corporate structure of Chemline and impose liability on its parent, Cenco....
>
> ...There is no proof that...Chemline...used its control over Chemline to defraud or deceive plaintiffs.

Id. at 865. The point of the case was that control is an issue only if the control was used to perpetrate a violation of the plaintiff's rights;

excessive control does not per se result in liability on the part of the parent corporation. The similar point was emphasized by the court in the Fischback case, supra.:

> [E]ven if it could be said that the subsidiary were the mere instrumentality of the parent, that circumstance by itself would not justify imposition of liability. For it has long been the law that the corporate entity is only ignored when the ends of justice require it.

Id. at 416. The Fischback Court found that the subsidiary corporation was not undercapitalized or insolvent, but rather "an independent and self-sufficient operating entity, with ample net worth and income to meet the needs of its operations." Id. Accordingly, the Fischback court declined to pierce the corporate veil of the subsidiary because there patently was no need to do so. The claimant must have cause to complain of undue control and, if the subsidiary has ample funds of its own to satisfy any judgment recovered by the claimant, there is no cause to complain or disregard the general rule of stockholder non-liability.

The classic instance of employing a corporation to defraud third parties is when the corporation is undercapitalized or it is stripped of its assets so as to render it insolvent and judgment proof. It is the obvious connection with third party injury, that makes under-capitalization a major factor in determining whether or not to pierce the corporate veil. See generally, Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939); Annot, 63 A.L.R.2d 1051 (1959); 6 Cavitch, Business Organizations §120.05:21 at 773; 120.05:31, at 775 (1971); see also: Mueller v. Seaboard Commercial Corp., 5 N.J. 28 (1950); Yacker v. Weiner, 109 N.J.Super. 351 (Ch. 1970). One should not be misled into believing

that insolvency or lack of capital necessarily translates into stockholder liability. The courts will not pierce the corporate veil simply "to force the parent to stand surety to a possible substantial recovery against the subsidiary." Inland Steel Products Co. v. MPH Mfg. Corp., 25 F.R.D. 236 (D. Ill. 1959). It is only when all of the three instrumentality criteria are met that stockholders of an insolvent corporation are liable for its debts. See, I. Fletcher, Cyc. of Corporations §§ 41, 44, 45 (rev. ed. 1974); 1 H. Oleck, Modern Corporations Law §10 (IV)(53) (1958); 2 G. Hornstein, Corporate Law & Practice §751 (1959). The undercapitalized subsidiary is frequently associated with the parent corporation's concealment of its separate existence and misleading a third party into assuming that it is dealing with the parent. Under such circumstances, it would be appropriate to impose liability because all the three instrumentality criteria have been met. See generally, Peter R. Previte, Inc. v. McAllister Florist, Inc., 113 N.H. 579 311 A.2d 121 (N.H. 197 Such third party reliance generally would not be involved when the plaintiff is an injured tort claimant. See, Zubik v. Zubik, 384 F.2d 267, 273 (3rd Cir. 1967). Where, however, the subsidiary is adequately capitalized and solvent no injustice is done to the third party for the subsidiary can be expected to meet its obligations. The defendant WRCC was not a sham corporation and remains financially capable of satisfying any judgment secured by the plaintiff State. The solvency of WRCC belies a puppet existence and negates any potential for loss by the plaintiff State attributable to any control exercised by defendant Velsicol.

C. THE EXCESSIVE CONTROL AND PARENT CORPORATION'S BREACH OF DUTY TO THE CLAIMANT MUST HAVE BEEN A PROXIMATE CAUSE OF CLAIMANT'S INJURY.

This aspect of the instrumentality criteria says nothing more than that the claimant's injury must have been caused by the conduct which is the subject of the claimant's complaint. In the context of a corporate tort the tort victim rarely can be heard to argue that he relied on the subsidiary corporation's having sufficient assets to satisfy a potential judgment in tort because there generally is no such reliance except in the context of contract actions. In the area of tort liability, the claimant in order to impose liability on a parent corporation must prove that the subsidiary was formed with the specific intent to avoid liability for the specific tort in question and that it was under-capitalized. In this regard, the case of Zubik v. Zubik, 384 F.2d 267 (3rd Cir. 1967), certif. denied, 390 U.S. 938 (1967) is worthy of review. That case involved a claim by owners of certain moored vessels to recover damages caused by barges which had broken loose from their moorings. The federal district court entered judgment against the corporate owner of the barges as well as the individual stockholder. The Circuit Court of Appeals reversed as to the individual stockholder's liability. There was considerable evidence tending to indicate that the individual stockholder, who held the majority of the stock of a closely held corporation, exercised considerable control over the corporation and had not rigidly adhered to corporate formalities. The Circuit Court appeared to be of the view that the control was not excessive but the reversal did not turn on the control issue. The Court deemed the demonstration of fraud or injustice as being the threshold issue.

> Once fraud or injustice demand piercing the corporate veil, then the intertwining of personal affairs with a family corporation can provide additional grounds for arguing that the defendant cannot be heard to complain. In such cases, the failure of

> various coprorate formalities either contributes to the fraud involved or strengthens the argument for injustice by holding the individual in effect estopped. But in the case of an old...illiterate, ill man, the conduct of personal affairs through a family corporation not only has its separate justification unrelated to fraud or injustice, but it fails as a "make weight" argument for ignoring the corporate entity. Nothing in the record indicates that an "operating company" such as Zubik Corporation was unique or that it perpetrated a fraud on the Pittsburgh River community. Neither does it justify a finding that the libellants in this case were defrauded in any respect by lack of corporate formalities of Zubik Corporation or the fact that it paid [the individual stockholder] by debiting his account rather than drawing a regular salary check to his order. Nowhere does it appear that anyone failed to insure or felt protected in reliance upon Zubik Corporation's assets.

Id. at 274. Essentially, the Court found that any corporate irregularities did not contribute to the claimant's injury and therefore could not be the basis for piercing the corporate veil, i.e., corporate control, even excessive control, is not actionable per se.

The requirement of proximate causation was articulated by the Second Circuit Court of Appeals in the following manner:

> To succeed here appellant must successfully advance a two-step argument. First, he must prove that PSJT is a "mere instrumentality" of McAllister, i.e., that McAllister actually dominates PSJT such that the subsidiary has no existence of its own and that McAllister uses the corporate existence of PSJT to perpetrate a fraud, resulting in an unjust loss to the claimants.

Williams v. McAllister Bros., Inc., 534 F.2d 19, 21 (2nd Cir. 1976).

The federal case of United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774 (9th Cir. 1977) involved a suit by the federal government to collect on a loan guaranteed by the Small Business Administration. The borrower corporation had sold its assets to the

defendant corporation subject to existing indebtedness including a lien to secure the SBA guaranteed loan. The sole shareholder was made a named defendant and found liable at the trial level on an "alter ego" theory in large part because the corporation had failed to pay its corporate franchise tax. The Circuit Court articulated the standard of liability so as to include causation of the plaintiff's injury:

> Before a court can hold that a corporation is the mere alter ego of its shareholders, two particular findings must be made. First, the court must determine that there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.
>
> ...Second, however, it must be shown that the failure to disregard the corporation would result in fraud or injustice...Failure to pay corporate franchise tax may, as indicated above, be relevant to the first of the two necessary determinations. But it is of doubtful, if any, relevance to the latter. This is a critical point. The purpose of the [alter ego] doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable...for the equitable owner of a corporation to hide behind its corporate veil...

Id. at 777.

The causal connection between the claimant's injury and the conduct of the stockholder was perhaps best expressed in the case of Plumbers & Fitters, Local 761 v. Matt J. Zaich Const. Co., 418 F.2d 1054, 1058 (9th Cir. 1969). The case was an action by an employer, Zaich Construction, against a union for damages incurred as a result of unlawful picketing. The defendant union contended that the plaintiff corporation was bound by an arbitration agreement between the defendant union and another corporation owned by the same individuals. The district court held that the two corporations were separate corporation and neither corporation was the alter ego of the other. The key

to alter ego liability, as expressed by the court, was not the general corporate procedure, but the impact on the specific transaction in question.

> The threshold question of whether piercing would be proper for the purpose intended is rarely articulated with any clarity. In principle, however, the disregarding of the corporate form of business should not rest on the manner of doing business in general but should rest on the effect that the manner of doing business has on the particular transaction involved...Generally speaking, the doctrine is designed to prevent a person from doing injury and then escaping responsibility by hiding behind a corporate shield.

Id. at 1058.

In the matter of Midtronic, Inc. v. Mine Safety Appliances Co., 468 F.Supp. 1132 (D. Minn. 1979), the plaintiff sought a declaratory judgment that one defendant's patents were involved and not infringed upon by the plaintiff. The parent corporation of the corporation owning the patent was named as a defendant on the plaintiff's theory that the parent by virtue of its control was the true party in interest. The Court noted that the corporate veil would be pierced only to prevent injustice or fraud and there was no indication that such was the case.

> In the instant case, the Court can conceive of no possible injustice or unfairness to Midtronic that will result from the dismissal of MSA [parent] as a party defendant...MSA's presence is not required for financial reasons because Midtronic's complaint does not seek money damages and, in any event, CRC [subsidiary] is apparently operating on a sound financial basis.

Id. at 1148-49. Accordingly, the court granted the parent corporation's motion to dismiss for lack of subject matter jurisdiction.

An interesting case dealing with the causation requirement is that of Poyner v.Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976), cert. denied., 430 U.S. 969 (1977). In the Poyner case, the plaintiff had secured a default judgment against the defendant's wholly-owned subsidiary which was a German corporation with no assets in the United States and was seeking to impose liability on the defendant, which had assets in the United States, by piercing the corporate veil of its subsidiary. The trial court found for plaintiff, but the Circuit Court reversed. The plaintiff's theory was that the corporate arrangement was designed with the specific fraudulent intent of forcing a plaintiff to commence suit against the subsidiary in Germany which would be prohibitive in cost and thus insulate the subsidiary from liability. The Circuit Court observed that the absence of its subsidiary's assets in the United States was the status prior to defendant's acquisition of the subsidiary and, therefore, there was no merit to the plaintiff's claim. The Court correctly found that the issue was one of law subject to unrestricted review (at 959) and espoused the following "but-for" causation test:

> There emerges [under the cases]...a but-for test according to which the corporate entity is disregarded only where control of the fictive corporate person achieves a result which could not otherwise have been achieved directly. Accordingly, LSI [parent] is liable if its ownership and control of Erma [subsidiary] deprived Poyner of a remedy against Erma which he would have possessed but for LSI's control.

Id. at 959.

In summation, a party seeking to impose liability on a parent corporation for the torts of its wholly-owned subisidary must prove that the parent corporation dominated the subsidiary to such an extent that it was a mere puppet and that, such dominance, was the proximate

cause of the plaintiff's injury. The plaintiff State, proved nothing more than the normal participation of a parent corporation in the business operations of its subsidiary. The plaintiff State did not prove the total dominance required under the instrumentality rule and it made no attempt whatsoever to establish an injury proximately caused by such Velsicol control over WRCC.

IV. TRIAL JUDGE ADOPTS NEW INSTRUMENTALITY STANDARD FOR ENVIRONMENTAL CASES

The trial judge imposed derivative liability on the defendant Velsicol for defendant WRCC's violation of the 1937 Act, N.J.S.A. 23:5-28, which was the only applicable statute during the years of Velsicol's ownership of defendant WRCC. (Vel-Da 38-39). Such liability was premised upon a new standard for control which permitted far less control than otherwise permissible under the traditional instrumentality criteria and imposed liability on a stockholder for the failure to exercise control inherent in 100% stock ownership so as to protect the environment.

> The indicia of control necessary where strict liability is imposed by statute need not be extensive as in the usual case where one attempts to "pierce the corporate veil". One must, in a public interest case, examine the nature of the business, the ability to control and the morality or immorality of a failure on the part of the parent company to act.

(Vel-Da 38).

> [T]he governing standard [is not]...the same [as that] for stockholders seeking to avoid the usual contract or tort liability as for 100% stockholders who, with knowledge, allows the operating corporation to violate environmental standards, create or continue a public nuisance, or in such a manner allow the subsidiary to act in the face of the policy of the State.

(Vel-Da 40-41). This new standard of liability was defined by the trial judge as follows:

> If one, with knowledge of the acts and with the ability to control the activities of a subsidiary by failure to act permits the subsidiary to endanger the environment, then as a matter of public policy, the parent must face the responsibility of its permissive inaction.

(Vel-Da 42). The knowledge requirement is not necessarily actual knowledge but may be imputed knowledge:

> Velsicol may not have known the consequences of the actions of WRCC, but it did know, or should have known that chemical mercurial wastes were being discharged.

(Vel-Da 38). According to the trial judge, this new standard of corporate liability was held to have its origin in the public policy of the State:

> The public policy of this State demands that with respect to the public need for environmental protection the usual standards cannot and should not apply.

(Vel-Da 41). This new standard of stockholder liability applies exlusively to environmental claims predicted on strict liability. (Vel-Da 38; Vel-Da 40-41).

The substance of this newly created standard of liability appears to be that a 100% stockholder of a corporation is strictly liable for any pollution by the corporation. Actual control, under the new standard, is truly a non-issue because it is the potential for control that results in liability. In effect, the new standard places the 100% stockholder on the horns of a dilemma; if he exercises control he is exposed to liability under the traditional instrumentality rule and, if he refrains from exercising control, he is exposed to strict liability under Judge Lester's the new standard. The new public interest standard is completely incompatible with the existing traditional standard. The trial judge opined that, if the traditional standard were to be applied, the determination of Velsicol liability "might be more difficult" (Vel-Da 41), but the old standard was not applied to Velsicol with the result that the trial judge admitted that he found it unnecessary to "analyze in depth"

the "many pages of testimony and the lengthy legal memoranda" dealing with the traditional instrumentality criteria. (Vel-Da 41).

This new standard of liability has no basis in law and the attempts of the trial judge to find some support for his position are palpably deficient. There is an allusion that Velsicol was "an entity which the legislature intended to include within the statutory control scheme." (Vel-Da 38). It is impossible to decipher this statement. To what "statutory control scheme" does the Court make reference? The Court seemingly acknowledges that the 1937 Act, N.J.S.A. 23:5-28, was the only legislation applicable to defendant WRCC during the period of Velsicol ownership and the trial court clearly held that subsequent legislation could not be retroactively applied. The 1937 Act, however, makes no reference whatsoever to the element of control and no legislative history was introduced or cited to support the interpretation of the trial court; the 1937 Act then consisted of a single paragraph.

To the extent that the trial judge's new standard of liability is predicated on the 1937 Act being a strict liability statute, the trial judge is in error. Firstly, the 1937 Act does not expressly provide for strict liability. Secondly, in the case of State v. American Aklyd Industries, Inc., 32 N.J.Super. 150 (Bergen Cty Ct 1954), which interestingly enough involved pollution of the very same Berry's Creek, the court held that the 1937 Act was not a strict liability statute and the defendant therein was found not liable for an accidential discharge. Thirdly, Judge Kentz in the case of State v. Exxon, 151 N.J.Super. 464 (Ch. 1977) similarly interpreted the 1937 Act.

> N.J.S.A. 58:10-23.1, et seq. was enacted in 1971. Prior to the enactment the only governing statute was N.J.S.A. 23:5-28 which had been specifically interpreted to exclude accidential spills.

Id. at 480. Fourthly, the New Jersey Supreme Court in interpreting the Act (post-'68), found that there must be "culpable causation" under the Act for liability to attach. State v. Jersey Central Power & Light Co., 69 N.J. 102 (1976). Therefore, if strict statutory liability on the part of the subsidiary is deemed a necessary component of the new standard, the standard is inapplicable to defendant Velsicol because the 1937 Act is not a strict liability statute. It certainly would seem from a review of the trial court's opinion that the finding that 1937 Act was a strict liability statute was pivotal to the application of the newly promulgated control standard.

It also should be noted that the trial judge found that defendant WRCC contributed to the current condition of pollution by (a) direct discharges of mercury to the Creek as an element of the processing plant's effluent; and (b) indirectly as a result of soil infiltration via dumping and other means with resulting stormwater runoff. As to the former direct discharge, such would be violative of the 1937 Act assuming the other criteria were met but, as to the later, the pre-'68 Act did not encompass such indirect liability and, therefore, Velsicol cannot be held liable under the 1937 Act for the totality of the alleged pollution of defendant WRCC during Velsicol ownership. The trial judge makes no allowance for this dual nature of defendant WRCC's liability and the fact that one aspect lies beyond the proscription of the 1937 Act.

The trial court's creation of a new standard of liability in order to impose liability on the defendant Velsicol is a clear indication that, under the traditional instrumentality rule, the defendant Velsicol had no liability. If that were not so, there would be no need to resort to novel theories of liability. This new standard is utterly baseless and

completely unworkable. The 1937 Act does not support such a control standard and has never been so interpreted. In point of fact, no pollution statute promulgated by the Legislature of this State has ever been interpreted so as to impose strict liability on a 100% stockholder for corporate pollution. Such a theory of liability is totally inconsistent with the wealth of authorities dealing with the "instrumentality" or "alter ego" rule and conflicts with our Supreme Court's decision in Ross v. Pennsylvania R. Co., 106 N.J.L. 536 (E&A 1930) to the effect that liability cannot be imposed on the basis of mere stock ownership and potential for control. Also, the new standard abrogates the provisions of our corporate statutes which allow "one-man" corporations and guarantees stockholder immunity under such circumstances. The mere potential for control that exists in any parent/subsidiary relationship cannot be the basis for stockholder liability regardless of the nature of the case.

Moreover, the trial court's new standard does not provide that the State must sustain an injury as a result of the stockholder conducting its business through a corporate entity. As noted in the prior discussion of the decisional law on the "instrumentality" rule, the proscribed control, without a proximately resulting loss, is not actionable. The imposition of stockholder liability in a situation where the corporation itself has ample assets to satisfy any claim arising out of its actions is completely unjustified. What public policy of this State justifies "piercing the corporate veil" when the corporation is financially capable of answering for its own conduct? There certainly is no logical reason to pursue the stockholder under such circumstances. The defendant WRCC is a party to this litigation which has vigorously defended itself and there is

nothing in the record to suggest that defendant WRCC currently lacks or ever lacked the financial capability to implement any remedy imposed by the Court; Ventron, as the trial Court properly noted, is absolutely liable for the acts of defendant WRCC as a result of the merger of the two corporations, and the confiscation of substantial corporate assets, including the $630,000,00 paid by defendants Wolf for the 7-acre plant site and monies received from Troy Chemical Co. for the sale of the business. The defendants, WRCC and Ventron, are primarily liable and can and should pay. That being irrefutably so, there is no legal basis for seeking to "pierce the corporate veil" either under the traditional or new standard.

