IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED
December 5, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30651

RELEASED
December 6, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ROBERT C. CARTER, ON BEHALF OF HIMSELF AND
A CLASS OF OTHERS SIMILARLY SITUATED,
Plaintiff

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,
Defendants

Appeal from the Circuit Court of Putnam County
Honorable O. C. Spaulding, Judge
Civil Action No. 00-C-300

CERTIFIED QUESTION ANSWERED

Submitted: November 13, 2002
Filed: December 5, 2002

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JUSTICE MAYNARD delivered the Opinion of the Court.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.
JUSTICE McGRAW concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. There is no common law cause of action in West Virginia for property monitoring.

2. "'The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.' Syllabus point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996)." Syllabus Point 2, *Keplinger v. Virginia Elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000).

3. "'A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land.' Syllabus point 1, *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989)." Syllabus Point 4, *Quintain v. Columbia Natural Resources*, 210 W.Va. 128, 556 S.E.2d 95 (2001).

4. "An interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm." Syllabus Point 2, *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989).

Maynard, Justice:

This case comes before us upon certification from the Circuit Court of Putnam County. By order entered on November 19, 2001, the circuit court presents the following question:

> Does a common law cause of action exist in West Virginia for the recovery of the cost of future inspection and monitoring of real estate for the presence of toxic substances where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct in creating and maintaining a chemical dump and permitting toxic substances placed in said chemical dump to enter the waterways of this State to be deposited downstream upon the land of others through flooding thus exposing such land and its owner to toxic contamination?

Answer of the circuit court: No.

We have reviewed the record, briefs, and arguments submitted on appeal. After applying the law to the facts of this case, we agree with the circuit court and answer the certified question in the negative.

I.

FACTS

Robert Carter represents himself in this class action as well as all other similarly situated plaintiffs. The second amended complaint filed by Carter on May 29, 2001 alleges that he is a resident of Putnam County who owns and resides on property which abuts the surface waters of Manila Creek. He states that his property is located downstream from the Manila Creek landfill, and that other property owners reside downstream from either the Manila Creek landfill or the Hiezer Creek landfill.

Carter alleges that in 1929, the Monsanto Company (Monsanto) operated a chemical manufacturing plant in Nitro, West Virginia, and that Solutia, Inc. (Solutia) is the successor to certain liabilities of Monsanto. He asserts that beginning in 1948, Monsanto produced a herbicide, 2, 4, 5-trichlorophenoxyacetic acid, which resulted in the formation of a contaminant, 2, 3, 7, 8-tetrachlorodibenzoparadioxin, otherwise known as dioxin. Carter believes dioxin in this formulation is highly toxic. He further contends that Monsanto disposed of large quantities of waste material contaminated with dioxin at various locations including the Manila Creek landfill and the Heizer Creek landfill.

Carter alleges that the City of Nitro, at all relevant times, owned and controlled the Heizer Creek landfill. He contends that Nitro allowed Monsanto to dump toxic chemicals

into the Heizer Creek landfill. Carter also alleges that Amherst Coal Company, at all relevant times, owned and controlled the Manila Creek landfill. He contends that Amherst allowed Monsanto to dump toxic chemicals into the Manila Creek landfill. He asserts that Arch of West Virginia, Inc. is a successor to the liabilities of Amherst. He believes that Arch of Illinois, Inc. is a successor to the liabilities of Arch of West Virginia, and that Apogee Coal Company is a successor to the liabilities of Arch of Illinois.

Carter alleges that during the 1980s, the United States Environmental Protection Agency required Monsanto to remove contaminants from both landfills. Despite these efforts, both landfills remain contaminated today and are sources of offsite contamination. Carter maintains that the surface water and sediment of Manila Creek, Heizer Creek, the Pocatalico River, and the Kanawha River are contaminated with dioxin. He states that Manila Creek, Heizer Creek, the Pocatalico River, and an unnamed tributary which flows from the Heizer Creek dump site periodically overflow their banks, thus flooding real property downstream and depositing contaminated sediment on adjoining property.

