No. 24200 -- *Pocahontas Mining Company Limited Partnership v. Oxy USA, Inc., Cardinal Resources, Inc., R & B Petroleum, Inc., and James J. Boyle*

McCuskey, J. dissenting.

In reaching its opinion, the majority of the Court has disregarded the requirements of Rule 9(b) of the West Virginia Rules of Civil Procedure regarding the pleading of fraud. This action adds credibility to the public perception that this Court does not follow its own precedents and rules. Reversal of the well-reasoned and factually grounded decision of the trial court will also create reluctance by trial judges to perform their duty to weed out meritless litigation when the facts and the law clearly entitle a litigant to a pre-jury determination.

The facts which are essential to the issues are not in dispute: in 1980, the appellee and defendant below, Cardinal Resources, Inc., acting pursuant to the provisions of a proper oil and gas lease, drilled a producing well on property owned by the appellant and plaintiff below, Pocahontas Mining Company. Cardinal did not pay the royalties due to Pocahontas under the lease until early 1992 when the appellant, through its surveying crew, determined that Cardinal's well was located on Pocahontas' property, not on the property of an adjacent landowner as was shown on Cardinal's original well permit application. After the discovery that the well was actually located on the appellant's

property, Cardinal began to pay the royalties to Pocahontas, leaving in dispute unpaid royalties of $32,842. In 1993, Pocahontas filed a complaint against Cardinal in the McDowell County Circuit Court seeking contract and tort damages, together with attorney's fees and punitive damages for alleged breach of contract, fraud, "theft," and trespass as a result of Cardinal's failure to pay the royalties due from the well under the lease.

Crucial to this case is the fact that Pocahontas did not allege any fact in its initial complaint, its second amended complaint, or in its subsequently filed "Bill of Particulars" which demonstrates that it relied, to its detriment, on the well drilling on its property by Cardinal or on Cardinal's failure to pay the royalties under the drilling lease when due.

The trial court, after twice giving Pocahontas the opportunity to amend its complaint to comply with the requirements of Rule 9(b) that fraud be pled with particularity, concluded that Pocahontas had failed to do so and granted the appellee's motion to dismiss the fraud claim. The court ruled that Pocahontas "does not allege fraud with the particularity required by Rule 9(b) and, as a matter of law, does not present a proper factual basis upon which relief can be granted for fraud and does not comply with the requirements of this court's order of April 4, 1996." The case proceeded to trial on the remaining contract claim on September 23, 1996, at which time the trial court directed a judgment in favor of Pocahontas against the appellee for $32,842 in unpaid

royalties and $12,783 for damages incidental to the breach of contract claim.[1]

Both Rule 9(b) of the Federal Rules of Civil Procedure and Rule 9(b) of the West Virginia Rules of Civil Procedure specifically require that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity . . . ." As clear as the Rule is, clearer still is the reason for the rule. In *Hager v. Exxon Corporation*, 161 W.Va. 278, 241 S.E.2d 920 (1978), this Court concluded that "fraud is of such gravity" that the strict requirement of Rule 9(b) was included to afford the party charged with fraud an opportunity to prepare an adequate defense. In the same vein, 5 Wright and Miller, Federal Practice and Procedure: Civil 2d § 1296 (1990), advanced the following reasoning for requiring particularity in the pleading of fraud or mistake:

> It has been said that the requirement is necessary to safeguard potential defendants from lightly made claims charging commission of acts that involve some degree of moral turpitude. Allegations of fraud or mistake frequently are advanced only for their nuisance or settlement value and with little hope that they will be successful.

This is precisely the type of case that the rule requiring particularity in pleading fraud was designed to prevent.

The majority's error arises from its failure to apply the definition of fraud under West Virginia law to the appellant's factual allegations. The elements of fraud under

[1]Cardinal offered to pay $71,000 to Pocahontas by an Offer of Judgment at an early stage of the proceeding, but Pocahontas refused the offer and elected to proceed to trial.

West Virginia case law, which tracks the classic textbook definition of fraud found in 5 Wright and Miller, Federal Practice and Procedure: Civil 2d § 1297 (1990), are stated in Syllabus Point 3 of *Cordial v. Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248 (1996):

> "'"The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981).' Syllabus Point 2, *Muzelak v. King Chevrolet, Inc.*, 179 W.Va. 340, 368 S.E.2d 710 (1988)." *Syllabus point 2, Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992).