V. IMPLICATION OF PROCEDURAL HISTORY OF LITIGATION ON INSTRUMENTALITY LIABILITY

The procedural history of the litigation tends to support defendant Velsicol's contention that the State did not seek to impose liability on the defendant Velsicol on any instrumentality or "alter ego" theory. The State's original Complaint (Ja2) made no mention of the defendant Velsicol as a former stockholder of the defendant WRCC. When the State sought leave to file its Amended Complaint so as to name defendants Berk and Velsicol, the supporting affidavit of counsel did not assert that the defendant had owned defendant WRCC, but instead asserted that the defendant Velsicol had owned and operated the plant and presently owned the adjoining tract of land which was similarly polluted. The affidavit incorrectly alleged that the 7-acre plant site had been sold by defendant Velsicol to defendant Ventron (Ja66, Para.2).

The State clearly thought that defendant Velsicol had owned the plant site and operated the plant, neither of which is correct, and that was the thrust of the State's greivance against the defendant Velsicol. The Amended Complaint (Ja69) is consistent in failing to allege any instrumentality liability. Also, the defendant WRCC in its answer to both the Complaint and Amended Complaint did not seek to avoid any liability on the basis of undue control exercised by the defendant Velsicol (Ja9; Ja79).

At the hearing at which Judge Gelman placed the aspect of the case dealing with the Velsicol property on the inactive list, which took place after the State had discovered that defendant Velsicol did not own the plant site or operate the plant, the State acknowledged that the case against defendant Velsicol with respect to the site was one of "mere ownership" liability, ultimately rejected by the trial court. Judge Gelman interpreted the State's claim as follows:

> You are claiming that they have a liabilty because they own a specific piece of property. There is no allegation unless I have never received anything from you, indicating that they actually did something wrong themselves.
>
> They are here as a defendant simply because they [Velsicol] happen to own a piece of property, vacant land, which apparently somebody else may have contaminated.

(Vel-Dal35) Judge Gleman continued in his analysis of the State's claim and recognized that the resolution of the quiet title dispute was essential before there could be any finding of Velsicol liability which, in Judge Gleman's view, was simply a claim arising out of ownership of the land.

> The State has an inconsistent position. I think they are entitled to know what it is the State relying on in that case to claim ownership of that land because if that is the case [the State owns the property] they [Velsicol] are not liable to the State in this case.

(Vel-Dal35) In light of the fact that no wrongful act of pollution was alleged by the State, Judge Gelman suggested to the State that it should dismiss the case as against defendant Velsicol pending a determintation of title in the quiet title action.

> THE COURT: Why don't you dismiss as against Velsicol until such time as that case has determined the title question?

(Vel-Dal36) In answer to the State's contention that it should not have to produce documents pertaining to title because a different department of the State was claiming title to Velsicol's land, the Court once again terms ownership of the land by Velsicol to be the <u>whole</u> <u>basis</u> for the State's making Velsicol a party defendant in the case at bar;

> MR RINDONE: They are the owners of record of this property, that is correct.
>
> THE COURT: Fine, so that is the whole basis upon which they are made a party defendant here.
>
> MR. RINDONE: Keep in mind that they owned all of this property [false].
>
> THE COURT: I know, but as I understand it, no one has alleged that they were the person or persons who were responsible for the introduction of the contaminants into the piece of property.
>
> MR. RINDONE: I don't know.
>
> THE COURT: I would be different if they were an active wrongdoer of some kind but where there only wrong is the fact that they own a piece of property which somebody else may have contaminated and you are claiming in another action that you own the property; so I think they are entitled to know.

MR. RINDONE: The logic is deceptive because as I understand it, Velsicol owned the entire tract on which all of the affected properties were located at one time.

THE COURT: How does that make this any different.

MR. RINDONE: Their ownership...

(Vel-Dal37-l38) It was only the defendant Ventron which, very late in the case, filed a Crossclaim against defendant Velsicol seeking to exculpate itself from liability on the theory that defendant Velsicol was liable for defendant WRCC during the period of Velsicol ownership (Jal27); recovery on such a Crossclaim was denied by the trial judge.

The first written request of the State issued to Velsicol to abate pollution was the State's Amended Complaint and, when questioned as to why the State was seeking to hold Velsicol liable for the pollution occurring on the Wolf property, the State indicated that the sole basis for any such liability was the State's misconception that Velsicol was in the chain of title on the Wolf site:

Interrogatory l2(a): Are you contending in this action to hold Velsicol responsible for deleterious discharges on premises other than premises of which Velsicol currently is record owner?

Answer: Yes.

Interrogatory l2(b): If so, identify by lot and block numbers all such premises and the nature of the deleterious substances being discharged?

Answer: Block 229, Lots l0A and l0B [Wolf/U.S. Life tract].

Interrogatory l2(c): State the factual basis for holding Velsicol responsible for deleterious discharges on such premises.

Answer: During the time that Velsicol was the previous owner of the aforementioned property, it conducted activities thereon which contributed to

> the contamination which is presently resulting in unlawful discharges into the waters of the State.
>
> Interrogatory 12(d): When did you first have knowledge of such discharges on such premises and state the manner in which such information initially was communicated to you and by whom.
>
> Answer: On or about April, 1956 (which is the first dated correspondence presently available to the Department), when the Department of Health was believed to have begun monitoring the site in question.

(Vel-Da 172 to 173). As shown earlier, Velsicol never owned that property and, therefore, Velsicol can have no liability since that was the State's sole theory of recovery against Velsicol in that regard.

The State's case against the defendant Velsicol, as defined by the pleadings and as limited by discovery, did not encompass any corporate instrumentality liability and, therefore, no relief should have been granted on a cause of action which never existed.

POINT II

THE TRIAL COURT ERRED IN FINDING DEFENDANT VELSICOL LIABLE UNDER N.J.S.A.23:5-28.

The 1937 Act, as amended and in force during the period of Velsicol's ownership of defendant WRCC, provided that no "deleterious or poisonous substance" could be discharged to state waters in "quantities destructive of life or disturbing the habits of the fish or birds" inhabiting said waters under penalty of a $500.00 fine for the first offense and $1,000.00 for all subsequent offenses, N.J.S.A. 23:5-28. This is the only anti-pollution law that was in effect during the period of Velsicol's ownership of defendant WRCC. The trial judge in his opinion correctly observed that the State placed much greater emphasis on the 1971 Act, N.J.S.A. 58:10-23.1, et seq., than the 1937 Act. The 1937 Act was interpreted by the trial court as being a strict liability statute. (Vel-Da).

The 1937 Act is not a strict liability statute. It certainly does not expressly provide for strict liability and as interpreted by the courts it is not a strict liability statute. See, State v. Jersey Central Power & Light Co., 69 N.J. 102 (1976); State v. Exxon, 151 N.J. Super. 464 (Ch. 1977) ("Prior to this enactment [1971 Act]...the only governing statute was N.J.S.A. 23:5-28 which had been specifically interpreted to exclude accidental spills." Id. at 480); State v. American Alkyd Industries, Inc., 32 N.J.Super. 150 (Bergen Cty Ct. 1954).

In order for the trial court to impose liability on the defendant Velsicol under the 1937 Act, the trial court created a new standard of corporate liability wherein a 100% stockholder is held strictly liable for the actions of the corporation. This new theory of liability was discussed previously; suffice it to say that this new theory of liability has

not been adopted by any other court in the country and conflicts with the fundamental legal distinctions between the corporation and its stockholders.

There are additional obstacles to imposing derivative liability on the defendant Velsicol for the actions of defendant WRCC. The 1937 Act, as it existed prior to 1968 and defendant Velsicol's sale of WRCC, proscribed the direct discharge of deleterious substances into State waters in "quantities destructive of life or disturbing the habits of the fish inhabiting same." Preliminarily, it should be noted that there was no proof submitted that, during the period of 1960-68, mercury was considered a deleterious substance within the meaning of the Act. With respect to the proofs adduced at time of trial, the following should be noted: (1) the trial court elsewhere in its opinion found that the defendant Berk, since 1929, had discharged mercury-laden effluent into Berry's Creek (Vel-Dal8); (2) assuming that the defendant Berk had polluted Berry's Creek for 30 years prior to the legal birth of defendant WRCC in June of 1960, it would not be illogical to question whether the ecological damage had not already been done and the inhabitants of the Creek already destroyed or inhibited within the meaning of the Act; (3) there was no proof whatsoever submitted by the State as to the quantity of mercury, if any, that was discharged by defendant Berk or by defendant WRCC during the period of Velsicol's ownership; (4) there was no proof whatsoever submitted by the State as to the destruction or inhibition of life within Berry's Creek during the period of Velsicol's ownership of defendant WRCC; (5) the absence of proofs referred to above with respect to the Velsicol years (1960-68) is not the result of a lack of opportunity on the part of the State to gather same because the State monitored the plant effluent of defendant WRCC throughout the

period of defendant Velsicol's ownership; (6) at no time during the State's continued and presumably thorough monitoring of the plant operations of defendant WRCC/Velsicol did the State issue a stop order or seek to impose liability under the 1937 Act; (7) the present Act expressly provides that if a discharge conforms to the rules and regulations of the DEP, it shall not constitute a violation of the Act; and (8) the 1937 Act in 1971 was amended to provide that it was not necessary to show that the deleterious substance has caused the death of any organisms, suggesting that prior thereto such proof was required. The foregoing, we submit, leads ineluctably to the following set of conclusions: (a) the State has failed to prove a violation of the 1937 Act by WRCC/Velsicol; and (b) the State condoned the discharges of WRCC/Velsicol as non-violative of the 1937 Act. The trial judge's rationale for finding defendant WRCC and Velsicol liable under the pre-1968 Act was concise, conclusory and speculative:

> Until 1968, the 1937 Act required a showing that a discharge to be actionable be "in quantities, destructive of life or disturbing the habits of the fish..." N.J.S.A. 23:5-8. The State has made such a showing, if not by producing a pre-1968 fish, then by the preponderance of logical evidence. Both Berk and WRCC sent highly polluted effluent into Berry's Creek from 1929 until 1974. The toxic hazardous pollutant was mercury in one form or another. Berry's Creek is, in fact, highly polluted as a result of these discharges. The Court is convinced by the expert testimony that during those years these discharges were, "destructive of life or disturbing the habits of fish..." As to those operating companies, no other conclusion is possible under the staggering statistical data before the Court.

(Vel-Da37) The import of this single paragraph, covering the entire history of the mercury operations of both defendant Berk and defendant WRCC, lies not in its content but in what is unstated. The "reasoning" of the Court is bereft of any specific finding of fact with respect to the

Velsicol period of defendant WRCC's operation. The trial judge's "Miscellaneous Basic Findings of Fact" found on pages 16 through 19 of his opinion (Vel-Da18 to 20) certainly do not support this paragraph as to the period of 1960-68. The substance of the Court's finding in this regard is simply that, notwithstanding the absence of supportive evidence for the period of 1960-68, he believes it is logical to assume that during those years defendant WRCC violated the 1937 Act. The "staggering statistical data" to which the trial judge refers cannot possibly pertain to the period prior to 1968 because it is irrefutable that what data does exist for that time period reflects no such mercury discharges. Such judicial assumption of liability is neither logical nor legally permissible. As stated by the New Jersey Supreme Court in State v. Jersey Central Power & Light Co., supra., the State has the burden of proving its case with respect to liability under the 1937 Act and, if it fails to meet that burden, the action should be dismissed. As to the illogical nature of the assumption, we need only refer this reviewing court to the trial judge's finding that defendant Berk had polluted the Creek for 30 years prior to the existence of defendant WRCC and ask whether it is logical to assume that the life in the Creek had not been substantially impaired or inhibited prior to the first day of defendant WRCC's operations. Moreover, is it logical to assume that the State knowingly observed violations of the 1937 Act during the period of 1960-68? The liability of defendant WRCC and, derivatively defendant Velsicol, for the period of 1960-68 under the 1937 Act is a matter of considerable complexity and was certainly not an issue to be decided purely on the basis of supposition cloaked in language of "logic". The trial judge himself stated in his opinion (Vel-Da31 to 32) that: "Plaintiff, in order to prevail under

the Act in its original form, must show that the discharge was in quantities which disturbed the habit of or destroyed the lives of the fish." The issue is one susceptible of proof and there was no supporting proofs and perforce there can be no Velsicol liability, direct or otherwise. How is the defendant Velsicol to refute the trial judge's unexpressed assumptions and suppositions? Clearly, such conduct prevents a fair hearing on the issue and should not be condoned. The trial judge merely assumed Velsicol's liability under the 1937 Act and, therefore, that determination must be reversed and judgment entered in favor of the defendant Velsicol because there is not a scintilla of evidence to support such liability under the 1937 Act.

The Act does not now, nor has it ever, provided that the violator shall be responsible to clean up any such prohibited discharge or bear the cost of same; the sole liability was a fine. In 1971, considerably after Velsicol had sold defendant WRCC to defendant Ventron (2/68), the 1937 Act was amended so as to proscribe an indirect discharge:

> No person shall put or place into, turn into, drain into, or place where it can run, flow, wash or be emptied into, or where it can find its way into any of the fresh or tidal waters within the jurisdiction of this State any...hazardous, deleterious, destructive or poisonous substances of any kind.

N.J.S.A. 23:5-28 (1971). The penalty, post 1971, provided was a fine not greater than $6,000.00 for each offense. Contrary to the contentions of the trial judge, the 1937 Act, N.J.S.A. 23:5-28, has been construed by our courts as a penal statute. State v. Twining, 73 N.J.L. 3 (Sup. Ct. 1905), aff'd, 73 N.J.L. 683 (E & A 1906), aff'd, 211 U.S. 78 (1906); State v. American Alkyd Industries, Inc., 32 N.J.Super. 150 (Bergen Cty Ct. 1954) and, in particular, the Court should not be

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allowed to assume liability under penal legislation. Moreover, the defendant Velsicol sold its interest in defendant WRCC in February, 1968 and N.J.S.A. 2A:14-10 provides that all actions for forfeiture upon any penal statute shall be commenced within two years of the offense. The instant action was instituted on March 31, 1976 which was more than two years after any infraction of the statute by defendant WRCC under Velsicol ownership and, therefore, any claim against defendant Velsicol is time-barred under N.J.S.A. 2A:14-10.

The simple irrefutable fact is that the 1937 Act requires a direct discharge in violation of the Act. Dumping on land is not prohibited conduct. There is no evidence that defendant WRCC discharged mercury to Berry's Creek in proscribed quotation during the period of June, 1960 through February, 1968; the trial court merely assumed such a discharge because during defendant Ventron's ownership such discharges were well documented by the State. The operations were not identical. The defendant Ventron discharged numerous plant personnel and attempted process changes (Cadmus 10/16/78, T14-24 to T20-13; T26-25 to T31-18; T75-25 to T76-22; Bernstein, 9/20/78, T16-4 to 6). The defendant Ventron's Bernstein acknowledged that the mercury business of defendant WRCC increased under defendant Ventron's ownership, its' competitors went out of business (W-144). All of the available data relative to the presence of mercury in the plant effluent reflects that no mercury was present; there is no credible expert opinion to the contrary.

The Court's imposition of liability on the defendant Velsicol for violations of the 1937 Act is predicated on the violations of the Act by defendant WRCC during Velsicol ownership (6/60-2/68). Any such

liability under the 1937 Act pre-dates the period during which defendant Velsicol owned any of the subject properties. (6/67-to date) and the State defined its claim prior to trial so as to exclude precisely such liability:

> Interrogatory 32: Do you in this action seek to hold Velsicol responsible for soil contamination which preceded Velsicol ownership of the premises? If so, state the factual basis for such alleged liability.
>
> Answer: No.

(Vel-Da174). The court has imposed liability on a State claim which did not exist.

POINT III

THE TRIAL COURT ERRED IN FINDING VELSICOL LIABLE UNDER THE 1971 ACT N.J.S.A. 58:10-23.1, ET SEQ.

The trial court found that the defendant Velsicol was "directly liable" under the 1971 Act, N.J.S.A. 58:10-23.1, et seq., by virtue of the fact that it knew or should have known that the defendant WRCC, under Ventron's ownership, was violating said Act by dumping mercury on the Velsicol property and should have put a stop to it. (Vel-Da39).

The 1971 Act forbids the discharge of hazardous substances into State waters, or in a manner which allows the flow or runoff into or upon the waters of this State and the banks and shores of said waters. N.J.S.A. 58:10-23.4. The 1971 Act defines "hazardous substances" to mean:

> such elements and compounds which, when discharged in any quantity into upon or in a manner which allows flow or runoff into the waters of this State or adjoining shorelines, presents a serious danger to the public health or welfare, including but not limited to, damage to the environment, fish, shellfish, wildlife, vegetation, shorelines, stream banks and beaches.

N.J.S.A. 58:10-23.3. The Act defines discharge as "any spilling, leaking, pumping, pouring, emitting, emptying or dumping" which definition clearly indicates affirmative conduct rather than passive inaction in the face of a discharge by others. N.J.S.A. 58:10-23.3(c). On page 27 of the trial court's opinion, the trial judge makes the following statement with respect to liability under the 1971 Act: "The purpose of all of these statutes and logic dictates that there be an affirmative act with or without knowledge or a failure to act with knowledge."

(Vel-Da29). The reference to "a failure to act with knowledge" is unsupported by the 1971 Act to the extent that the person failing to so act was not responsible for the act of discharge. It is only the "discharge" which is prohibited under N.J.S.A. 58:10-23.4 and only the discharger which is liable under the Act. A bystander with knowledge of the discharge is not guilty of the discharge and consequently has no liability under the Act. The Act is clear in providing that the discharger, the "person responsible for discharging" shall immediately undertake to remove such discharge..." N.J.S.A. 58:10-23.5. Liability for costs of abating the discharge is similarly to be assessed against the party making the discharge. N.J.S.A. 58:10-23.7:

> Any person who has discharged any petroleum products, debris or hazardous substances into the waters of this State and is therefore responsible for removing same from said waters and shall be liable for moneys expended for the removal of said discharges by (a) himself, (b) the department and (c) third persons so authorized by the department, but not to an extent greater than $14,000,000.00...

There is no provision in the 1971 Act which fairly can be interpreted as imposing liability upon the owner of property on which another dumps hazardous substances in violation of the Act, nor can the Act be fairly read to impose liability on a person who fails to prevent another from violating the Act. The Act provides that the discharger, not someone who witnesses the discharge or has knowledge of it, must notify the State. See N.J.S.A. 58:10-23.6. It is the State, not an adjacent property owner, which is permitted by the Act to enjoin any violations thereof. See N.J.S.A. 58:10-23.8. The trial court correctly held that the mere ownership of property is an insufficient basis for imposing liability under the Act (Vel-Da23). The Act defines "person" so as to

include "an individual, firm, corporation, association or a partnership.." and does not purport to include a 100% stockholder of any corporation and, therefore, the clear intent is that only the corporation actively violating the Act would be liable. It cannot be seriously suggested that defendant Velsicol actually knew that defendant WRCC, while owned by defendant Ventron, was dumping mercury on Velsicol's property. The persons employed in management positions by the defendant WRCC, Messrs. Cadmus, Bernstein and Derderian, all professed to have no knowledge of such dumping during their respective trial testimony. The plaintiff State, which continually monitored the plant operations of defendant WRCC, took no action to prevent such dumping and presumably was unaware of it. The defendant Velsicol, throughout the period of Ventron's operation of defendant WRCC, was an absentee landowner without knowledge of such dumping.

