

No. 30461—*James Tolley and Nancy Tolley, his wife v. ACF Industries, Inc., a New Jersey Corporation, et al.*

FILED

January 3, 2003

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

RELEASED

January 3, 2003

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

McGraw, Justice, dissenting:

In this case Mr. Tolley alleged that his employer allowed plant employees to be exposed to a toxic chemical, and that this exposure caused him harm. The lower court determined that Mr. Tolley failed to present sufficient evidence to withstand a motion for summary judgment. While I agree with the majority that Mr. Tolley has, thus far, only been able to produce limited evidence that his employer violated each element of our deliberate intent statute, I do not agree with the lower court's grant of summary judgment.

As this Court as often noted, when reviewing a motion for summary judgment, a court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). Mr. Tolley has produced substantial evidence that the chemical in question was present in the plant, that a different means of testing might be required, and that he has suffered an injury consistent with exposure to this chemical.

This Court has stated that "[e]veryone who has a good faith dispute requiring a decision by an impartial arbiter is entitled to his day in court." *Yost v. Fuscaldo*, 185 W. Va.

493, 500, 408 S.E.2d 72, 79 (1991) (quoting *Nelson v. Public Employees Insurance Board*, 171 W. Va. 445, 454, 300 S.E.2d 86, 95 (1982)). It is true that Mr. Tolley has suffered from asthma and has been a smoker for some time. Reasonable minds may differ as to the cause of his injury, the propriety of the steps taken by the employer to prevent exposure, or the likelihood of Mr. Tolley's personal, direct exposure to the chemical. However, I would prefer that those reasonable minds, that is members of the jury, be given a chance to consider the question.

Therefore, I respectfully dissent.