

**No. 30651—*Robert C. Carter, on Behalf of Himself and a Class of Others Similarly Situated v. Monsanto Company, a Foreign Corporation, et al.***

**FILED**

**January 6, 2003**

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

**RELEASED**

**January 8, 2003**

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

McGraw, Justice, concurring in part and dissenting in part:

I concur with the majority in its decision that the plaintiff in this case already has an existing cause of action for nuisance or trespass, and that Mr. Carter, as the majority states, “has other avenues available to him which he may pursue.”

Also, I agree whole-heartedly with the comments made by Justice Starcher in his concurring opinion, that under the right circumstances a court could require a defendant polluter to pay for the cost of testing a plaintiff’s property for contaminants. Like Justice Starcher, I also believe that the certified question, as presented to this Court, was confusing.

I dissent because I believe that the certified question, and with it syllabus point one of this opinion, could be read to suggest that *even when a plaintiff prevails* in establishing that a defendant polluter has exposed his or her property to toxic contamination the plaintiff would not be entitled to the cost of monitoring for that contamination. I believe that our existing law clearly provides that a wrongdoer must pay for all the costs of his or her actions in such a case.

Furthermore, I believe that this case stands for a simple proposition, and one that we should not lose sight of. On the one hand we have a large corporation that operated a toxic waste dump and allegedly allowed odorless, tasteless, colorless, unsafe substances to escape and potentially contaminate the property of its neighbors. On the other hand we have local property owners who want to know if it is alright for their kids to play in the yard or safe to grow a few tomatoes in the summer. It seems obvious to me that once a plaintiff has established that a defendant has exposed its neighbors to a substantial risk of contamination, the company should have to pay to determine if the neighbors' land is safe.

Therefore, I respectfully concur in part and dissent in part to the majority decision.