It is somewhat ironic that the trial court, although imposing direct liability upon defendant Velsicol under the 1971 Act for the dumping of defendant WRCC while owned by defendant Ventron, does not impose direct liability on defendant Ventron for the very same dumping. Certainly, if defendant Velsicol knew or should have known then the same must be true of defendant Ventron which owned and controlled WRCC, but the only direct liability imposed on defendant Ventron was predicated on the merger with defendant WRCC: "The liability of Ventron is direct under the merger theory, and derivative under the "control theory" (Vel-Da24). Mere consistency would dictate that defendant Ventron would have direct liability under the 1971 Act based upon its failure to stop any such dumping by its wholly-owned subsidiary as well as by virtue of the merger.

The 1971 Act should not be employed as a device to entrap non-dischargers on a theory of inaction in the face of knowledge (actual or imputed) of infractions of the Act by others. It is the State, not private individuals, which is charged with enforcement of the Act:

> If any person violates any of the provisions of this act, the department may institute a civil action in the Superior Court for injunctive relief to prohibit and prevent such violation or violations and said court may proceed in a summary manner. The department may also bring an action in the Superior Court against any persons in violation of this act to recover any moneys expended by it or any moneys expended by third persons which the department so authorized.

N.J.S.A. 58:10-23.8. Private individuals lack the expertise to detect violations of the Act.

In the case of State v. Exxon, 151 N.J. Super. 464 (Ch. 1977), the State had sought to have the court adopt a broad construction of the term "discha[illegible]", arguing that "the Legislature intended to prohibit all activity and inactivity that would result in petroleum products finding their way into the waters of the State." Id. at 471. Judge Kentz refused to expand the language of the Act, holding that "human activity", not inaction, is a prerequisite to liability under the Act.

The State, during the trial, failed or neglected to prove the nature or chemical composition of the mercury present on the subject properties or within the Creek sediment. Such proof was essential to establishing that the mercurial compounds constituted "hazardous substances" under the 1971 Act. The definition found in the Act itself, quoted previously, is so general as to be of little value. Guidance in this regard can be gleaned from the successor act, the "Spill Compensa-

tion and Control Act", N.J.S.A. 58:10-23.11, et seq. The Spill Act provides that "hazardous substances" shall be as defined in the DEP's regulations. N.J.S.A. 58:10-23.11b(j). The DEP's regulations list a number of mercury compounds, none of which have been proven to be found on the subject properties. No attempt has been made by the State to justify its failure to present proofs on this issue. The delineation of those mercury compounds deemed "hazardous" under the Spill Act is a clear admission by the State that mercury, per se, and all mercury compounds are not deemed hazardous within the intendment of the Act.

The 1971 Act, as interpreted by the State, requires either a direct discharge to Berry's Creek or the placement of hazardous substances so as to allow their runoff to State waters. There is not a scintilla of evidence that Velsicol placed any hazardous substances on any property anywhere. Nor is there a shred of evidence that Velsicol directly discharged hazardous substances into Berry's Creek. Also, there is absolutely no evidence that hazardous substances are being discharged from the Velsicol property through a natural leaching action; the trial court found no such leaching. Consequently, Velsicol can have no statutory liability whatsoever. That is so even without relying on Judge Kentz' decision in State v. Exxon, 151 N.J. Super. 464 (Ch. 1976) because in that case there was an admitted natural movement of the pollutant from the defendant's (ICI's) property.

The finding of the trial court that the defendant Velsicol knew or should have known that pollution was occuring from the plant operations of defendant WRCC is unsupported and, indeed, refuted by the trial record. The State's environmental "experts", who periodically inspected

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The finding of the trial court that the defendant Velsicol knew or should have known that pollution was occuring from the plant operations of defendant WRCC is unsupported and, indeed, refuted by the trial record. The State's environmental "experts", who periodically inspected

plant operations throughout Berk's and WRCC's operations, failed to make any note or mention of soil contamination. The State monitored defendant WRCC's processing plant and certified to the absence of mercury in the plant effluent (N-29). It is only by happenstance that the link between soil contamination and water pollution dawned on the State. This was when the runoff from the Wolf property during demolition was measured for mercury content. The regulatory agencies during the period of Ventron's operation knew of the soil contamination and it was of particular, albeit momentary, concern to the EPA, but no remedial action was taken. If anything is clear from the evidence adduced at trial, it is that the problem of soil contamination did not surface until Ventron's ownership and, when it did, none of the parties, through the benefit of hindsight, reacted responsibly. It is absurd to knowingly allow mercury to be discharged at the rate of .5 or .1 lbs. per day and then object to lesser levels which may be leaching from the soil or entering the Creek via surface water. When mercury was found in the plant effluent an intensive investigation should have been made of the environs to determine the dimensions of the problem in terms of soil and sediment contamination and their impact on water quality, but instead the discharge continued unabated through the same drainage system into and onto the Velsicol property and into Berry's Creek. At no time were soil tests performed by the State or at the State's direction until the plant premises had been sold. If the State had acted responsibly it would have instructed Ventron to advise it of any contemplated sale of the premises, but it did not.

It is one thing for the trial court to hold that Berk and WRCC should be liable for the pollution despite their unawareness of the

problem, but to argue that they knew or should have know what the State and Federal agencies did not comprehend is a factually more difficult allegation for the period prior to Ventron's operation.

This, as the trial court repeatedly noted, is a public interest case. There is no party which has more ill-served the public in this matter than the State through its initial inaction and subsequent over-reaction. Can the State seriously be alarmed about the presence of mercury in Berry's Creek when it knowingly allowed the discharge from 1968 to plant shut down in 1974 without once sampling the waters or sediment of Berry's Creek. This, moreover, occurred during the period of heightened sensitivity to the mercury problem.

The State never complained to defendant WRCC during Velsicol's ownership that the mercury was being discharged in its effluent. In fact, there is not proof that there was mercury in defendant WRCC's effluent during that time period. Velsicol challenges the State to cite one scrap of paper, one document of any kind, wherein the State noted the presence of mercury in WRCC's effluent during Velsicol ownership. The State tested Berk's effluent shortly before WRCC purchased Berk's assets and the State report was made available to WRCC prior to purchase; the report stated that there was no mercury in defendant Berk's effluent. (N-20; N-41).

The claims of knowledge, actual or imputed, are totally unsupported by the evidence. Virtually everyone who testified noted an increase awareness in the 1970's, after Velsicol's ownership of defendant WRCC, and, indeed, Dr. Joselow criticised the governmental agencies for failing to realize the problem earlier.

The State never even alleged that the defendant Velsicol was liable under the 1971 Act for failure to prevent such dumping. The State sought to impose liability only on the ground that it allowed, not the dumping, but mercury dumped on its property to run off into Berry's Creek.

> The term discharge as defined in N.J.S.A. 58:10-23.3(c) and N.J.S.A. 58:10-23.11b(h) encompasses two separate types of conduct. "Discharge" includes any intentional or unintentional action or inaction which results in the direct release or emission of pollutants in the waters of the State or which results in the placement of these substances in a position where they are capable of flowing into said waters. By allowing the mercury and other heavy metals dumped on its land to run off in the groundwaters and/or into Berry's Creek, Velsicol is presently responsible for the former type of "discharge" and therefore guilty of violating the statutes in question.

(State's Proposed Findings of Fact & Conclusions of Law, Vel-Dal90 to 191). The trial court refused to impose liability on this theory by holding that liability could not be imposed on the basis of "mere ownership". Moreover, the "failure-to-act" argument which served on a basis for Velsicol liability under the 1971 Act was clearly predicated upon the Spill Act's reference to "any intentional or unintentional action or omission" but the trial court correctly found the Spill Act was not applicable to defendant Velsicol.

The trial court declined to impose any liability under the 1971 Act on the basis of mere ownership of property which was leaching pollutants and, in that regard, the court followed the prior decision of Judge Kentz in the matter of State v. Exxon, supra. It was precisely on that basis that the court dismissed as to defendant U.S. Life at the conclusion of the State's case. In fixing liability on the defendant

Velsicol, the Court was compelled to make a distinction between defendants U.S. Life and Velsicol. The "distinction" seized upon by the Court was defendant Velsicol's prior stock ownership of defendant WRCC; the rule apparently being that mere land ownership was insufficient but mere stock ownership was more than enough for the attribution of liability under the 1971 Act. It is truly a distinction without a difference. Just as the 1971 Act does not impose liability for mere ownership of land, it does not provide for liability of stockholders for a corporate violation of the Act. The Act does not encompass mere bystanders, but only dischargers. Attempts to impute knowledge to the bystander does not alter the fact that the bystander is not discharging in contravention of the Act and has no obligation thereunder.

The trial court ignored the plain language of the 1971 Act and the evidence adduced at trial in an attempt to impose liability on defendant Velsicol, which undoubtedly was deemed a "deep pocket" defendant, simply to avoid imposing full and exclusive liability on defendants WRCC and Ventron. There is no authority authorizing or permitting the Court to extend the scope of the Act beyond its express bounds; certainly, a desire to simply spread the liability is no justification. The trial judge was bound to interpret the Act as written and not, under a guise of implementing its spirit, extend the Act to persons who clearly were not intended to have liability under the Act. See generally, Belfer v. Borrella, 9 N.J.Super. 287, 293 (App. Div. 1950).

Liability under the 1971 Act, as under the 1937 Act, N.J.S.A. 23:5-28, involves a finding of causation. See, State v. Jersey Central Power & Light Co., 69 N.J 102 (1976). Clearly, the defendant Velsicol did not cause defendant WRCC to dump on its, defendant Velsicol's,

property while defendant WRCC was owned and controlled by the defendant Ventron.

The trial court was not faced with the difficult task of being presented with a potential pollution threat caused by someone who was not before the court or which was not financially viable. The defendant WRCC, which the Court found did the dumping under defendant Ventron's control, was and is before the Court and defendant Ventron is liable as a matter of corporate law for whatever liability defendant WRCC may have. There is no reason to seek to impose liability on defendant Velsicol to minimize WRCC/Ventron liability; the active polluter is before the court and fully capable of satisfying any judgment.

Certainly, there is no public policy against owning stock in any type of business venture, regardless of the inherently dangerous nature of the activities of the business enterprise. The full panoply of advantages as well as disadvantages are afforded by the laws of New Jersey to stockholders of corporations involved in high-risk operations. As indicated in Point I, supra., that is true even if the venture is a one-man corporation. The 1971 Act does not purport to alter those well established principles of corporate law, but instead, focuses on the operating corporation rather than the stockholder or, as applied to defendant Velsicol, a former stockholder. Velsicol had no stock interest in defendant WRCC since February, 1968 when defendant Ventron acquired defendant WRCC. Since the sale of defendant WRCC, Velsicol has done nothing but own in absentia a vacant tract of land. The defendant Velsicol owned stock and now owns land; neither can constitute a violation of the 1971 Act or result in the imposition of liability.

The non-liability of the defendant Velsicol under the 1971 Act is not dissimilar from that of defendants U.S. Life and Wolf. The defendants U.S. Life and Wolf owned land and were involved jointly in a venture to develop said land for an anticipated mutual profit. The defendant U.S. Life held title to a portion of the former plant site as security for a loan made to defendants Wolf which undertook to develop the site. As to the defendants Wolf, the Court stated that the prerequisite to liability under the 1971 Act was a discharge to Berry's Creek:

> Have defendants Wolf and/or Rovic "discharged" within the meaning of the 1971 statute? The court thinks not. While the demolition-construction may have "moved" some of the pollutants around the Wolf site, there is no adequate proof that any such action added to the pollution in Berry's Creek - a sine qua non to liability under the State's case.

(Vel-Da32). Unlike the defendant Velsicol and ICI in the Exxon case, supra., which took no action whatsoever, the defendants Wolf did act and, as the court noted, perhaps did commit a "technical violation" of the Act (Vel-Da32) resulting in a "de minimus" discharge. (Vel-Da32-33). Application of the same analysis to defendant Velsicol's liability under the 1971 Act presents a stronger case for non-liability for defendant Velsicol than it did for defendants Wolf. There is no proof that any post-1971 dumping "added to the pollution in Berry's Creek" and defendant Velsicol committed no act which could even be construed as a technical infraction of the 1971 Act or to have contributed even in a "de minimus" degree to the condition found to exist by the trial court.

It seems that the trial court's evaluation of the liability of the defendants U.S. Life and Wolf under the 1971 Act involved a set of criteria totally different from that applied to defendant Velsicol. The defendants Wolf could have no liability under the 1971 Act even if they

technically violated it because they did not put the pollutants there originally and they acted in good faith. On the other hand, the defendant Velsicol was found liable when someone else, defendant WRCC (under Ventron control) dumped an unknown quantity of mercury on its vacant property without defendant Velsicol's authorization. Velsicol, the court held, should have known out in Chicago that this dumping was occurring, although defendant WRCC's management denied knowledge thereof and apparently the State, despite its continuous monitoring, had no such awareness. In contrast, the bulk of the Wolf development occurred after the defendants Wolf were actually aware of the presence of contaminants.

Despite the attempts by the trial court to camouflage it, the imposition of liability under the 1971 Act is on the basis of "mere ownership" which the trial court itself held was no basis for liability under the 1971 Act. (Vel-Da23). Imposition of liability on the basis of land ownership with knowledge imputed by virtue of former stock-ownership is "mere ownership" liability. Neither land nor stock ownership is a permissible basis for liability under the 1971 Act. Moreover, the imputation of knowledge by virtue of stock ownership prior to passage of the Act seems to involve a retroactive application of the Act which the trial court itself, held was impermissible. ("These quasi-penal statutes may not be retroactively applied.").

In order for there to be liability imposed under the 1971 Act, one must be a discharger guilty of some affirmative act N.J.S.A. 58:10-23.3(c). The trial court in the instant case acknowledges that to be so in one portion of his opinion wherein he quoted approvingly from Judge Kentz opinion in State v. Exxon, supra.:

> as Judge Kentz stated..."these verbs connote some activity, some human agency, even if that activity is accidental or unintentional.

(Vel-Da30). When it came to defendant Velsicol, however, the trial court seemingly ignored this interpretation as it engaged in a procrustean application of the Act to Velsicol's conduct -- inaction.

If a failure to act with knowledge can lead to liability under the 1971 Act, then clearly the State would be liable. The State admittedly knew of the effluent discharges by defendant WRCC and did not stop it. The State by virtue of its continuous monitoring of the site knew or should have known that there was dumping of mercury on the Velsicol property, but the State did not stop it. Moreover, when the post-1971 dumping was occurring, the State was charged under N.J.S.A. 58:10-23.5 to "undertake the removal of such discharge and [was authorized to] retain agents and contractors for such purpose who shall operate under the direction of the department." No such action was taken with respect to any such dumping or with respect to the effluent being discharged. As indicated previously, the State had actual knowledge of the mercury being discharged onto the defendant Velsicol's property as part of the effluent of the processing plant. Nothing was done by the State despite being required by the 1971 Act to do something. Instead, the State or at least the Court, seeks to impose liability on the defendant Velsicol for that which it had no obligation and that which the State ignored both before and after the passage of the 1971 Act. The 1971 Act further provided that the "department [DEP] 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." N.J.S.A. 58:10-23.5 This would seem to apply to defendant Velsicol which owned

the property on which defendant WRCC was dumping mercury, but the State never contacted defendant Velsicol with respect to the dumping, the effluent discharge or anything else. It is quite clear from the latter provision that defendant WRCC, not defendant Velsicol, was intended to be the party primarily liable for its discharge contrary to the holding of the trial court.

To the extent that ownership is a key element to the imposition of liability upon Velsicol under the 1971 Act, it should be noted that at that time and now the issue of ownership of the defendant Velsicol's property is in dispute by virtue of the State's riparian claim. Thus, both the State and the Defendant Velsicol laid claim to the land when the dumping occurred. The quiet title action was tried before the Honorable James J. Petrella and the State has filed an appeal and defendant Velsicol a cross-appeal from the order of final judgment. The matter is presently pending in the Appellate Division.

The defendant Velsicol did not commit a discharge within the meaning of the 1971 Act and, therefore, it can have no liability under the Act. If the defendant WRCC violated the Act, then it is liable for such conduct and is fully capable of paying for any remedial action necessitated by such conduct. There is no basis for seeking to hold defendant Velsicol liable for defendant WRCC's violation of the Act; certainly, there is no logic to imposing any direct or primary liability on defendant Velsicol.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT VELSICOL HAS NUISANCE LIABILITY TO THE STATE.

The trial court in imposing statutory nuisance liability on the defendant Velsicol, did so on the basis of violations of the 1937 and 1971 Acts. (Vel-Da50) Having established heretofore that the defendant Velsicol did not violate either Act, there can be no such statutory nuisance liability.

In order for a common law nuisance to exist there must have been an unreasonable, unwarranted or unlawful use of real property resulting in a material annoyance or injury. See Cherry Hill Tp. v. N.J. Racing Comm., 131 N.J.Super. 125 (L. Div. 1974), aff'd. 131 N.J.Super. 482 (App. Div. 1974), certif. den., 68 N.J. 135 (1975); State v. Exxon Corp., 151 N.J.Super. 464 (Ch. 1977). A public nuisance is a nuisance which exposes the general public to danger. Bengivenga v. City of Plainfield, 128 N.J.L. 418 (E&A 1942). The basis for the imposition of common law nuisance liability must fall within one of three categories: (1) negligence; (2) intentional conduct; or (3) strict liability. Ettl v. Land & Loan Co., 122 N.J.L. 401 (Sup. Ct. 1939); Prosser, Handbook of the Law of Torts, (4th ed. 1971), at 574; State v. Exxon, supra.; State v. Jersey Central Power & Light Co., supra. As to the common law liability imposed upon the defendant Velsicol, the trial court correctly held that such liability may be predicated upon intentional acts negligence, or strict liability (Vel-Da51). With respect to intentional acts, the court ruled as follows:

> Surely Berk and WRCC intended to and volitionally did manufacture mercury compounds and dumped waste on the Velsicol property. However, the court cannot find that the acts were done with the intent to pollute the waters of the State or with the knowledge that such an invasion was substantially certain to occur. No such knowledge or intent may be imputed to defendants under an intentional tort theory.

(Vel-Da52). Similarly, it was held by the trial court that no common law nuisance liability could be based upon negligent conduct of defendants.