The majority opinion ignores this Court's precedents regarding fraud, which were reaffirmed as recently as 1995 in *Croston v. Emax Oil Co.*, 195 W.Va. 86, 464 S.E.2d 728 (1995). In upholding the trial court's grant of summary judgment for the defendant in a similar oil and gas lease case alleging fraud, the unanimous Court said:

> It is noted that the allegations of fraud in the complaint are general and fail to meet the requirements of Rule 9(b) of the West Virginia Rules of Civil Procedure . . . . The failure to plead particularly the circumstances constituting fraud . . . inhibits full review of the substance of the claim of fraud by this Court on appeal from the grant of summary judgment . . . .

195 W.Va. at 91, 464 S.E.2d at 733.

To plead fraud properly, West Virginia law requires more than the mere allegation of a misrepresentation contained in the appellant's complaints and Bill of Particulars.

Although Pocahontas alleged a false representation by Cardinal (claiming to drill a well on adjoining property but knowing that the well was actually located on the appellant's property), none of the appellant's pleadings meet the requirements of the second element of fraud, which necessitates *reliance* by the plaintiff, to its detriment, on the alleged fraudulent act of the defendant.[2]

Thus, an essential element necessary to the proper pleading of fraud is absent from any and all of the appellant's pleadings. The circuit court gave the appellant every opportunity to comport with the rules for pleading fraud, but the appellant was unable to comply, apparently because there were no facts which could arguably constitute an act of detrimental reliance by Pocahontas on Cardinal's failure to provide proper notice of the drilling of the well or on Cardinal's failure to promptly pay royalties. In other words, Pocahontas did nothing differently, and lost no economic opportunities, simply because Cardinal drilled a well on Pocahontas' property under the incorrect assertion that the well was located on adjacent property.

The appellant's intemperate use of highly charged rhetoric ("theft" and "stealing the gas") beguiled the majority of this Court to a conclusion that this dispute is something more than what the trial court recognized as a simple contract claim. Rather than

[2]The appellant's last and most detailed pleading (entitled "Bill of Particulars"), stating the facts that allegedly constitute fraud, is set forth verbatim in footnote 3 of the majority opinion.

encouraging prompt resolution of a relatively minor dispute between two business entities, the Court has created another stereotypical West Virginia tort litigation bonanza.

This Court, in *Chamberlaine & Flowers v. Smith Contracting*, 176 W.Va. 39, 341 S.E.2d 414 (W.Va. 1986), lucidly defined the difference between a contract claim and a tort claim:

> The key distinction is whether the act complained of was one of misfeasance or nonfeasance. Misfeasance, or negligent affirmative conduct, in performing a contract generally subjects the actor to tort liability in addition to contract liability for physical harm to persons and tangible things. On the other hand, there is generally no tort liability for failing to do what one has contracted to do, unless there is some duty to act apart from the contract.

341 S.E.2d at 417 (citations omitted).

The proper characterization of Cardinal's action in drilling a well on the appellant's property, pursuant to a proper lease, but failing to pay royalties due under the lease, is a contract claim, whether the failure to pay royalties was intentional or a mere mistake. At most, Cardinal failed to do what it had contracted to do, namely pay royalties due to Pocahontas.

The error in the majority's reasoning warrants more than a simple dissent because of the far reaching result that can be foreseen from this anonymous *per curiam* opinion.

If the appellant is allowed this “second bite of the apple” with a new trial, this time on a fraud count, it will undoubtedly seek, in addition to the breach of contract damages already received, attorney’s fees, pursuant to *Bowling v. Ansted*, 188 W.Va. 468, 425 S.E.2d 144 (1992), annoyance and inconvenience, other subjective, tort-type damages, and, of course, unquantifiable and unlimited punitive damages as a result of this Court’s ruling in *TXO Production v. Alliance Resources*, 419 S.E.2d 870 (W.Va. 1992). There is irony lurking in the fact that the former justice of this Court who served as the midwife to the goose that laid the golden *TXO* egg now appears before the Court as a member of the Bar seeking an opportunity to seize that same golden egg for his client, the appellant. Chances are good that the hatchling from this egg will be either "really mean or really stupid."[3]

Justice Maynard has authorized me to state that he concurs with this dissent and that he wishes to join herein.

[3]Justice Neely penned this categorization of the basis for assessing punitive damages 500 times greater than actual damages in the *TXO* case, *supra*.