Nos. 31428 and 31429– *State ex rel. E. I. Dupont De Nemours v. Hill, Jr., Judge*

McGraw, Justice, dissenting:

FILED
December 9, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

The majority notes that "this case is governed by *Carter v. Monsanto Co.*, 212 W. Va. 732, 575 S.E.2d 342 (2002)," another case in which I disagreed with the majority. I depart from the majority for similar reasons today. The *Carter* dissent states in part:

> 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.

Id. 212 W. Va. at 739-40, 575 S.E.2d at 349-50 (McGraw, J., concurring in part and dissenting in part). In this case, plaintiffs aver that the pollution is not on their land, but is actually in their bloodstream, a much more frightening prospect. They also claim, as the majority notes, that the defendant possesses one of the few, if not the only, labs in the country capable of determining whether or not C8 is coursing through the veins of the citizens of Wood County.

The majority discusses the "balancing test" a judge must use when issuing an injunction:

> The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ. Syl. pt. 4, *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932).

Syl. pt. 2, *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002). I believe that Judge Hill exercised "sound judicial discretion" when he granted the injunction. As Justice Starcher noted in his concurrence to *Carter*:

> [I]n 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.

Carter v. Monsanto Co., 212 W. Va. 732, 739, 575 S.E.2d 342, 349 (2002) (Starcher, J., concurring). I believe this case presents just such a scenario, and that the lower court was justified in requiring the defendant to provide the blood testing. Therefore, I must respectfully dissent.