> While the discharge of mercury might be considered unreasonable, unwarranted or unlawful, by today's standards, the actions of the defendants must be measured as of the date they occurred. The standards as to the effluent treatment, even as late as 1974 and 1975 at the time of demolition, did not require any higher degree of care or caution then was taken by them.
>
> The DEP and the EPA had been watching WRCC since the mid-1960's. The effluent being discharged was tested by plaintiff and plaintiff never formally cited WRCC for violations of any statute nor did it seek judicial relief on the ground that WRCC's conduct violated any standard of reasonable action.
>
> * * * *
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> Thus, the court cannot find that Berk, WRCC, Velsicol or Ventron acted negligently. The conduct of those defendants was reasonable in light of the state of knowledge as it then existed.
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> * * * *
>
> This determination applies equally to any allegations by plaintiff that it was unreasonable for the defendants Berk, WRCC, Velsicol and Ventron to fail to rectify the discharge and contamination that occurred regardless of their role in creating such conditions. Plaintiff argues that those defendants knew or should have known about the problems and that they

were negligent in failing to take steps to rectify them. Negligence as a basis for nuisance liability has not been demonstrated.

(Vel-Da53 to 54)

The trial court proceeded to impose nuisance liability on defendant Velsicol solely on the theory of strict liability as if defendant Velsicol, rather then defendant WRCC, operated the mercury processing plant. This application of strict liability to the defendant Velsicol is inappropriate. There was no showing made that in 1960-68 the operation of a mercury processing plant was an inherently dangerous enterprise in the sense of pollution liability. There was only the one anti-pollution act, the 1937 Act, which consisted of a single paragraph. The business industry and the environmental agencies were, at that point in time, insensitive to mercury as a significant threat to the environment. The trial court cannot consider and evaluate the actions of defendant WRCC in the light of the heightened sensitivity to mercury which currently prevails or prevailed during Ventron's ownership. The Court itself recognized in its finding that the defendants were free from negligence that the standard of care was different then than now.

The defendant WRCC, not the defendant Velsicol, was engaged in the enterprise which allegedly gave rise to the condition of pollution found to exist by the trial court. The defendant Velsicol has never been engaged in the mercury processing business on the subject properties. If there was a violation of the anti-pollution laws, it was the defendant WRCC which violated said laws. In point of fact, the trial record demonstrates that the defendant Velsicol's property has served

to insulate Berry's Creek from further contamination by absorbing mercury from the ground and surface water. The defendant WRCC, not the defendant Velsicol, reaped the profits of such business venture and it was defendant WRCC, if anyone, which had tne opportunity to secure insurance coverage for liability arising out of its business operations.

The cases which have imposed strict liability on polluters all involve situations where the party found strictly liable was engaged in a business endeavor which necessitated the use or storage of ultra hazardous substances. For example, in the case of City of Bridgeton v. B.P.O.L. Inc., 146 N.J.Super.. 169, 369 A..2d 49 (L. Div. 1976), the City of Bridgeton instituted suit against the owner and lessee of property on which oil spills had occurred. The City was seeking to recover its expenses in preventing the spread of the oil spill. The Court, although recognizing that the City could not recover such costs because that was a government cost, held that one who stores ultra hazardous materials is strictly liable for damages caused by such activity:

> [T]he possessor of a pollutant keeps it on his premises at his peril. If it escapes he is answerable to one who suffers a provable loss thereby. The policy of the law in this State and of society in general makes this a case of strict liability rather than of negligence. Id. at 179

The case of Lansco Inc. v. Department of Environmental Protection, 138 N.J.Super. 275 (Ch. 1975), aff'd, 145 N.J.Super. 433 (App. Div. 1976) is in accord with this concept of enterprise liability. The defendant Velsicol irrefutably was not engaged in such a risk-ridden enterprise. As stated, the chemical plant was operated by the defendants Berk and WRCC/Ventron. The defendant Velsicol, as owner of property purportedly polluted, is the victim rather than a perpetrator of any wrong. In

Bridgeton, supra., the Court noted that a party in the position of defendant Velsicol in the matter sub judice should be allowed to recover damages from the party actively engaged in the enterprise responsible for the pollution:

> [I]f the City were the owner of adjacent land damaged by escaping oil, it like all landowners, may recover damages caused by their escape. Id. at 179.

Liability is sought to be imposed on defendant Velsicol on account of actions of its predecessor in title both before and after transfer of title. Imposition of liability on defendant Velsicol on a theory of strict liability clearly is unjustified. The reasoning of Judge Kentz in State v. Exxon, supra., is most apt on this point:

> The rationale behind strict liability, i.e., that an enterprise involving unusual hazards must pay its way, is not application to ICI. ICI is not [illegible] and never has been in the business of storing oil or doing anything connected with oil. Exxon, not ICI, discharged oil onto and into the ground when it owned the property. Therefore, ICI should not bear the burden of paying for the consequences of the activities of its predecessor in title.

Id. at 484.

The party or parties actually creating the alleged nuisance are the parties upon whom nuisance liability should be imposed and not an innocent landowner or stockholder such as defendant Velsicol. The general rule is that a creator of a nuisance remains liable even after alienating title to the property. See, Garvey v. Public Service Co., 115 N.J.L. 280 (E&A 1935); State v. Exxon Corp., 151 N.J.Super. 464 (Ch. 1977); State v. Ole Olsen, Ltd., 38 A.D.2d 967, 331 N.Y.S.2d 761 (App. Div. 1972). The trial court by holding defendant Velsicol, rather

than defendant WRCC, liable for the WRCC pollution ignored this well established principle of law.

The Velsicol property, if a present source of some degree of pollution, is a source only because it previously was polluted by affirmative conduct of others which went unabated. Nothing has been done by defendant Velsicol to increase any discharge of pollutants from its property. The imposition of abatement responsibility on defendant Velsicol under these circumstances, clearly would be oppressive and confiscatory. The nuisance, in the sense the term is used to ascribe abatement responsibility, is the source conduct, the deposit of pollutants in the soil, and not the aftermath of natural leaching from property to property or property to waterway. The State of New Jersey in its anti-pollution laws has recognized the unfairness of attempting to hold liable for abatement the landowner who has had his property polluted by others so as to become itself a natural source of pollution. The statutes provide that the true culprit, the active discharger or source actor, bears the responsibility for abatement and, if the source cannot be located, the State abates the condition in the public interest through the use of the Spill Fund.

It would be unconscionable to adopt a rule of law, be it under the nebulous rubric of "nuisance" or whatever, that would permit the State to assess the enormous cost of pollution abatement based solely upon stock or land ownership. Because of the dimensions of the problem and the onerous nature of the abatement, the condition must be abated by the actual creator of the nuisance or at the general expense of the public. The present approach under New Jersey's "Spill Act" is perhaps the most equitable solution. The "Spill Act" allows the State to tax

large users of pollutants so as to create an abatement fund to be used when the actual discharger is unknown or the discharger neglects or refuses to abate. Judge Kentz in deciding State v. Exxon, supra., essentially decided it would not be fair and consistent with the law of this State to impose liability on defendant ICI which found itself the owner of property contaminated with oil by a prior owner, the co-defendant Exxon Corporation. Judge Kentz recognizing the inequity of the State's contentions with respect to imposing liability on defendant ICI, stated:

> blind adherence to a theory making every landowner liable for pollution on his land regardless of the source of that pollution ...would be inequitable if not a travesty of justice...

State v. Exxon,, supra. at 485. A contrary holding would be detrimental to the public interest and advantageous to polluters and users of hazardous substances. If the trial court is correct that a stockholder is liable regardless of fault, when are the monies in the Spill Act Fund to be expended? Certainly, the users of hazardous substances who are paying the tax which funds the Fund will protest any utilization of Fund monies without prosecution of the innocent stockholder so as to realize full or partial Fund reimbursement. The statutory scheme is rendered a total sham if that is to be the law of this State and a holding to that effect would constitute an unconstitutional encroachment by the judiciary into the functions of the State legislature. What innocent landowner is going to report to the State that he finds his property is polluted by unknown causes if he knows that he will be strictly liable for abatement costs. The imposition of strict liability on the landowner

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protects the Fund and sources of the Fund rather than the public at large.

It is simply contradictory for the "Spill Act" and its predecessor legislation to provide that a person is not liable for a discharge caused solely by a third person or act of God or governmental negligence and yet impose liability on the individual in just such situations on the ground that he, as a 100% stockholder of a polluter corporation, is liable in nuisance regardless of who caused the pollution. The answer must be that in the context of pollution and pollution abatement that the express statutory schemes are controlling and have superseded any State common law in this area.

Because the WRCC plant under Velsicol's ownership operated with the approval, explicit and/or implicit, of the State, the plant operations cannot be held to constitute a public nuisance. Such was the thrust of the Court's holding in Borough of Westville v. Whitney Home Builders, 32 N.J.Super. 538 (Ch. 1954), aff'd, 40 N.J.Super. 62 (App. Div. 1956). In that case the Borough brought suit to enjoin the defendants from utilizing their plan to discharge effluent from a neighboring township's proposed sewerage plant into a ditch which ran across the Borough's boundary. The Borough sought relief on the common law ground that a lower riparian property owner has a right against an upper riparian property owner who discharges pollutants onto its property. The right to assert such a claim was not contested. The Borough asserted a claim on behalf of the State on the ground that the proposed discharge would create a health hazard. The Court awarded the defendants summary judgment as to the Borough's claim on the ground that, if the sewerage plant was approved by the State, it could not constitute a public nuisance.

The attempt by the trial court to attribute the strict nuisance liability of the defendant WRCC to the defendant Velsicol is predicated exclusively on the basis of the imputed knowledge and potential for control inherent in 100% stock ownership. Assuming there is a common law basis for imposition of liability on the parent corporation for a public nuisance created by the wholly-owned subsidiary, the Legislature by allowing for one-man corporations clearly abrogated any such common law liability. See N.J.S.A. 14A:2-6. The trial court cannot ignore the Legislature's clear intent in enacting the General Corporation Act of this State. As Judge Miller stated in Mingin v. Continental Can Co., 171 N.J.Super. 148 (L. Div. 1974), the statutory non-liability of a corporate stockholder cannot be circumvented:

> The statute now permits one person to function as a corporation...[and] places upon the court the duty to realize that this procedure is lawful and that the corporate forum may not be disregarded except in the case of actual fraud... The court may not bastardize by construction that which the Legislature has legitimized by statutes.

Id. at 152. The defendant Velsicol, by the trial court's own admission is guilty of neither intentional nor negligent conduct. The trial court cannot properly impose liability on defendant Velsicol on the basis of stock ownership when the Legislature has said that liability shall not attach to the stockholder even if all the stock is held by a single individual.

Certainly if there were any nuisance liability on the part of defendant Velsicol, it would be secondary to that of the defendant WRCC and

the trial court so found. The defendant Ventron by virtue of the merger with the defendant WRCC voluntarily assumed all the liabilities of the defendant WRCC. Moreover, the defendant Ventron took to itself all the assets of the defendant WRCC including the $630,000.00 paid by the defendants Wolf for the 7-acre plant site as well as whatever additional monies the defendant Ventron secured from its sale of the business of the defendant WRCC. It is certainly inequitable to allow the defendant Ventron the benefit of 100% of the assets of the defendant WRCC, but only 50% of the liability. As with the statutory infractions, the defendants WRCC and Ventron must be primarily liable and, if Velsicol has any liability, it is exclusively secondary in nature.

POINT V

THE TRIAL COURT ERRED IN DENYING VELSICOL'S CLAIM FOR INDEMNIFICATION AND/OR CONTRIBUTION FROM THE DEFENDANTS WRCC AND VENTRON.

It is clear from a review of the trial court's opinion that the defendant Velsicol's liability is vicarious, imputed or secondary. In the matter of Public Service Elec. & Gas Co. v. Waldroup, 38 N.J.Super. 419 (App. Div. 1955) the Appellate Division addressed the issue of common law indemnification by quoting approvingly from the case of Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A. 2d 368 (1951):

> There is, of course, a fundamental difference between indemnity and contribution. The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence, - a doctrine which, indeed, is not recognized by the common law...It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person....
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> * * * *
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> Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized.

Public Service Elec. & Gas Co. v. Waldroup, supra., 38 N.J.Super. at 431, quoting from, Builders Supply Co. v. McCabe, 77 A. 2d at 370-71. As the court in Public Service, supra., the "right of indemnity is granted...to those whose liability is secondary...,i.e., whose negligence is not morally culpable but is merely constructive, technical, imputed or vicarious." Id. at 432: accord: Adler's Quality Baking, Inc. v. Gaseturia, Inc., 32 N.J. 55, 79-81 (1960); Hut v. Antonio v. Guth, 95 N.J.Super. 62, 69-70 (L.Div. 1967); Restatement, Restitution K96 (1937).

The record is abundantly clear. The defendant Velsicol's liability, if any, is secondary to that of the defendants WRCC and Ventron. Perforce the defendant Velsicol is entitled to indemnification from defendant WRCC. The defendant Ventron, by virtue of its merger, is absolutely and primarily liable for defendant WRCC, including the defendant WRCC's obligation to indemnify the defendant Velsicol.

Not only does a mere molding of the judgment to reflect properly the legal implic ons of the trial court's findings, mandate a recovery on the defendant Velsicol's crossclaim against defendants WRCC and Ventron, but the conduct of the defendant WRCC and Ventron following the sale by defendant Velsicol is such as to make the denial of recovery legally infirm.

It was during Ventron's operation that mercury became well known as an environmental contaminant. (Bernstein, 9/28/78, T57-20 to 24). Debris found by the DEP on the Velsicol property reflect that WRCC, under Ventron's ownership, dumped materials on the Velsicol property. (Reed, 6/13/78, T61-162). Moreover, WRCC/Ventron admitted to dumping on the Velsicol property after Velsicol acquired title. (Bernstein, 9/28/78, T9-23 to T10-4; Pffeifer, T37-2 to T38-10).

Sometime in 1970-71, the WRCC/Ventron sewer lines were flushed out (Faye, 10/17/78, T103-19 to T104-1; W-52). At this time Ventron anticipated that there was residual mercury in the lines (Faye, 10/17/78, T104-4 to 7). No attempt was made by Ventron to treat the discharge from this flushing operation although it was being discharged onto and into the Velsicol property through the drainage system and to the extent the mercury was not absorbed by the Velsicol property it was discharged into Berry's Creek. (Faye, 10/17/78, T104-21 to 25). The DEP was never advised of this flushing operation. (Faye, 10/17/78, T105-6 to 9). Ventron claimed it had received permission from John Ciancia of the EPA (Faye, 10/17/78, T104-12 to 17), but Ciancia denied ever agreeing to such wanton pollution. (Ciancia, 10/14/78, T63-25 to T64-2; T78-17 to 23). As a result of this unauthorized flushing operation, which apparently took place over several weeks (W-52), unknown quantities of mercury residuals in the pipe lines which had accumuluated over the many years of the plant's operations were discharged onto and into the Velsicol property and, in part, into Berry's Creek. Such a discharge evidenced Ventron's total lack of concern for the environment and was totally unnecessary because the discharge could have been treated.

In December of 1968 Ventron's ROM reactor kettle in Building 18 blew and generated an enormous concentration of dust and vapor; a fan in Building 18 dispersed such mercury vapor and particulate to the outside of the building and presumably on the adjoining Velsicol property. (Joselow, 5/23/78, T241-14 to T245-17).

Ventron knowingly discharged varying quantities of mercury through its effluent and storm sewer systems into and onto the Velsicol property

and into Berry's Creek throughout the entire period of its operation. (Pfeiffer, 6/6/78, T77-6 to T79-14; Testimony of Faye and Bernstein; W-93; W-95; W-110; W-112; W-116; W-117A; W-117B; W-120; W-170A; W-177; W-182; W-184; W-189; W-190; W-191; W-192; W-195; W-196; W-198; W-205).

Ventron imported to Wood Ridge the waste from its Chicago mercury operation (W-119), although knowledge of such activity was denied by the Ventron plant engineer (Faye, 10/17/78, T2-22 to T4-9). Such a denial causes one to suspect the data generated by Ventron's self-surveillance and reflects on the amount of mercury being discharged from the site through the various avenues of transport, i.e., air, water and dumping.

Ventron was required under the Federal discharge permit program to secure a permit for the discharge into Berry's Creek and Ventron never secured such a permit. (Faye, 10/18/78, T27-4 to T29-5). Such a permit was not required under the Velsicol years. In connection with this permit program, Ventron had to secure a certification from the State that its discharge was acceptable, but the State never issued such a certification. (Faye, 10/18/78, T30-6 to 22). All the while, Ventron knowingly discharged mercury into a drainage system which allowed the mercury to enter the soil of the Velsicol property and, in part, Berry's Creek. In completing its application for the federal discharge permit Ventron acknowledged that the question on the application inquiring about the State's evaluation of the Ventron effluent was a "touchy" subject for Ventron and ultimately the question was answered by a statement that the Ventron effluent had neither been approved nor disapproved. (B-37; B-38; B-39; Faye, 10/18/78, T43-7 to T48-8).

In 1970 or 1971 Ventron was sufficiently cognizant of the mercury problem as to have had an in-house discussion about whether the regulatory authorities would require Ventron to dredge Berry's Creek (Bernstein, 9/27/78, T97-1 to T99-6). Nevertheless, Ventron continued to discharge mercury into and onto the Velsicol property and into Berry's Creek.

Ventron knew that the soil on the plant site was contaminated with mercury as was the ground water and took no effective steps to contain it and prevent its transport to the Velsicol property and Berry's Creek. Knowledge of the soil and ground water is established by the following portions of the record.

In an internal Ventron memo of October 23, 1970 Ventron noted that it, Ventron, "had already suffered adverse publicity because of leached mercury discharged." (Faye. 10/17/78, T78-6 to 11).

In the Fall of 1971 Ventron became aware of a discrepancy between the mercury content in its treated effluent and total plant effluent which was suggestive of an infiltration of mercury into the storm sewers and effluent lines by leaching from the soil. (Faye, 10/17/78, T102-20 to T103-15).

The Metcalf & Eddy report (P-755) in February, 1972 verified substantial soil and ground water contamination. (Faye, 10/5/78, T75-5 to 10). The mercury content of the ground water as reflected in the Metcalf & Eddy report (P-755) was considerably higher than the mercury content of the plant effluent and in some instances it was ten thousand times higher (Tidewell, 6/7/78, T112-5 to T113-12). Obviously, Ventron knew it had a significant soil and ground water problem above and beyond its impact on total plant effluent. However, it was viewed only

as a problem to the extent that it might be increasing the total mercury reading on total plant effluent.

The EPA at one point suggested to Ventron that Ventron consider some kind of chemical treatment of the soil to contain the mercury (Horner, 6/8/78, T92-5 to 8; W-160); however, no such treatment occurred.

