

No. 31391 - State of West Virginia ex rel. Frazier & Oxley, L.C., a West Virginia Legal Corporation, and William M. Frazier, Individually, v. The Honorable John L. Cummings, Judge of the Circuit Court of Cabell County, West Virginia, and St. James Management Company, L.L.C., a West Virginia Limited Liability Company

Maynard, J., concurring:

FILED

January 6, 2004

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

I fully concur in the majority opinion. As the author of the Court's opinion in *Frazier & Oxley I*, though, I feel it incumbent on me to briefly address the contentions of my dissenting colleague and explain why, in light of the posture of *Frazier & Oxley I*, I do not find them to be compelling.

In *Frazier & Oxley I*, St. James originally brought only one claim against Frazier & Oxley, a claim that the ending of the prime lease agreement between City National Bank and St. James terminated Frazier & Oxley's sublease. Even though St. James knew as early as December 12, 2001, about the sublease, the company did not file a motion to amend its complaint at that time; rather, it chose to forego further discovery on the potential recording act claim and instead file a motion for partial summary judgment on the only claim that it had brought—the termination claim. Even after Frazier & Oxley sought a writ of prohibition before this Court, St. James did not indicate to this Court that it had another potential basis of recovery against Frazier & Oxley. It was only after this Court ruled against St. James and issued the writ of prohibition that St. James returned to circuit court and sought to add the additional recording act claim to its complaint.

It is important to realize that when this case initially came before us, St. James emphasized the need to rapidly resolve it¹ based on the fact that it was receiving only \$250.00 a month in rent from Frazier & Oxley and St. James believed the mezzanine was actually worth anywhere from \$2,000 to \$4,000 per month in rent. In light of this, even though we issued a prohibition against Judge Cummings on the grant of partial summary judgment, we acceded to St. James's desire to rapidly resolve the case, returning the case to circuit court for the limited purpose of "a factual determination of whether a surrender of the prime lease occurred." It was only then, after we returned the case to the circuit court for a determination of the single claim that St. James chose to pursue up to that point, that it sought to amend its complaint to add another count.²

¹Indeed, St. James requested an expedited trial date and filed its motion for partial summary judgment less than three months after filing its complaint, *State ex rel. Frazier & Oxley*, 212 W. Va. 275, 279, 569 S.E.2d 796, 800 (2002), and, then, after only limited discovery. *Id.* at 280., 569 S.E.2d at 801 ("St. James believes discovery is complete because the circuit court needed only five documents in order to make a ruling in this case [.]").

²Of course, nothing prevented St. James from simultaneously filing both its partial motion for summary judgment and a motion to amend its pleading if the summary judgment was unsuccessful. Instead, St. James decided to bank on obtaining victory under the single count of the complaint by filing only a motion for partial summary judgment and foregoing further discovery related to the lack of recordation of the sublease—a lack of recordation known to St. James at least as early as December 12, which was well before St. James filed its motion for partial summary judgment on January 22, 2002.

In light of St. James's expressed desire in *Frazier & Oxley I* to secure a determination of its rights as rapidly as possible and, in so doing, its failure to express to us therein that it was aware that another possible theory was available, our decision in *Frazier & Oxley I* was clearly a limited remand designed to grant each party as much of their requested relief as possible while still protecting the rights of all parties involved. Thus, no one should take the majority opinion in *Frazier & Oxley II* out of the factual and procedural context of *Frazier & Oxley I*.

With a full understanding of the background to *Frazier & Oxley I*, I think it is apparent that the dissent's dire predictions and characterizations of the effects of *Frazier & Oxley II* are not well founded. With those clarifications, I fully concur in the majority opinion.