No. 30651 - Robert C. Carter, on behalf of himself and a class of others similarly situated v. Monsanto Company, a foreign corporation; Solutia, Inc., a foreign corporation; the City of Nitro, a West Virginia municipal corporation; Amherst Coal Company, a West Virginia corporation; Arch of West Virginia, Inc., a West Virginia corporation; Arch of Illinois, Inc., a foreign corporation; Apogee Coal Company, a foreign corporation

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Starcher, Justice, concurring:

I write separately in concurrence to emphasize several aspects of the majority opinion and the underlying case.

First, as the majority opinion points out, these plaintiffs – independent of their other causes of action that were based on nuisance, etc. – pled a separate cause of action for property monitoring. The circuit court granted a motion to dismiss the separate property monitoring cause of action; and in so doing, posed and answered the certified question that was sent up to this Court.

I think that the circuit court was correct in dismissing the separate cause of action for property monitoring, for reasons that I will briefly outline.

As the majority opinion recognizes, the certified question as posed was confusing and inappropriate to the posture of the case as it stood in the lower court, where no discovery had taken place, etc., much less any findings made. The certified question appears to assume that the plaintiffs had already proven that their property was exposed to dangerous

substances through the defendants' wrongdoing. At that point, the plaintiffs would have already made out a case of nuisance, and they would need no separate cause of action to invoke the remedial powers of the court, which as I point out *infra*, could include some form of monitoring or testing.

The cause of action for private nuisance has been for centuries a highly flexible one, giving courts substantial latitude to fashion appropriate and reasonable remedies, depending on the harm to be avoided or remedied. For example, a dangerous animal need not first escape and attack a child before a court can entertain a request to order the animal chained or a suitable fence built. And to draw an imperfect but useful parallel to the instant case, if such an animal did escape and bite someone, a court could certainly consider whether the cost of rabies tests should be paid by the animal's owner, even though the test results might be negative.

This leads me to my next point – that property monitoring (like medical monitoring, under my understanding) is not – repeat, IS NOT – a separate cause of action. In my view, monitoring and the cost thereof are simply a remedy or an element of damages that are available to a court to award or order against a culpable party. Therefore, to be complete and more accurate, the new syllabus point in the Court's opinion in the instant case should be read as holding that:

> There is no common law cause of action in West Virginia for property monitoring that is separate and distinct from the established causes of action that protect interests in property, such as private nuisance and trespass.

Additionally, I would further clarify the Court's opinion by holding that:

> Under the cause of action for private nuisance, a court may not as part of its judgment award against a defendant the cost of future inspection and monitoring of the plaintiff's real estate until and unless the plaintiff first establishes the fact of a nuisance by proving a past, existing, or likely future illegal or unreasonable interference with the enjoyment and use of the plaintiff's property by a defendant.

The plaintiffs in the instant case presented this Court with a "moving target" of shifting theories and requested rulings by this Court. But all of their theories and requests came around to arguing that the defendants should have to pay "up front" for testing the plaintiffs' property – without any sort of prior showing by the plaintiffs that the defendants had used their property illegally or unreasonably, and that such use had resulted in tangible injuries or real threats to the plaintiffs' interests. For example, no expert opined that there was likely to be risk or harm to the plaintiffs' properties from the defendant's conduct. Nor did the plaintiffs produce the results of sample testing that could indicate the likelihood of more widespread contamination, and therefore the reasonableness of ordering testing of other properties. With the case in such a nebulous posture, this Court rightly ruled that the plaintiffs had the cart "way before" the horse.

Nevertheless, in the context of a preliminary injunction request, under the "balancing of the harms" test, one can imagine a scenario where a court might be justified in preliminarily requiring some form of monitoring by a nuisance defendant before final judgment on liability – such as where a strong preliminary showing of a highly unreasonable risk to others was made. Of course, if a plaintiff in such a case did not ultimately prevail, they would have to

reimburse the defendant for the cost of the monitoring. However, this is not the sort of award of monitoring costs that the plaintiffs in the instant case are seeking.

I believe that the classic causes of action for trespass, nuisance, and negligence can and must be flexible enough to deal with the environmental challenges of our modern era. If a person or company disposes of poisons on their property, and those poisons are proven to be likely to migrate or to have migrated, through the air or water, to contact and contaminate other persons and/or their properties, then the poison disposer should be accountable in court to people whose persons or properties are actually threatened or contaminated. If the disposer can persuade a jury that their conduct and its likely and actual consequences is or was not unreasonable (a nuisance) or otherwise culpable, then there is no liability. But if such a disposer is proven to have culpably injured or placed people at substantial risk in their persons or property, then – in an appropriate case – a court *can* order the wrongdoer to pay for the cost of monitoring – to detect the extent of harm, to aid in the determination of damages and other remedies, and for the future protection of innocent victims of possible or actual contamination.

Nothing in the Court's opinion in this case precludes this sort of remedy. I therefore concur in the Court's judgment.