Dr. O'Rourke, Ventron's consultant, advised Ventron that the contaminated soil should not be excavated because that would only increase the likelihood of mercury transport from the site. (Bernstein, 9/16/78, T93-23 to T94-16; P-811; Derderian, 9/13/78, T63-8 to T67-1). As a result of Ventron's involvement in the negotiations for the sale of WRCC's business to Troy Chemical Co., Ventron became even more acutely aware of the problem with soil contamination at the site. (Derderian, 9/12/78, T72-4 to T23-4). Despite that information, the property was sc by WRCC/Ventron to defendants Wolf without warning.

During the period of Ventron's operation of the plant, Ventron increased the number of recovery stills from 3 to 4 reflective of the increased volume of mercury in the effluent, the sludge being put through the stills (Pfeiffer, T16-1 to 5) and ultimately the debris dumped on the Velsicol property. Upper-level management of Ventron was aware of dumping on the Velsicol property and took no effective measures to stop such activity (Bernstein, 9/28/78, T9-23 to T10-4; T23-2 to 9). WRCC/Ventron unlike WRCC/Velsicol, knew that the ash residue from the still operation contained mercury in the range of 500 PPM (P-754) when this ash was being dumped by WRCC/Ventron on the Velsicol property. On the other hand, during the operation of WRCC/Ventron, according to Ventron's Cadmus, it was believed that the ash did not contain mercury. (Cadmus, 10/12/78, T81-1 to T82-5).

The first reference by Dr. Joselow, an environmental consultant retained by defendant WRCC during the ownership of both defendants Velsicol and Ventron, to the presence of waste piles on the Velsicol property is in his report of July 8, 1970, i.e., when Ventron was operating the plant. (Joselow, 6/13/78, T17-21 to T22-12).

Despite the EPA's suggestion that Ventron abate the soil and groundwater problem (Tidwell, 6/8/78, T53-22 to 25; W-160), Ventron took little action in this regard:

> Q. As far as you know during the period when you were involved, was Ventron making any effort at all with respect to dealing with mercury in the soil and ground water?
>
> A. They were making exploratory efforts in determining the size and nature of the problem, but I don't know of any activities they engaged in in order to clean up the mercury that was found.

(Tidwell, 6/8/78, T73-24 to T74-7).

In 1971, Mr. Tidwell, a representative of the EPA, while on a tour of the Ventron operations observed mercury products blowing around inside one building, mercury compounds positioned near catch basins so as to allow for the possibility that it might be washed into the storm drain by runoff, and minor leaks in process lines all of which contributed to soil contamination. (Tidwell, 6/7/78, T22-3 to T24-6; W-117A; and W-117B).

Ventrons' failure to abate the soil and ground water contamination at the plant site resulted in migrational contamination of the Velsicol site and its environs. The Velsicol property has in the past and is now soaking up the mercury being discharged onto the Velsicol property

from the Ventron plant site through the surface and ground waters and, in a sense, the Velsicol property has served to insulate Berry's Creek from much of the contamination:

> Q. Is it generally true that the Velsicol property to the extent that it is exposed to surface or ground water flow containing any degree of concentrations of mercury serves somewhat as a sponge and it takes up the mercury?
>
> A... That's correct.

(Stopford, 8/23/78, T133-11 to 16).

Ventron carelessly left mercury sludge at the site when it sold the property to Wolf (Longstreet, 6/27/78, T79-14 to T81-8 although in its letter of May 29, 1974 (B-5) Ventron falsely had advised the State that all chemical bearing residues had been removed from the site. On June 7th, 1974 piles of chemical were at the site:

> Q. On the basis of your observation had all mercury chemicals bearing resides been removed from the Ventron plant before it was shut down?
>
> A. No, they had not.

(Longstreet, 6/27/78, T83-13 to 18).

The conduct of defendant Ventron cannot be dismissed on the basis of a lack of awareness which prevailed prior to its takeover of defendant WRCC. The defendant Ventron knew the full extent of the mercury threat and the actual conditions existing on the site. Gauged in the light of its actual knowledge of the problem, the conduct of the defendants WRCC/Ventron was such that they should be held accountable to defendant Velsicol for the pollution of the Velsicol site by WRCC/

Ventron and also any pollution attributable to the demolition and construction performed by the defendants Wolf due to the knowing concealment by defendant Ventron.

POINT VI

THE TRIAL COURT ERRED IN DENYING RELIEF TO DEFENDANT VELSICOL ON ITS CROSSCLAIM AGAINST DEFENDANTS WOLF.

The trial court in analyzing the potential liability of the defendants Wolf, essentially concluded that, since the defendants Wolf did not place the mercury originally on the 7-acre tract they could have no liability even if it committed technical violations of the applicable statutes. Moreover, the court concluded, the extent to which the defendants Wolf added to the problem was "de minimus". The reasoning fails to take into account that, with respect to the surface of the Velsicol site, the degree of contamination of same was unknown at the time of the demolition activity of the defendants Wolf. The same is true with respect to the contamination of Berry's Creek. Not knowing for a fact the extent of the pollution which pre-dated the demolition, it is difficult to discern whether the demolition activity contributed in merely "de minimus" fashion to the condition of pollution. One needs to know additionally the extent to which mercury was transported from the Wolf site to either the Velsicol property or Berry's Creek to ascertain the extent to which the pre-existing condition, whatever that may have been, was exacerbated by the demolition and construction taking place on the Wolf site.

It is much too simplistic to conclude that, because the defendants Wolf did not bring any additional mercury to the subject properties it can have no liability or be incapable of materially increasing the threat of pollution. The movement of mercury from the 7-acre tract (Wolf/U.S. Life property) to the defendant Velsicol's property is an exacerbation of

the problem to the extent that it constitutes a movement closer to the Creek and certainly any such increase would be objectionable from defendant Velsicol's point of view. Moreover, if that movement results in surface contamination of the Velsicol site, where no such contamination previously existed (despite considerable subsurface contamination), there has been a material enhancement of the condition of pollution assuming the surface contamination is such as to allow surface water transport of mercury to the Creek. The trial court did conclude, based essentially on supposition, that there was such surface water transport. Arguably, such surface water transport might result in a "de minimus" enhancement of the contamination of the Creek but, if that were true, the Court's requirement of surfacing of the Velsicol tract would be inappropriate and it probably is.

The point to be made is that the mode of analysis applied to the conduct of defendants Wolf should be the same as that applied to the co-defendants. The trial judge did not know the precise extent to which Berk or WRCC contributed to the condition of pollution found to exist and yet that was no impediment to fixing liability on said defendants. The trial court did not know to what extent the totality of WRCC's contamination might be "de minimus" if we knew the extent of the contamination, if any, attributable to defendant Berk. The State's case is largely one of conjecture and supposition; we do not know for certain what happened. We do not know with any degree of probability whether the conduct of the defendants Wolf resulted in merely "de minimus" additional pollution or whether it created a surface of contaminants where only less troublesome subsurface contamination existed.

The record is quite clear in establishing that mercury was being transported off the Wolf site during demolition and that it was travelling onto and into the Velsicol property and ultimately into Berry's Creek. That was so after the defendants Wolf knew of the presence of hazardous materials. On June 7, 1974 the State's Mr. Longstreet visited the site and found a series of buildings in various stages of demolition, "piles of material at various locations" and "water flowing over the site." (Longstreet, Tr., 6/20/78, T112-19 to T113-15). It was further noted by Mr. Longstreet that the water was moving over the surface of the Wolf site, onto the Velsicol property and into the Creek.

> "Q. I think you testified that you saw water on that day.
>
> A. Yes, sir.
>
> Q. Where did you see the water?....
>
> A. I saw evidence of water generally in the area where the buildings are.
>
> Q. Let the record indicate that you were making a circular motion covering buildings 18, 3, 14 and back to 13 again. Is that right?
>
> Q. Are you saying that the entire area that is bounded by those four buildings generally had water on it?
>
> A. Yes, that is correct.
>
> Q. Was the water standing still or was the water moving?
>
> A. To the best of my recollection I saw or observed water moving from the area of 13 and 19 over the ground and through something which looked to me like a plant drainage system."

(Longstreet, 6/27/78, T8-2 to 19). In Dr. Stopford's expert opinion, the surface discharge of mercury during demolition/construction would have gone through the Velsicol property to Berry's Creek through the drainage system and to the extent the surface water percolated through the soil the mercury would be filtered out by and into the Velsicol property. (Stopford, 8/23/78, T112-25 to T116-19; T117-9 to 16). The defendants Wolf, according to Mr. Longstreet, allowed contaminated soil to be piled on site without any protective covering thereby allowing contaminants to be transported by air and surface waters to the Velsicol property abd, ultimately Berry's Creek. (Longstreet, Tr. 8/24/78, T134-20 to T146-7). Regardless of the quantity, such contamination should not be condoned as it was by the trial court.

POINT VII

JUDGMENT SHOULD HAVE BEEN ENTERED ON DEFENDANT VELSICOL'S COUNTERCLAIM AGAINST THE STATE AND SPILL FUND.

The 1971 Act, N.J.S.A. 58:10-23.5, provides that, if a discharger fails to remove a discharge, the State is empowered to "undertake the removal of such discharge and...retain agents and contractors for such purpose..." Such prompt action was never taken by the State under the 1971 Act. The Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq., effective in April, 1977, provided that in the event of a hazardous pollution condition, the plaintiff State has the primary responsibility to remedy the situation and it is required to take such remedial action. Under said Act, the State is strictly liable for such remedial action with the right of reimbursement against the party found ultimately responsible.

The plaintiff State in its Second Amended Complaint conceded that the Spill Act was applicable to the instant matter and, if so, the plaintiff State was and is obligated to follow the mandate of the Act and take immediate corrective action. The propriety and extent of such protective action, as well as the ultimate liability for the costs of same, is a separate and distinct issue.

The Spill Act is such that it allows for the prompt abatement of a condition of pollution even when the source is unknown. The Act, N.J.S.A. 58:10-23.11, provides that the Spill Fund may be utilized to compensate a claimant for damages sustained through the discharge of hazardous substances regardless of the source.

As to the obligation of the State in this regard, the statute is very clear in making the State responsible for remedial action:

> Whenever any hazardous substance is discharged [pre or post-passage of the Act], the department [plaintiff] shall act to remove or arrange for the removal of such discharge..."

N.J.S.A. 58:10-23.11f. Thus, it would appear that the principal purpose of the Spill Act is to abate and compensate for a discharge and/or the after effects, regardless of their genesis and regardless of whether the State ultimately has recourse against anyone. If the Court were to hold otherwise, there would be no fund available to the State to abate pollution problems when the responsible party was unknown and preliminary disbursements from the Fund conceivably could, after the fact, be held improper if the source were the result of pre-passage conduct. Such a result is clearly contrary to the express language of the statute and was properly repudiated by the trial court.

On September 12, 1977 the defendant Velsicol moved for summary judgment to compel the State to cleanup any pollution which existed (Vel-Dal57); said motion should have been granted so as to mitigate damages, protect the public and permit the remainder of the case to be adjudicated without repeated allusions by the State to an existing health danger at the subject properties. In response to said motion the State filed an opposing brief wherein the State conceded that the Spill Fund monies could and should be used:

> It is important to note that the plaintiff herein and this writer takes the position that Fund money can and should be used in the instant case. Because of this, it will not be able to take a position adverse to the moving party on this issue.

(Vel-Dal88). However, the State sought to stave off utilization of the Fund monies and perforce clean-up by arguing that the Court should allow the Fund to come in as a separate party and argue its non-liability.

> [T]he liability of the Fund in this case and others like it is not crystal clear and, therefore, cannot and should not be decided without the Fund being a party and its position adequately presented to this Court. There are serious factual and legal issues which must be decided before the ultimate question of the Fund's liability can be determined. Since the issues were by the defendants' motion regarding the Act were matters of first impression and the Court's ruling may have enormous ramifications, it should have the benefit of a complete record and also the benefit of Fund's position before it makes a ruling. In addition, these issues should be decided in an adversary proceeding which are noted above as not present here at this point in time.

(Vel-Dal88). The defendant Velsicol was attempting to have the situation cleaned up by using the Spill Fund monies without prejudice to its right of indemnification; the State agreed that the Spill Fund was liable, but blocked any action by insisting that the matter should be decided in an adversarial context. The result was that the State hired special counsel to represent the Fund and argue non-liability and, as far as cleaning up the subject properties, nothing was done. The defendant Velsicol's motion for summary judgment should have been granted because there was no real opposition to same.

Following the trial, the trial court properly held that the Spill Fund was liable for the conditions of pollution found to exist. On page 23 of the court's opinion, it is stated that: "The Fund constitutes a source of money which is available (and has been available) to abate problems such as the one before the Court." (Vel-Da25). It was further found that: "It was (and is) plaintiff's obligation to take a

corrective action...[and] since 1977 funds have been available." (Vel-Da26).

The trial court's ultimate denial of judgment on the defendant Velsicol's Counterclaim in its final opinion was manifestly improper; such a denial would only be warranted to the extent that the defendant Velsicol actually caused the pollution on its property. The trial court found that the defendants Berk and WRCC caused the pollution, not defendant Velsicol, and then sought, improperly, to allocate the responsibility between the defendants Ventron and Velsicol. However, the opinion is clear in holding that defendants Berk and WRCC polluted defendant Velsicol's property. That being so, the liability of the Spill Fund is clear and judgment should have been entered for the full amount of all costs incurred to clean up the defendant Velsicol's property. The Spill Fund can recoup any expenditures from the defendants Berk, WRCC and/or Ventron to the extent they may be liable to the State under predecessor legislation or common law nuisance principles.

Accepting the trial court's opinion at face value and ignoring the legal inconsistencies in imposing liability on the defendant Velsicol, the following is clear: (a) although not provided for in the judgment, the defendants Berk and WRCC, as a result of their joint and several liability, would each be entitled to a judgment against the other for 50% of the total remedial costs despite each being liable to the State for 100% of said costs; and (b) the defendants Ventron and Velsicol by virtue of their derivative liability through defendant WRCC, would have a derivative right to share equally in defendant Berk's theoretical 50% contribution to the solution and the trial judge so ruled. (Vel-Da125 to 131). It

is clear therefore, that the trial judge has concluded that the defendant Velsicol caused indirectly only 25% of the problem (1/2 of WRCC's 50%). The defendant Velsicol is entitled, therefore, to a judgment against the Fund for at least 75% of the cost of cleanup of the defendant Velsicol's property to the extent said proportion of the costs are not recovered from any co-defendant. It is the Spill Fund, not the defendant Velsicol, which should bear the cost of the defendant Berk's pollution because defendant Berk is a defunct corporation incapable of reimbursing the defendant Velsicol. Moreover, if the defendant WRCC or defendant Ventron are incapable of paying for the 50% caused by the defendant WRCC, then the Spill Fund, not the defendant Velsicol, should bear that cost as the Legislature intended. In fact, the Legislature has recently amended the Spill Act so as to make it perfectly clear that the Spill Fund is liable for any such cleanup if the actual polluter cannot pay for such clean-up regardless of when the condition was created. N.J.S.A. 58:10-[illegible].11f(b)(3).

To the extent that the defendant Velsicol did not cause the pollution found to exist on its property, the Spill Fund is strictly liable to defendant Velsicol to clean up said pollution. Having found, to some extent, that defendant Velsicol was not liable for the pollution a favorable ruling on the Counterclaim should have followed as a matter of course imposing secondary liability on the Spill Fund.

POINT VIII

THE TRIAL COURT ERRED IN IMPOSING LIABILITY ON VELSICOL FOR 50% OF THE LIABILITY OF THE DEFENDANT WRCC AND PERFORCE 50% LIABILITY FOR THE FULL EXTENT OF THE EXISTING CONTAMINATION

The Court held that the defendant WRCC by virtue of its joint and several liability with the defendant Berk was responsible for the pollution in its entirety. The liability of the defendant Velsicol, according to the trial court's opinion, "is partly direct and partly derivative under the so-called "control theory" (Vel-Da24). As to the defendant Ventron, the Court found that its liability is "direct under the merger theory, and derivative under the "control theory". (Vel-Da24). In the case of both defendant Velsicol and Ventron, their derivative liability stems from their alleged ownership and control of the defendant WRCC. As to the alleged "direct" liability, the defendant Velsicol's liability is predicated upon its failure to prevent the defendant WRCC from dumping on its property after defendant Ventron had acquired the defendant WRCC; this direct liability would encompass the period of February, 1968 through May of 1974 when defendant WRCC ceased its operations. As to the direct liability of the defendant Ventron, said liability is premised on the fact that defendant WRCC merged into defendant Ventron rendering defendant Ventron fully liable for all the pollution committed by defendant WRCC. Despite the reference in the opinion to primary and secondary liability on the part of the defendants Ventron and Velsicol, the order of judgment makes it clear that the defendants Velsicol and Ventron are liable in the secondary sense, save

for Velsicol's exclusive liability for surfacing; witness the following language of paragraph 7 of the order of judgment:

> 7. The cost of the remedial relief imposed or to be imposed by this Court shall be borne by the liable defendants as follows:
>
> (a). Defendants F.W. Berk & Co., Inc. and Wood Ridge Chemical Corp. shall be liable jointly and severally for the entire cost for the clean-up of Berry's Creek; and defendants Velsicol Chemical Corporation and Ventron Corporation shall be each liable for one-half of the cost of any remedial measures imposed upon defendant Wood Ridge Chemical Corp. in this regard.
>
> (b). Defendant Velsicol Chemical Corporation shall be solely liable for the cost of any development or surfacing of its property in accord with a plan approved by the court.
>
> (c). The cost of any monitoring performed by the State shall be borne initially by the State or the Spill Compensation Fund but, in the event that said monitoring reveals leaching of mercury from the subject properties into Berry's Creek in prohibited quantities, the defendants F.W. Berk & Co., Inc. and Wood Ridge Chemical Corp. shall be primarily liable for the costs of said monitoring and defendants Velsicol Chemical Corp. and Ventron Corporation shall be secondarily liable each for one-half of such monitoring costs as aforesaid.
>
> (d). The cost of any remedial measures that may be imposed by this court to eliminate the presence of mercury found to be leaching into Berry's Creek from the subject properties, disclosed by the aforementioned monitoring, shall be borne primarily and in full by the defendants F.W. Berk & Co., Inc. and Wood Ridge Chemical Corporation and defendants Velsicol Chemical Corporation and Ventron Corporation shall be secondarily liable each for one-half of such costs as aforesaid. (Ja376 to 377; Emphasis added).

The defendants Velsicol and Ventron each were made severally liable for 50% of the liability of the defendant WRCC and by force of law 50% liable for the totality of the existing pollution:

> Considering the number of years involved, the actions of Velsicol and Ventron and the basis of liability referrable to each the responsibility for the acts of WRCC should be shared equally.

(Vel-Da25). This 50-50 allocation of responsibility is inconsistent with the Court's own reasoning.

With respect to the derivative liability of both defendants Ventron and Velsicol, the trial court ignored the fact that it is obviously the defendant WRCC which is primarily liable for its own actions. The defendant WRCC and Ventron by merger should be primarily liable and, assuming some Velsicol liability, Velsicol should be secondarily liable with defendant Velsicol being entitled to common law indemnification as against the defendants WRCC and Ventron by merger. The defendant Velsicol filed such a Crossclaim which inexplicably was denied by the trial court.

