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MEMORANDUM

TO: Charles McCrea and Paul Merrell
FROM: David S. McCrea
DATE: February 24, 1992
SUBJECT: Appellees' Petition for Rehearing

1. The Defendants do not know if they committed fraud, did not commit fraud, or should have committed fraud. It will be interesting to see which hat the Defendants wear in prosecuting their affirmative defense. We need to force the Defendants to go forward with their affirmative defense that Nevada Power should have discovered the fraud more than three years before the action was filed.

2. We need a transcript of the oral argument referenced in footnote 1, page 2, of Appellees' Brief.

3. The opinion in this case is powerful. It makes common sense. Plaintiffs cannot file a fraud claim until they have "evidence" of fraud. To file a fraud claim without evidence of fraud invites Rule 11 Sanctions.

4. In oral argument one of the judges on the panel addressed the following factual/legal proposition to Bruce Featherstone:

"The Defendants argue that Plaintiffs should have found what Defendants hid."

In the opinion the judges determined that this is a jury question. To file a case of fraud without evidence of fraud would risk sanctions. To wait until you get evidence of fraud and be dismissed on a statute of limitations argument makes a mockery of justice, to paraphrase Chief Justice Swiggert, 7th Circuit, in Braswell v. Flintkote Mines.

5. Defendants cannot seriously contend that a Plaintiff can file an action on fraud without evidence of fraud. Defendants do not know if they are better off admitting fraud, denying fraud or taking a position somewhere in between in the case at bar.

The Appellees do not address their misciting Sparks v. Metalcraft.

McCrea & McCrea

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Charles McCrea and Paul Merrell

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I would like to have all Rule 11 letters sent to us organized, including our responses. It was an infernal outrage for the Defendants to send such a letter. I also would like the letters addressed to us asking for costs with the suggestion that our action was frivolous. As Paul Merrell said - We need to send a letter to the author of the Rule 11 accusation informing this attorney that "some damn fool signed his name to the letter we received."

CONCLUSION

This opinion based on simple logic (we did not find what the Defendants were hiding) is clearly one of the ten most significant opinions in the history of American jurisprudence as it relates to tort law.

TRANSACTION REPORT

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