As to any alleged direct liability of the defendant Velsicol, it is clear that such liability is not truly direct. Assuming an obligation on the part of a landowner to enforce the pollution laws with respect to the conduct of others over whom has no control (the defendant WRCC was then owned by defendant Ventron), clearly such liability is not primary or direct and, in any event, the landowner, Velsicol, would be entitled to indemnification from the actual polluters and the 1971 Act so provides. The court's own determination that the defendant WRCC was responsible for the entirety of the pollution (jointly and severally with defendant Berk) and its failure to make the defendant Velsicol jointly and severally liable with the defendant WRCC to any degree clearly reflects a determination that the defendant WRCC is primarily liable for the remedy imposed by the court and the defendant Velsicol, to a

limited degree (50%), is secondarily liable. Both under the very reasoning of the trial court and the facts of the case, the defendant Velsicol can have no direct or primary liability. The defendant Velsicol's involvement in this controversy was simply through its ownership for a period of time of (a) defendant WRCC and (b) its present property. On the other hand, the direct liability of the defendant Ventron under the "merger theory" is clear and irrefutable. For all intents and purposes, the defendant Ventron is defendant WRCC and their liability is coincident and co-equal in degree and nature. It is undisputable that, under the trial court's findings, defendant Ventron is primarily liable for 100% of the remedy imposed by the trial court simply because the Court determined that that was the extent of the defendant WRCC's liability. A fair reading of the trial court's opinion would lead ineluctably to a conclusion that, as a matter of law, the defendants Berk, WRCC and Ventron are jointly and severally liable for the full cost of the remedy to be imposed.

The fallacy of the trial judge's reasoning lies in the fact that he ignored the primary nature of the liability of the defendant WRCC once he had adjudicated said defendant to be fully liable along with the defendant Berk. The defendant Berk, a defunct corporation, can be disregarded in terms of the practical matter of enforcement of relief, but the defendant WRCC is not a defunct entity. The defendant WRCC is a party to the litigation which has been represented by counsel throughout the case and vigorously defended itself. Why does the Court elect to treat the defendant WRCC as a non-entity when it comes to enforcing its finding of 100% of the pollution? There is no basis for ignoring the defendant WRCC which is precisely what the trial judge

did when deciding who is to bear the cost for that which it found defendant WRCC had done or for which it is otherwise liable. The defendant WRCC must pay the price of its pollution and defendant Ventron by law stands in the shoes of defendant WRCC.

Accepting all but the conclusions of the trial court as to Velsicol liability to be true, it is clear simply from a review of the opinion that, as a matter of law, any 50-50 allocation of liability as between the defendants Velsicol and Ventron is precluded. The defendant Ventron, by merger with defendant WRCC, is liable for 100% of the pollution. Neither the defendant WRCC nor Ventron were successful in asserting any crossclaim for indemnification and/or contribution against the defendant Velsicol. How can the defendant Ventron be anything less than 100% liable to the State?

The court in imposing liability on the defendant Velsicol played a simplistic numbers game without regard to the nature of the respective liabilities involved. However, even the numbers do not jibe. If we ignore the ultimate significance of defendant Ventron's merger with the defendant WRCC and simply review the liability allocation in terms of the period of responsibility for defendant WRCC, such a review would not support a 50-50 allocation. The defendant Velsicol's association with defendant WRCC was limited to an approximately 7-year period and the same is true of defendant Ventron. However, the defendant Ventron, by virtue of the merger, is responsible for defendant WRCC for the period of Velsicol's ownership; the opposite cannot be true of defendant Velsicol. We thus have a period of operation of approximately 14 years. The last half of that period, the defendant Ventron had sole control and exclusive liability and, as to the first half, the defendants

Velsicol (ownership) and Ventron (merger) both had involvement. Only this first half of the defendant WRCC's operations could even theoretically expose defendant Velsicol to any liability for defendant WRCC and, assuming a 50% allocation with respect to said half, that would leave the defendant Ventron liable for 75%, rather than 50%, of the total liability of the defendant WRCC. This mere numerical analysis, the approach of the trial court, obviously fails to consider the primary nature of the defendant Ventron's (merger) liability for defendant WRCC and, when that factor is properly considered, the determination must be that the defendant Velsicol can have no primary liability in this matter and defendant Ventron must have 100% primary liability.

The basic defect which pervades the liability analysis of the trial court is a failure to grasp or an unwillingness to recognize the legal implication of finding: (a) the defendant WRCC is primarily liable for 100% of the pollution; (b) the defendant Ventron is liable by merger for all the pollution liability of defendant WRCC; and (c) the defendants WRCC and Ventron are not entitled to indemnification or contribution from defendant Velsicol. The trial court's paralogism has adopted a conclusion, Velsicol liability, which is a patent non sequitor from the premises of primary liability on the part of defendants WRCC and Ventron for 100% of the pollution. The legal logic of the court is infirm on its face. Merger is not dissolution and there is a distinct difference between direct and vicarious liability. The defendant WRCC is 100% liable for the pollution and the defendant WRCC merged into the defendant Ventron with defendant Ventron assuming all the liability of defendant WRCC, post hoc ergo propter hoc, the defendant Ventron is liable for 100% of the pollution.

POINT IX

THE PLAINTIFF STATE IS ESTOPPED FROM ASSERTING ANY STATUTORY OR COMMON LAW CLAIM AGAINST DEFENDANT VELSICOL.

Estoppel is an equitable doctrine which prevents a party from taking a position inconsistent with that previously taken if it would work an injustice on another. See generally, Summer Cottagers Ass'n of Cape May v. City of Cape May, 19 N.J. 493 1955).

The DEP has never issued a stop order to defendant Velsicol and perforce the defendant Velsicol has never declined to honor a stop order of any kind. (Vel-Dal67). Under the terms of N.J.S.A. 58:11-10 the plaintiff's predecessor, the Department of Health, was required to approve all proposed changes and/or improvements to waste treatment systems such as that existing at the WRCC plant site. (Vel-Dal53). From 1921, when the statute was enacted, up until 1971, when the plaintiff DEP assumed the function, the Health Department monitored the wastewater treatment system of defendants Berk and WRCC and all alterations and improvements thereto (Vel-Dal62). As a matter of law, the Health Department and DEP had the obligation and authority to enjoin all alterations and improvements made to the defendant WRCC's effluent treatment system unless duplicate plans and specifications had been submitted to them for approval. N.J.S.A. 58:11-11. The plaintiff State has no record of ever enjoining or seeking to enjoin alterations or improvements of the effluent system of defendant WRCC. (Vel-Da164). Nor does the State have any record of disapproving any alterations or improvements to the effluent treatment system. Consequently, all alterations and improvements made to the effluent systems of defendants

WRCC and Berk were approved by the State and, if not, the State was delinquent in performing its responsibility to enjoin any improvement not approved. It is unquestioned that the plaintiff and its predecessor were aware of the nature of the effluent treatment systems in operation at the Berk/WRCC plant. The State simply did not concern itself with water contamination resulting from soil contamination (Vel-Dal64). The apparent reason for such lack of concern is that there has never been any New Jersey or federal standards which specify maximum allowable amounts of mercury in soil (Vel-Dal62). The connection between soil contamination and water contamination was not made by the State until the final stages of defendant WRCC's operations, long after defendant Velsicol had relinquished ownership. Neither the plaintiff nor its predecessor ever advised the defendant WRCC or Velsicol that the effluent treatment system was such as to result in soil contamination or soil contamination's potential for water contamination. The defendant WRCC, during Velsicol's ownership, was advised by the plaintiff and its predecessor that its effluent treatment system was acceptable, but for certain improvements which were unrelated to any potential hazard of soil contamination. It is noteworthy in the context of this discussion that there did exist, and still does, a statute, N.J.S.A. 26:3B-4, which provides that no person

> shall deposit, store or allow to accumulate or provide storage facilities for... any polluting matter so that it gains access to any well, spring, stream, lake or other body of water, including the ocean and its estuaries in such a manner as to cause or threaten injury to any of the inhabitants of this State, either in health, comfort or property.

The statute was enacted in 1945 and on February 5, 1973 the following was added to the end of the statute by amendment:

> or to cause or threaten degradation of water quality resulting in damage to the aquatic community or wild life in and adjacent to the affected water body.

None of the defendants were charged with violating this statute. The point of interest is that N.J.S.A. 26:3B-8 expressly provides that effluent from industrial waste treatment plants is not subject to N.J.S.A. 26:3B-4 if approved by the Department of Health. The question then becomes whether the effluent treatment systems of defendants Berk and WRCC were operated with the approval of the State Department of Health. The record indicates that the Department of Health monitored the system and did not shut down the Berk or WRCC plant at any time. If the effluent system polluted the property presently owned by defendants U.S. Life, Wolf and Velsicol and Berry's Creek, certainly the State must bear some responsibility. Furthermore, the State having approved the Berk/WRCC effluent systems, it is unlikely that they could be considered a public nuisance. See, Easton v. New York & Long Branch R.R. Co., 24 N.J.Eq. 49 (Ch. 1873).

Now, having discovered or allegedly discovered that there is soil contamination which allegedly is resulting in water contamination, the plaintiff seeks to attribute the responsibility for same to the very effluent system which it had monitored continuously for approximately 45 years. It further seeks to establish that the effluent being discharged, of which it was fully cognizant and which it had continually sampled and tested, was in violation of statutory and common law although plaintiff never so contended contemporaneously with the events.

The development of the WRCC's effluent system was a joint effort involving both plaintiff and defendant WRCC. The system had to be approved by the plaintiff and improvements were dictated by the plaintiff. The plaintiff cannot now, in fairness, hold the defendant WRCC and, derivatively defendant Velsicol, responsible for adhering to the plaintiff's directives in this regard. The plaintiff, not defendant WRCC, should bear the sole responsibility for soil contamination generated by the effluent system. The defendant WRCC relied, as it was compelled to rely, on the guidance and expertise of the plaintiff in such matters.

Such conduct on the part of the plaintiff and its predecessors is such as to prevent plaintiff from now asserting that the operations of defendant WRCC during the Velsicol years were violative of any existing laws or regulations.

POINT X

THE TRIAL COURT ERRED IN IGNORING THE STATE'S CLAIM LIMITATION AS TO DEFENDANT VELSICOL AND FINDING THE DEFENDANT VELSICOL LIABLE TO THE STATE FOR THE ACTIONS OF DEFENDANT WRCC.

During the course of discovery the defendant Velsicol served the State with interrogatories designed to elicit from the State the precise nature of the State's claim against the defendant Velsicol. In responding to said interrogatories the State stated that it did not intend to hold the defendant Velsicol liable for soil contamination which occurred prior to defendant Velsicol's ownership of its property. Interrogatory No. 32 was quite specific, as was the State's answer:

> Do you in this action seek to hold Velsicol responsible for soil contamination which preceded Velsico' ownership of the premises? If so, state the fa. ual basis for such alleged liability.
>
> Answer: No.

(Vel-Dal7⁴). It is undisputed that defendant Velsicol acquired an ownership interest in its 33 acres in June of 1967 shortly before the defendant Ventron acquired defendant WRCC (February, 1968). The judgment of the trial court ignored the State's own limitation on its claim, and imposed liability on defendant Velsicol for the period prior to June of 1967. As to the period after June of 1967, that period encompasses virtually exclusively the operations and/or pollution of defendant WRCC during the period of defendant Ventron's ownership and for which the defendant Velsicol can not have and need not have any liability.

POINT XI

THE TRIAL COURT ERRED IN FINDING THAT THE STATE'S CLAIMS AGAINST VELSICOL ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

To the extent that any claims against the defendant Velsicol are predicated on any alleged undue control over defendant WRCC, such claims are untimely and barred by the six-year statute of limitations. N.J.S.A.2A:14-1. The defendant Velsicol relinquished its interest in defendant WRCC on February 1, 1968 when the defendant Ventron purchased defendant WRCC more than six years prior to commencement of the instant law suit.

POINT XII

DUE TO THE ABSENCE OF ANY EVIDENCE OF APPORTIONMENT OF DAMAGES, VELSICOL CAN HAVE NO STATUTORY OR COMMON LAW LIABILITY TO THE STATE.

Whether the plaintiff's cause of action be an asserted violation of statute or an alleged nuisance, the defendant Velsicol cannot be held liable and responsible for the results of pollution except to the extent shown to be caused by them. One is responsible for the results of its own pollution and not the pollution of others. Newark v. Chestnut Hill Land Co., 77 N.J.Eq. 23, 29 (Ch. 1910); Prosser, Handbook of the Law of Torts (9th ed. 1971), at 608. This proposition necessarily follows from the requirement inherent in N.J.S.A. 23:5-28 and N.J.S.A. 58:10-23.1 and in the general law governing nuisances that the plaintiff must establish that the defendant's conduct was the cause-in-fact of the pollution, i.e., a causal nexus between the damage and an act by a given defendant. See, State v. Jersey Central Power & Light Co., 69 N.J. 102, 110 (1976) (cause-in-fact required under the 1937 and 1971 Acts); Richards v. Sun Oil Co., 23 N.J. Misc. 89, 93 (Sup. Ct. 1945) (doctrine of probable cause applies equally to cases founded in negligence and in nuisance). Accordingly, the defendant Velsicol can be held liable only for the proximate and foreseeable consequences of Velsicol's activity.

The State made no attempt to apportion damages in the instant case and indeed avoided doing so. Nor was there any proof adduced to the effect that a general allocation could not have been made between, for example, the pollution attributable to defendants Berk and WRCC.

Q. When is the first time that mercury was found to be in the sediment of Berry's Creek by your organization?

A. By our organization, 1972.

Q. At that time, Doctor, in 1972, in theory, the mercury you observed could have been from 1929 or 1940 or 1960, could it not?

A. Oh, yes, sir.

(McCormick, 8/17/78, T26-6 to 13). In the absence of apportionment or proof that apportionment was not feasible, there can be no liability on the part of defendant Velsicol for all or any portion of the abatement measures judicially imposed. To hold otherwise would be to impose impermissibly liability on defendant Velsicol for the pollution caused by others. In light of the fact that the defendant Berk is a defunct corporation which operated the mercury plant for many years longer than defendant "RCC and that the State continually monitored the operations of both entities, the failure to present proofs designed to apportion damages should be particularly suspect. It was in the interest of the State not to apportion damages because any damages attributable to the defendant Berk would be non-recoverable and have to be paid from the Spill Fund.

Damage allocation is essential even where a single stream has been polluted simultaneously from separate sources and successively from the same source under different ownership:

> [D]efendants who independently pollute the same stream, or who flood the plaintiff's land from separate sources, are liable only severally for the damages individually caused...

Prosser, Handbook of the Law of Torts (4th ed. 1971) at 317-318.

> If two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused separate damage, limited in time, and that neither has any responsibility for the loss caused by the other.

Prosser, Handbook of the Law of Torts (4th ed. 1971) at 320.

> The plaintiff is or should be in a position to allocate responsibility

for the pollution alleged. It certainly is not fair to shift the burden to defendant Velsicol which did not own or operate the chemical plant. The plaintiff was charged under the law with monitoring the site and it cannot now come before this Court in good conscience and state that it is unable to prove who caused the pollution and request that the defendants prove the State's case against themselves. If the plaintiff had performed its monitoring function properly in the first instance there would be no pollution of the type currently alleged and certainly no complex proof problems for the State.

The legal principle established in City of Newark v. Chestnut Hill Land Co., 77 N.J.Eq. 23 (Ch. 1910) has never been questioned by the courts of this State and, therefore, the plaintiff State must establish what proportion, if any, of the pollution was caused by Velsicol. Moreover, this rule is the general rule adopted by the majority of the states. See generally, United Verde Copper Co. v. Jordon, 14 F. 2d 299 (9th Cir.), cert denied, 273 U.S. 734 (1926); Tennessee Coal Iron & R. Co. v. Hamilton, 100 Ala. 252, 14 So. 167 (1893); Jones v. Tennessee Coal, Iron & R. Co., 202 Ala. 380, 80 So. 463 (1918); Thome v. Honcut Dredging Co., 43 Cal. App.2d 737, 111 P. 2d 368 (Dist. Ct. App. 1941); Miller v. Highland Ditch Co., 87 Col. 430, 25 P. 550 (1891); Bowman v.

Humphrey, 124 Iowa 744, 100 N.W. 854 (Sup. Ct. 1904); Polk v. Illinois Central P. Co., 175 Ky. 762, 195 S.W. 129 (1971); Johnson v. City of Fairmont, 188 Minn. 451, 247 N.W. 572 (Sup. Ct. 1933); Masonite Corp. v. Burnham, 164 Miss. 840, 164 So. 292 (1933); Swain v. Tennessee Cooper Co., 111 Tenn. 430, 78 S.W. 93 (1903); Tucker Oil Co. v. Matthews, 119 S.W.2d 606 (Tex. Civ. App. 1938); and Windfohr v. Johnson's Estate, 57 S.W.2d 215 (Tex. Civ. App. 1933).

The attempt by the State and the trial court to cast the burden upon the defendants to establish their own varying degrees of responsibility fails to take into account that the plaintiff is alleging statutory infractions predicated on statutes which did not exist throughout the time period involved and/or which were amended during that time period. In proving its statutory claims the plaintiff must establish that each defendant violated statutes in effect at the time of the alleged conduct constituting the infraction. None of the statutes provide for any vicarious or joint liability nor have they been construed to permit retroactive application. The State's refusal to make any attempt to establish when the acts of pollution occurred and degree of such pollution leaves the Court to speculate as to liability which is precisely what the Court did. If the law is to comport with common sense and fairness the State must meet the burden of establishing which defendants are responsible for the alleged pollution, when the acts of pollution occurred and the degree of contribution by each to the overall problem. The State has environmental experts within the DEP and has the cooperation and assistance of the EPA. A landowner, such as defendant Velsicol, has no such resources. Furthermore, the State has the responsibility of surveillance of potential polluters; Velsicol had no such responsibility.

It is the State, not Velsicol, which is in the better position to prove its case against active or affirmative polluters. The State's present approach to this case represents a total abdication of its enforcement function with respect to the anti-pollution statutes and reflects a callous disregard for the general public.

POINT XIII

THE TRIAL COURT ERRED IN IMPUTING KNOWLEDGE OF POLLUTION TO DEFENDANT VELSICOL.

The trial court, without citing the trial record or legal authority, seemingly attributes to defendant Velsicol knowledge of pollution by the defendant WRCC or at least suggests that Velsicol should have known that mercury pollution was occurring. Although the trial court ultimately imposes strict liability on Velsicol, little emphasis is placed on the knowledge issue. However, the trial court's remarks designed to buttress its finding of liability must be addressed. There is no basis for the imputation of such knowledge.

There did not exist among the State surveillance reports at the time of WRCC's asset purchase any reference to the presence of mercury in the plant effluent. (H-40). Velsicol relied upon a State surveillance report received prior to purchasing Berk's assets wherein the State, with all its professed expertise, stated that there was no mercury being discharged in Berk's effluent. Prior to the WRCC transaction, Berk had given Velsicol (P-660) a copy of the State's inspection report of February 4, 1960 and the State's transmittal letter of March 4, 1960 (N-20 and N-41). The report expressly stated that the State found no mercury in Berk's effluent: "Toxic mercuric compounds were absent from all three individual effluents (Bldgs. 9, 13 and 18) and from the combined effluent" (N-20, page 3). The transmittal letter of the State placed particular emphasis on the fact that mercury was not found in the plant effluent: "Toxic mercury compounds were absent." (N-41, para. 2). This report was relied upon by Velsicol; it supported Berk's

claim that there was no mercury problem and supports Velsicol's contention that it did not know that the plant operations involved the discharge of mercury. Perhaps it was discharging mercury but it was not known to Berk, WRCC, Velsicol or the State. Approximately six months after WRCC purchased the Berk assests, the State did an inspection of the WRCC effluent and, under spectrographic analysis discovered traces of certain metals, but not mercury. (N-29). Such reports by the State are indicative of the lack of awareness of any mercury problem by all the parties involved. The State's argument, if indeed it makes the argument, that Velsicol knew of a mercury problem at WRCC is clearly belied by the State's own reports and the State's own ignorance of the problem, if such a problem then existed. If the State's periodic inspections of WRCC's operations did not detect the problem, how could Velsicol discover it from its headquarters in Chicago. There is no reference to the presence of mercury in the plant effluent of Berk or WRCC (Velsicol) in any State inspection report covering the period of those operations. Similarly, the corporate minutes of WRCC during the Velsicol years do not reflect mercury pollution as a plant problem or as a concern of the regulatory agencies (H-36); nor do any of the voluminous records disclosed to the State during discovery. The State monitored, sampled and analyzed the effluent of Berk and WRCC prior to February, 1968 with no finding or caution about mercury in the effluent.

The State admitted early in this litigation that it had no documentary evidence of mercury discharges from the plant site (the present Wolf property) during the period that WRCC operated the plant under Velsicol's ownership:

Question 227: The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of mercury.

Answer: Admitted.

Question 228: The DEP has no document from any source wherein the test results of water or soil samples taken on the Wolf property during the period of 1960 through 1968 indicate the presence of any of the hazardous substances which are the basis for the plaintiff's action herein.

Answer: Admitted:

(Vel-Dal67) Mr. Cadmus, WRCC's quality control chemist, never discussed his work on the plant effluent with John Kirk. (Cadmus, 10/16/78, T72-2 to 4). Also, Cadmus, who was at the site on a daily basis during the period of Velsicol's ownership, disclaimed any knowledge of dumping by WRCC on Velsicol's property (Cadmus, 10/12/78, T78-18 to 25; T79-18 to 23). If Cadmus did not know, Kirk's testimony of a lack of such knowledge is most credible since he was at the site only twice a year. Further in this regard, Cadmus testified that the still residue was tested twice a month and most of the time the test results were negative for mercury and, on those occasions when mercury was discovered in the ash, it was run through the still a second time. (Cadmus, 10/12/78, T81-1 to 3; T81-18 to T82-5). If Cadmus, a chemist fully familiar with plant operations, knew of no mercury in the final ash, certainly Velsicol could not have known. The State certainly never expressed any concern about the ash. Is Velsicol, as a 100% stockholder, to be held to a higher standard of knowledge than both WRCC and the State, both of which had constant involvement and greater expertise in the field of mercury.

It is interesting to note that Dr. Joselow, the State's trial expert, worked at WRCC under the regimes of both Velsicol and Ventron and during that period he had a more-than-average awareness of the environmental hazards of mercury. Despite this "awareness" his written reports which purport to cover his significant findings make no mention of the danger of soil infiltration of mercury or its potential impact on ground and surface waters (See Joselow reports, P-502 to P-510; P-502A to P-510A). Dr. Joselow does not even mention the presence of waste piles at the site until his final report of July 8, 1970 (P-510A). (Joselow, 6/13/78, T17-21 to T22-12). At no time did Dr. Joselow take any sludge or water samples. (Joselow, 6/13/78, T41-3 to 11).

It was around 1970 that mercury as an environmental pollutant became recognized. Dr. McCormick testified that it was in 1968 (after Velsicol sold WRCC) that mercury began to be written up extensively in the scientific literature as a significant pollutant. (McCormick, 8/10/78, T113-10 to 18). Thirteen of the fifteen references cited by Dr. McCormick in his expert report (S-22) are dated 1970 or later. The State's surface water standard for mercury was not promulgated until 1975 (McCormick, 8/9/78, T86-17 to 21). There still is no standard for mercury in channel sediments or soil (S-22; McCormick, 8/9/78, T84-8 to 11).

Whether, in fact, there was some degree of mercury pollution by defendant WRCC during the period of Velsicol ownership is not the issue. What is relevant in the context of this discussion is that mercury pollution was not conceived of as a problem by either the defendant WRCC or the State regulatory agencies. The State with all its expertise and familiarity with the pertinent controlling legislation never cited defendant WRCC, while owned by defendant Velsicol, with mercury

POINT XIV

THERE IS INSUFFICIENT CREDIBLE EVIDENCE IN THE TRIAL RECORD TO SUPPORT AN INJUNCTION COMPELLING THAT SEDIMENT IN BERRY'S CREEK BE CLEANED UP.

Dr. McCormick took 24 water samples from Berry's Creek on June 8, 1977 (S-22, Table 12, at 50); none of said samples revealed mercury concentrations in excess of 5ppb, the applicable State surface water standard. On July 13, 1977 Dr. McCormick took another 8 water samples from the Creek and none of those exceeded a mercury concentration of 5 ppb (S-22, at 53) and, in fact, the water quality was such that it met the State drinking water standard of 2 ppb mercury as was generally true of the sampling of June 8, 1977. (S-22, McCormick 8/16/78, T37-24 to T38-13). There clearly is no basis, in terms of the water quality of Berry's Creek, which would warrant any clean-up activity such as required by the trial court. The action is a water pollution case and not a stream sediment case. There is no State standard with respect to allowable concentrations of mercury in stream sediment. (See S-22; McCormick, 8/10/78, T115-25 to T116-2). Moreover, Dr. McCormick did not perform any tests which confirmed that the mercury in the sediment was moving within the Creek (McCormick, 8/10/78, T12-15 to 24); in fact, Dr. McCormick conceded that the data was deficient with respect to stream sediment transport:

> MR. HILL: My notes indicate that the witness said as to sediment mercury movement, that there was not enough testing to make a clear determination as to that. Is that correct? Did I understand that point of your initial comments along said lines?

THE WITNESS: My response at that point was directed specifically to the stations in Berry's Creek.

MR. HILL: Stations in Berry's Creek?

THE WITNESS: Yes, sir; and specifically limited to the study as that is reflected in S-22.

MR. HILL. As to those areas there has not been enough testing to make a clear determination. Is that correct?

THE WITNESS: Based on that report and the studies done for it, I don't believe that there is sufficient evidence to say that there is movement.

(McCormick, 8/16/78, T21-18 to T22-8). The State not only failed to establish who caused any downstream pollution within the Creek, but made no attempt to do so. Witness the following testimony from Dr. McCormick:

THE COURT: Do we have any comparative figures showing the added contamination in Berry's Creek or down from Berry's Creek done after mercury production or mercury processing stopped on the site and after construction on the Wolf property? In other words, are we building up downstream or is it just contaminated from past flow? Do you understand the question?

THE WITNESS: ...As far as testing downstream repeatedly over a period of time, no, sir. To my knowledge, there was not sufficient data to enable anyone to make a determination on that. The concentrations are so high that one would have to sample very intensively in order to get statistically valid results.

THE COURT: Are you saying, Doctor, that there are no statistics before the court that would give the court a basis for determination as to who created the downstream problem?

THE WITNESS: No. I was answering or responding to the question as to whether there is

a continuing build-up of mercury downstream, which is the way I understood it.

THE COURT: The answer as I understood it led me to what I thought was the conclusion that there is no way to distinguish in terms of any particular year what percentage of the downstream pollution was caused in any given year.

THE WITNESS: Your Honor--

THE COURT: Gentlemen, have I misstated that question? It seems to be an issue we have talked about from the beginning of the the case. I want to know if there is any information I will receive on that subject from this witness.

THE WITNESS: No sir; there won't be from me.

THE COURT: That is responsive. I do not want you to comment on the entire State's case.

THE WITNESS: No.

THE COURT: Just your testimony. Gentlemen, I think the answer to that question should limit the cross examination of this witness.

(McCormick, 8/16/78, T24-12 to T26-6; Emphasis added). Note that Dr. McCormick did not testify that such a determination could not have been done, but simply that he had not been called upon by the State to do so.

An ironical footnote to the alleged pollution of the Creek, is that Dr. McCormick recommended to the State that it post signs along the Creek warning against fishing or crabbing, but the State declined to follow such recommendation. (McCormick 8/9/78, T127-24 to T130-6). There is no solid biological evidence indicating that there is mercury present in the food chain in any significant amounts. The only indication of the presence of mercury in organisms beyond the F.D.A. limit of 5ppm were the so-called "Ventron specimens" taken in the latter part

of 1976 and which involved migrating specimens which could have absorbed mercury elsewhere in the estuary and which included such specimens as a house mouse which clearly are not ultimately consumed by the inhabitants of the area and are specimens to which the F.D.A. limit is clearly inapplicable. (McCormick, 8/17/78, T6-1 to T12-21). The most recent specimen sampling by the Fish and Game Bureau revealed that the mercury concentrations in the specimen were less than the F.D.A. limit (McCormick, 8/17/78, T77-3 to T81-12).

It should be noted that the State concedes that there were other polluters of Berry's Creek which the State allowed to pollute:

> Question 120: Randolph Chemical Corp. is or was located in the immediate general vicinity of the Wolf and Velsicol properties.
>
> Answer: Admitted.
>
> Question 123: The site of the Randolph Chemical Corp. is presently discharging pollutants into Berry's Creek.
>
> Answer: Admitted.
>
> Question 126: The DEP in the past has monitored the effluent discharges from the site of Randolph Chemical Corp
>
> Answer: Admitted.
>
> Question 127: Prior to institution of this suit the DEP was aware that pollutants were being discharged from the site of the Randolph Chemical Corp.
>
> Answer: Admitted.

(Vel-Dal65).

> Question: 202: The source of pollution in Berry's Creek is not exclusively the Wolf and/or Velsicol property.
>
> Answer: Admitted.

(Vel-Dal67). Dr. McCormick, the State's chief trial expert, similarly testified as to the existence of other sources of mercury in the Creek.

> Q. You have indicated that the readings on the up station, 8, were higher than the readings on the down station, 9, and that these readings were at low tide. My question is, considering those facts, does that raise the question that there is a source other than the WRCC site?
>
> A. An explanation of that situation could be that there is another source.
>
> BY THE COURT:
>
> Q....The question I want to know is do you have an opinion as to whether there was another source upstream?
>
> A. I have no question that there is some mercury coming from sewerage treatment plants. It probably is an significant amount, but there is no question.
>
> Q. Have there been tests as to the quantities of mercury coming from those sewerage disposal plants?
>
> A. Those specific plants, I don't know of any...

(McCormick, 8/10/78, T125-22 to T126-19). In Dr. McCormick's 1976 report, prepared for the Sports Authority and not the litigation, he reported that a sewerage treatment plant in Rutherford was a potential source of contamination. (McCormick, 8/17/78, T28-3 to 10). There are several landfills in the Hackensack Meadowlands District and such landfills, particularly solid waste landfills, are potential sources of mercury. (McCormick, 8/17/78, T130-7 to T131-18). The diking system which has been under consideration for the contaminated Sports Authority property has yet to be implemented. (McCormick, 8/17/78, T57-16 to 22; T5-1 to T6-10). Any requirement for dredging prior to

description of the sources of pollution which had to be abated; it was not part of the State's case, as defined by the pleadings in terms of an area to be cleaned up or contained. The Creek, itself, was the waterway that was being polluted, but the pleadings did not encompass any remedial action with respect to cleaning up the sediment in the Creek. The relief sought by the State was solely the elimination of discharges from the properties owned or formerly owned by the named defendants; none of the defendants ever owned the Creek bed. In part, the State was proceeding against the defendants on the theory that "mere ownership" was sufficient to impose liability. Dr. McCormick in his trial testimony readily admitted that the clean-up of Berry's Creek was "not something that [his organization had]...given a lot of consideration to" (McCormick, 8/9/78, T112-16 to 17). As to any recommendation for dredging, Dr. McCormick stated that a further study of the situation was needed: "The information we have assembled...I don't believe are substantial enough to be used to determine what must be done..." (McCormick, 8/9/78, T109-22 to 25).

POINT XV

THERE IS NO LEGAL BASIS FOR IMPOSING UPON THE DEFENDANT VELSICOL EXCLUSIVE LIABILITY FOR THE SURFACING OF DEFENDANT VELSICOL'S PROPERTY.

The trial judge found that the defendant Velsicol, in addition to its 50-50 liability with the defendant Ventron for the pollution of the defendant WRCC, was solely responsible for the surfacing of its property. (Vel-Da25). It can only be stated that the imposition of such liability makes no legal sense. The Court determined that the defendant WRCC was responsible for the subject pollution and that the defendant Ventron and Velsicol were each liable for 50% of the liability of the defendant WRCC (See Point VIII, supra.). The express language of the surfacing requirement is to contain pollution caused by defendant WRCC. (McCormick, 8/9/78, T98-24 to T99-16). Why would the defendants WRCC and Ventron have no responsibility whatsoever for such surfacing? At the hearing on the proposed form of the order this issue was raised and the trial judge stated as follows:

> The surfacing problem is Velsicol's alone because that is something they want to do and they have to do anyhow to develop the land. I am doing that, frankly, because the whole purpose of this remedy approach was to make all of this land available for use by the owners and not tie it up for the next ten or fifteen years during litigation.

(Vel-Da95 & 96). Contrary to the assumption of the trial judge that surfacing "is something they [Velsicol] want to do," the defendant Velsicol does not want to surface its property. Certainly, when and if the property were to be developed, the Velsicol property would, to a

certain extent, be surfaced. However, there is nothing to suggest any current development plans; the court nevertheless has required immediate surfacing regardless of whether in the context of site development. Such present surfacing would not involve normal development costs because such surfacing would only impede development and have to be removed and then replaced. Also, there is no state or federal standard or regulation fixing an upper limit for mercury in soil. (McCormick, 8/10/78, T115-20 to 23). If the surfacing of the site is necessitated by the presence of pollutants and the potential for surface water discharge, then the parties responsible for the pollution must bear the cost of same, i.e., defendants Berk, WRCC and, by merger, Ventron. Also, the trial court, in requiring surfacing only of the Velsicol site, seemingly ignored the aspect of Dr. McCormick's testimony to the effect that surface water transport of mercury was occurring on the Wolf property and being transported onto the Velsicol property. (S-22; McCormick, 8/16/78, T18-7 to T20-23). The mere surfacing of the Velsicol site will not prevent the discharge of mercury from the Wolf site but may well increase the rate and quantity being discharged.

The Judgment entered by the trial court on November 15, 1979 (Ja369) is quite precise in stating that the defendants "F.W. Berk & Co., Inc. and Wood Ridge Chemical Corp. are jointly and severally liable for the pollution of the subject property..." That being so, the imposition of sole liability on the defendant Velsicol for any aspect of the pollution was baseless and inconsistent.

POINT XVI

THERE IS NO FACTUAL BASIS FOR THE TRIAL COURT'S FINDING THAT SURFACE WATER RUNOFF IS TRANSPORTING MERCURY OFF THE VELSICOL SITE.

The trial court found that there was mercury being discharged from the subject properties via surface water runoff (Vel-Da23). There was no proof of such discharge.

The State's expert, Dr. McCormick, established a total of nine (9) surface water stations. Stations 1 through 5 are located on the Wolf property within the existing drainage system. Station 6 is located in an open ditch on the Velsicol property which also lies within the existing drainage system. Station 7 is located at the outfall point of the drainage culvert, which traverses the Velsicol property, where the water from the site enters Berry' Creek. Stations 8 and 9 are located in Berry's Creek itself. (S-22 at 3 & 32). There is only one surface water sampling station on the Velsicol tract (Station 6) and it is located at the terminus of an underground culvert which serves as a drainage pipe for the Wolf site and perhaps other premises. The mercury readings on the samples taken from stations 6 and 7 do not necessarily reflect that mercury is being picked-up from the Velsicol site, but could reflect mercury transported from the adjoining Wolf property. (McCormick, 8/16/78, T18-T19). Stations 1 through 7, due to the fact they are connected by culverts and ditches to the Creek, could also be reflecting mercury which has been brought in with the tide.

In order to determine the quality of the "surface water" on the subject properties (Wolf, U.S. Life and Velsicol properties), Dr.

McCormick took 95 water samples on June 8, 1977 (S-22 at Table 12, page 50) and on July 13, 1977 took 12 such samples (S-22, at 53). The June 8th sampling revealed that 24 samples had mercury in a concentration in excess of 5ppb, the State surface water standard, which allows for four readings which Dr. McCormick said should be disregarded due to "procedural errors" (S-22 at 49). The following is a breakdown of the 24 high readings (excess of 5ppb) found during that sampling in terms of general location:

Wolf/U.S. Life Site (Stations 1-5)	17 readings in exess of 5ppb
Velsicol property (Station 6)	1 (5.4 ppb)
Drainage Discharge or Outfall (Station 7)	6
Berry's Creek (Stations 8 & 9)	0
	24

Berry's Creek was thus found to have met the State surface water standard in each of 26 samples taken in the Creek on June 8, 1977. The samples taken from the U.S. Life/Wolf sites revealed the highest percentage of samples exceeding the 5ppb standard; every sample taken at stations 1 (3 samples) and 5 (3 samples) exceeded 5ppb. Of the 13 samples taken at station 6 within an open ditch on the Velsicol site, only one sample exceeded 5ppb and only just barely. Six of eleven samples taken at the mouth of the discharge pipe revealed concentrations in excess of 5ppb. The higher concentrations therefore, were found at the two extremes of the drainage system, the Wolf/U.S. Life site and the outfall point at Berry's Creek.

The sampling of July 13, 1977 was confined to stations 7, 8 and 9, i.e., the outfall (7) and Berry's Creek (8 & 9). (S-22 at 53). Those samples revealed that of the 12 samples taken, none exceeded a concentration of 5ppb.

Such sampling data does not point to the Velsicol property as a source of surface water transport of mercury and clearly reflects that any such discharge is not adversely affecting the water quality of the Creek.

Dr. McCormick testified as follows with respect to tidal deposits of mercury onto the Velsicol property:

> Q. Do you concede that there is a tidal flow through that Diamond Shamrock ditch, [located at southerly portion of Velsicol property] flow back north of the creek itself, northwest?
>
> A. Yes, the tide flows in and ebbs back out again, floods in and ebbs back out.
>
> Q. When the tide comes in and there is a movement towards the Velsicol property, is it not probable that there is some transportation of mercury in particulate form to the Velsicol property?
>
> A. Recognizing that there is a good deal of mercury in the sediments of Berry's Creek right at, I believe, it is station 22S which is right at the mouth of the channel, I would expect that particulate mercury is carried back in there on a rising tide, yes, sir.

(McCormick, 8/17/78, T91-20 to T92-14). No attempt was made by the State to calculate the net transport of mercury, if any, off the subject properties, i.e., the amount by which the amount of mercury leaving the site exceeds the amount of mercury being deposited on the site. Dr. McCormick testified in this regard as follows:

> Q. Did you not indicate in your prior testimony that there was natural level, a background level of mercury in soil?
>
> A. Yes. sir.
>
> Q. Would it not be probable that there would be some discharge assuming that the property

is located adjacent to a creek or tributary, tidal tributary, that there would be some natural discharge of that, to some degree, of that background level mercury?

A. Yes, sir, it would be extremely low. In other words, the natural background is .05 parts per million.

Q. Relatively insignificant amount, but there would be some discharge?

A. Yes, that would be diluted and the measurement in the water would be below one part per million.

Q. Have you made any calculations as to the net transportation from the Velsicol tract of mercury in particulate form on either a daily, weekly or monthly basis?

A. No, sir.

May I make certain that I answered the previous question properly? I meant to say that one part per billion at the end and I may have uttered on part per million. It was supposed to be billion, but the answer to your question that you just asked is no.

Q. You have no figure in terms of the net transport from the site of mercury that we could compare or contrast with the background level discharge?

A. We measured total mercury. We did not filter the stream samples, so we have--well, as far as comparing with this hypothetical background that I just mentioned, yes, we could, we could compare our measurements of surface water with that hypothetical background.

Q. I am not so much looking for a comparison of your surface water samples, I am looking for a calculation, a determination, of the net amount of mercury that is being discharged, if any, from the site, allowing for the give-and-take of mercury through the tidal action. How much are we talking about in terms of mercury that is leaving the property?

A. You are talking in terms of, let's say, pounds per day or something like that.

Q. Right.

A. We have no calculations of that sort.

(McCormick, 8/17/78, T92-18 to T94-24). When asked if such a calculation could have been made, Dr. McCormick responded affirmatively:

> Q. Have you made any attempt to make that calculation?
>
> A. No. I did not personally, nor did anyone in my firm. I didn't mean to imply that.
>
> Q. There is a formula or calculation by which you can make that unit determination, can you not, provided you have the proper data?
>
> A. Yes, and largely the data are water flow and concentration.
>
> * * * *
>
> Q. If you wanted to determine the rate through which the water was flowing through the fill material, you would have to take into consideration the permeability or transmissibility of that material?
>
> A. It could also be measured directly.
>
> Q. I am not talking in terms of how you would do it, but you would have to consider the permeability or transmissibility of the material?
>
> A. By my answer, I meant, no, you would not have to because there are other measures to measure.
>
> Q. Did you at any time make any calculations of the permeability of the fill layer or any other layer on the Velsicol property?
>
> A. No, sir.

(McCormick, 8/17/78, T97-16 to T98-11) When inquiry was made by the trial judge as to the percentage of mercury leaving the site through the drainage system as opposed to other means, such as voids in the fill,

t he had insufficient data to render

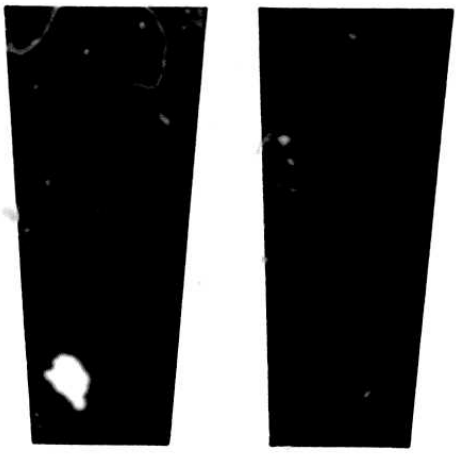
RT: Doctor, I don't know if you can
using a scale of one to ten, but do you
an opinion, percentage-wise of the amoun
particulate mercury that escapes from the
property through the drainage system tha
exists as against the particulate mercury tha
escapes through the system through othe
sources such as voids in the fill?

THE WITNESS: Well, I have an opinion
would have to say the opinion is based on data
that are few enough that it makes me a little
nervous to even give an opinion.

(McCormick, 8/17/78, T102-24 to T103-13)

found in his opinion that: "In the pas
available to indicate how much mercury
the Velsicol property either by way
surface water or through leaching."
It is important to realize that
McCormick on the subject
mercury and mercury
measured.

CORRECTION



PRECEDING IMAGE HAS BEEN REPEATED TO ASSURE LEGIBILITY OR TO CORRECT A POSSIBLE ERROR

Dr. McCormick recognized that he had insufficient data to venture a meaningful opinion.

> THE COURT: Doctor, I don't know if you can do it using a scale of one to ten, but do you have an opinion, percentage-wise of the amount of particulate mercury that escapes from the property through the drainage system that exists as against the particulate mercury that escapes through the system through other sources such as voids in the fill?
>
> THE WITNESS: Well, I have an opinion. I would have to say the opinion is based on data that are few enough that it makes me a little nervous to even give an opinion...

(McCormick, 8/17/78, T102-24 to T103-13). The trial judge correctly found in his opinion that: "In the past few years there is no data available to indicate how much mercury is reaching Berry's Creek from the Velsicol property either by way of any drainage system through surface water or through leaching." (Vel-Da23).[21]

It is important to realize that the surface water samples taken by Dr. McCormick on the subject properties made no distinction between dissolved mercury and mercury in particulate form, i.e., only total mercury was measured. (McCormick, 8/17/78, T124-4 to 5). The mercury measurements could be 100% particulate, 100% dissolved mercury or some mixture of the two. If 100% dissolved mercury, the only dissolved mercury found elsewhere is in the three wells located on the defendants Wolf property (Wells I, E & W), which would suggest that the surface water transport of mercury is limited to dissolved mercury being gener-

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[21] A finding by the trial court that the State failed to prove such a discharge would seem to preclude the imposition of a surfacing requirement.

ated by the Wolf site. A surfacing of the Velsicol site would not eliminate such a discharge but, instead, it would undoubtedly enhance the discharge by eliminating any absorption of the dissolved mercury by the soil on the Velsicol site.

There was no calculation of the nature or quantity of mercury, if any, that was migrating via the groundwater to Berry's Creek; nor was there any calculation of the quantity of mercury, if any, that was migrating from the Wolf property to Berry's Creek. Dr. McCormick testified that the paved swale located between the Wolf and U.S. Life properties had high concentrations of mercury. (McCormick, 8/16/78, T18-10 to 12). He conceded that the surface water in the paved swale "would be" transported into the unpaved ditch and from the ditch through a culvert between stations 5 and 6 and then through the second culvert through to station 7, the discharge point. (McCormick 8/16/78, T19-11 to 19). There was no attempt to determine the source of the mercury measured in the surface waters on the defendant Velsicol's property. The source could be the Wolf/U.S. Life site, the Velsicol site and/or Berry's Creek. As to the later, it is not disputed, that the tidal action of Berry's Creek reaches as far as the Wolf tract. (McCormick, 8/16/78, T43-18 to T46-20; T47-3 to T48-3). Absent such proof, there is no basis, factual or legal, for imposing a surfacing requirement.

The State's surface water samples, except for stations 8 and 9, are truly nothing more than samples of the storm water or tidal water in the pre-existing drainage system. During the course of the trial the State, by characterizing the water in the drainage system or culvert as "surface water", sought to apply the State surface water standard of

5ppb mercury which standard is palpably inaccurate (S-22). This standard was never intended to apply to such drainage waters. Dr. McCormick testified that this standard was a "stream water standard" and not a standard for storm water drainage. (McCormick, 8/10/78, T116-16 to T117-4).

The surface water standard, promulgated in 1975, is found in N.J.A.C. 7:9-4(a)(ii). This standard, as is true of all surface water guidelines, applies to State owned surface waters classified as fresh water (FW), tidal water (TW) and coastal waters (CW). N.J.A.C. 7:9-4.5. This point is supported by the regulation allowing for "mixing areas" where localized areas of surface water combine with wastewater effluents. Wastewater or drainage water is not intended to be included among the State "surface waters". The surface water standard of 5ppb would apply only to Berry's Creek and the waters of the Creek have consistently met said standard.

The concentration of mercury in the site drainage waters is greatly decreased if and when it enters Berry's Creek and it is that concentration which is discharged that should be of concern. The wastewater standard adopted by New Jersey is as follows:

> The minimum level of treatment required for any wastewater must be that discharges shall meet effluent limits as established under Section 402 of the Federal Water Pollution Control Act Amendments of 1972 and shall not cause the surface water quality critieria contained herein to be contravened.

N.J.A.C. 7:9-4.4(a)(4). There is no State storm water quality guideline but, assuming that the wastewater standard were applicable, there is no evidence that any surface water discharge violates said guideline

because the water samples taken from the Creek revealed compliance with the surface water standard of 5ppb.

With respect to surfacing, Dr. McCormick made only the following limited recommendation with respect to 19 acres of the Velsicol property:

> If the property is developed, as much as possible of the surface should be covered with impervious pavement or structures. If the property is not improved, the surface should be planted to develop a complete, dense cover of vegetation such as a thick lawn.

(S-22 at 94). Clearly the surfacing requirement was designed to minimize pollution and, if surfacing is justified, it must be the responsibility of the polluters and not exclusively that of defendant Velsicol.[22]

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[22] Dr. McCormick's recommendations are suspect. He recommended that the tidal gate adjacent to the Velsicol site be repaired. (S-22 at 93). After it was repaired, he testified that the repair to this tidegate did not improve the situation. (McCormick, 8/10/78, T134-20 to T135-7).

POINT XVII

THE TRIAL COURT ERRED IN PROVIDING A PROCEDURE BY WHICH THE STATE IS AFFORDED A SECOND OPPORTUNITY TO PROVE: (A) THE APPROPRIATE REMEDY FOR BERRY'S CREEK AND SURFACE TRANSPORT OF MERCURY AND (B) AT DEFENDANT VELSICOL'S EXPENSE AND WITHOUT A PLENARY HEARING, THAT MERCURY IS LEACHING FROM THE SUBJECT PROPERTIES THROUGH THE GROUND WATER.

The trial court's final judgment provided that the State was to submit a plan for the clean-up of Berry's Creek and defendant Velsicol was to submit a plan for surfacing its site. The Court alone to subsequently decide upon precisely what is to be done without benefit of a plenary hearing and on the basis of the written submissions and oral argument. The State had the burden of proving the nature of the relief sought. Obviously, the State failed to meet that burden with respect to Berry's Creek and surfacing of the Velsicol site. The State is not entitled to a second chance to prove its case and certainly, the defendant Velsicol should not be compelled to submit a plan for surfacing of its site when it does not want to surface the site. The denial of a right to a plenary hearing after materials have been submitted by the State is a denial of the fundamental right to confront and cross-examine the State's witnesses and is equally impermissible.

A similar approach was followed by the trial judge with respect to the issue of leaching from the subject properties. The trial court concluded in its opinion that the State had failed to prove that pollutants were entering Berry's Creek via the ground water:

> The State has met its burden of proof as to the pollution of Berry's Creek. However, it is not demonstrated that pollutants are now

> entering that waterway from the premises in question through groundwater.

(Vel-Da23). As a consequence of the State's inability to meet its burden of proof in this regard, the court properly found that it could not require entombment of the Velsicol property as had been sought by the State.

> The court will not now require entombment of the entire Velsicol tract. The preponderance of the evidence does not demonstrate that there is present leaching of ground water, nor is there proof that such leaching would create in a dredged Berry's Creek a hazardous condition.

(Vel-Da 67). Despite this finding, the Court concluded that such a "gap" in the State's case did not preclude future liability on the part of defendant's Berk, WRCC, Ventron and Velsicol based upon future testing (Vel-Da 23). The Court provided for a one-year period of monitoring by the State to commence after the clean up of Berry's Creek and the surfacing of the Velsicol site.

> When the surfacing of the Velsicol property and the cleanup of Berry's Creek are complete, the monitoring may begin, to see if mercury is leaching into the creek and in what amounts ...The State may, during that year monitor as it deems appropriate to determine the efficiency of the surface cover and the amount of leaching then occurring and provide proof of its claim that a further remedy by way of entombment of the entire tract is otherwise required."

(Vel-Da 68). The trial court was giving the State a second chance to prove its leaching case after fifty-five (55) days of trial. Not only did

the trial judge give the State a second chance, but he provided that the liable defendants may well end up paying the State for the cost associated with proving its case.

> The cost of monitoring, however, must be initially borne by the State. The State has heretofore failed to prove its case as to present leaching. If it seeks to prove such leaching, the burden is upon it. The State or the Fund will initially serve as the source of financing such monitoring."
>
> * * * * *
>
> If, in fact, the court determines that there is leaching which will create a violation of the standards now existent, the liable defendants may be charged with all or part of the monitoring costs.

(Vel-Da 68). In order to ensure payment by the liable defendants of potential liability for the State's monitoring costs and the possible entombment of the site, the court provided that the defendants Velsicol and Ventron must post security for same.

> As security for entombment and/or monitoring costs,...Ventron and Velsicol will be required to post security to assure payment for any procedures which may prove to be necessary should the monitoring system indicate that there is present actionable leaching or leakage which is reaching or may reach Berry's Creek.

(Vel-Da 69) (Emphasis added). The security required to be posted by defendant Velsicol and Ventron was estimated at $1 million each. (Vel-Da 70). Thus, on an aspect of the case on which the defendant Velsicol has won, it is being compelled to post security of approximately $1 million.

The procedure of allowing a litigant, even the State, a second chance to prove its case, assessing the costs of such second chance against defendants Velsicol and Ventron and providing further for the posting of security for such costs is a procedure having no basis in law and is in contravention of the rights of the defendant Velsicol as a litigant. The defendant Velsicol has not been afforded the right to re-try any aspect of its case, nor have any of the other litigants. All, save the State, are left with their right of appeal. The State is not entitled to any such preferential treatment under the rules governing the courts of the State of New Jersey, regardless of the nature of the controversy. The issue of leaching was tried and lost by the State and the State has taken an appeal which, presumably, encompasses the court's adverse finding on the leaching issue; the State may have no second chance at the trial level.

As to the manner in which the Court is to determine if there is leaching, it would appear that the trial court intends to dispense with a plenary hearing although such a hearing was provided on the State's first attempt to prove leaching.

> In the event that the one-year monitoring period provided for hereinabove indicates that mercury is continuing to reach Berry's Creek from the subject properties which would pollute the waters of Berry's Creek under existing standards, then appropriate remedial measures will be mandated by this court. The State may submit to this court within sixty (60) days of the one year period its proof of mercury pollution of Berry's Creek and these defendants will have thirty (30) days thereafter to reply.

(Ja 375-76). The State is afforded a one-year and two months to prepare its case and the defendant Velsicol is afforded only 30 days for

its defense. There is no provision for any discovery with respect to the dispute or for a plenary hearing. The denial of a plenary hearing is consistent with the trial court's position on the plans for cleanup of Berry's Creek and surfacing of Velsicol's property which the Court held would be finalized "without further plenary hearing" (Ja 374). This failure to afford the right of discovery and a right to a plenary hearing are further violations of the rights of the defendant Velsicol.

This entire procedure adopted by the trial court with respect to affording the State a second chance to prove its case is in contravention of the defendant Velsicol's rights under the Rules of Court and a denial of constitutional due process and equal protection of the laws. The court has held that the State may try its case against defendant Velsicol twice. The 1937 and 1971 Acts are penal in nature in that they provide for the imposition of fines. Clearly, the defendant Velsicol should not be subjected to what amounts to "double jeopardy" and be required to post security to cover the cost of the second prosecution and ultimate liability under the Acts.

The trial court's provision in its order for subsequent remedial proceedings, on the issue of leaching should be reversed in its entirety. If not reversed in its entirety, then at least there should be a reversal as to (a) the requirement for posting security; (b) Velsicol's potential liability for the cost of monitoring, which is nothing more than the cost of proving the State's case; (c) the failure to afford discovery on any subsequent hearing; and (d) the failure to afford a right to a plenary hearing prior to any subsequent determination.

POINT XVIII

THE ANTI-POLLUTION STATUTES, AS APPLIED BY THE TRIAL COURT, ARE UNCONSTITUTIONAL.

The trial held that the defendant Velsicol was liable under the 1937 and the 1971 Acts by virtue of strict liability arising out of its former ownership of the defendant WRCC. A statute must comply with certain standards of clarity and narrowness so as to be understood by men of common intelligence. Connally v. General Construction Co., 269 U.S. 385 (1926); State v. Smith, 46 N.J. 510 (1966); State v. Bank of New Jersey, 193 N.J.Super. 395 (L. Div. 1976).

If, in fact, the 1937 and 1971 Acts were designed to impose liability on a 100% stockholder of a polluting corporation, the Acts do not so provide with sufficient clarity as to properly place the defendant Velsicol on notice of said intentic On the other hand, the General Corporation Act of this State is quite precise in providing that 100% of the corporate stock may be owned by a single individual without being liable for the tort or contract liability of the corporation. See, N.J.S.A. 14A:2-6.

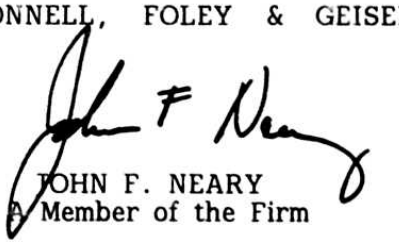
As interpreted and applied by the trial court the 1937 and 1971 Acts are unconstitutional due to the fact that their vagueness on the issue of stockholder liability deprived the defendant Velsicol of due process of law. A fair reading of such legislation would not have disclosed an imposition of strict liability on a 100% stockholder such as defendant Velsicol particularly in light of the conflicting corporate statutes of the State. The Acts in question are quasi-penal in nature and the monetary liability imposed by the trial court was in lieu of fines; such legislation must possess sufficient clarity to properly alert persons of their meaning.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the decision of the trial court imposing liability on the defendant, Velsicol Chemical Corporation, be reversed and judgment be entered in favor of the Defendant, Velsicol Chemical Corporation, on its Counterclaim and Crossclaims.

Respectfully submitted,

CONNELL, FOLEY & GEISER



JOHN F. NEARY
A Member of the Firm

Dated: July 23, 1980