Based upon these allegations, Carter asserted four counts in his complaint: (1) property inspection/monitoring; (2) risk assessment and health monitoring; (3) interference with use and enjoyment of riparian property rights; and (4) diminution in value of riparian property rights. Monsanto and the landfill owners filed motions to dismiss the complaint. Following a hearing held on July 26, 2001, the circuit court granted the motion to dismiss as

to count 1, property inspection/monitoring, and certified the aforementioned question to this Court. The motion to dismiss the claims constituting counts 2, 3, and 4 of the complaint was denied. The court further stayed all proceedings in this matter until we certify our answer back to circuit court.

II.

STANDARD OF REVIEW

"'The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.' Syllabus point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996)." Syllabus Point 2, *Keplinger v. Virginia Elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000).

III.

DISCUSSION

Carter contends the circuit court erred by answering the certified question in the negative and granting the motion to dismiss as it relates to count 1 of his complaint. He argues that Monsanto and the landfill owners should pay to quantify the amount of dioxin which exists on his property. In his brief, Carter essentially argues that medical monitoring which was instituted by this Court in *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999), should be expanded to include property monitoring. He states that he must test his property now, those tests are prohibitively expensive, and he has an interest in avoiding the cost of that testing. However, during oral argument, Carter's attorney appeared to abandon the property monitoring argument and instead focused on nuisance by arguing that Monsanto and the landfill owners interfered with Carter's peaceful enjoyment of his land. He argued that he has a "well-founded fear" of contamination which actually constitutes a present injury. When asked if any other state has recognized a "well-founded fear" as a separate cause of action, Carter's attorney admitted that he knew of none.

Monsanto and the landfill owners counter that unlike the present case, the *Bower* plaintiffs had been significantly exposed to a hazardous substance. The companies differentiate between *Bower* and this case by pointing out that Carter does not know if his property has been exposed to a hazardous substance. Instead, Carter is seeking expense money to conduct testing to determine if his property has been damaged by exposure to dioxin; in essence, he is asking that the burden of the expense of gathering evidence, testing and sampling, be shifted to Monsanto and the landfill owners. The companies maintain that if

Carter brings a private nuisance action and prevails, he will recover the costs of his expenses.[1] But the burden is his and he must first prove at his expense that his property has in fact been injured. We agree.

Neither West Virginia common law nor West Virginia statutory law presently supports or recognizes a claim for property monitoring. Carter does not support his claim for preliminary testing of his property with citations to West Virginia law or to citations from any other jurisdiction. In our judgment, the *Bower* opinion does not support his claim. In *Bower*, this Court established a method to allow recovery for future medical monitoring of individuals who suffered significant exposure to a hazardous substance and, consequently, suffer a significantly increased risk of developing a latent disease. In order to recover, a plaintiff must demonstrate that he or she has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure. In the case *sub judice*, Carter has not established that his property has been exposed to a hazardous substance. If he proves that exposure has occurred, he is not without a remedy under private nuisance law, as we will discuss *infra*. Under the facts of Carter's case, we decline to create a new cause of action for "property monitoring." We, therefore, hold that there is no common law cause of action in West Virginia for property monitoring.

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[1]We acknowledge and appreciate the amici curiae briefs filed by the West Virginia Farm Bureau and the West Virginia Manufacturers Association in support of Monsanto's and the landfill owners' position.

During oral argument before this Court, Carter's attorney argued that our previous opinion, *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989), takes this case out of the context of property monitoring and puts it into the context of nuisance. Carter's attorney also admitted that nuisance law has not been expanded to permit recovery of preliminary expenses or costs for property testing from alleged tortfeasors. He, nonetheless, argued that he should be allowed to present evidence to a jury concerning Carter's "well-founded fear" of property contamination. Further, he argued, if the jury believes Carter's "well-founded fear" is justified, then the burden shifts and Monsanto and the landfill owners must pay for sampling and testing to determine if Carter's property is contaminated with dioxin. This argument is very original and creative, but it misconstrues nuisance law and would result in a fairly fundamental change in the manner in which nuisance litigation has been historically conducted in our courts.

This Court previously defined private nuisance by stating that "'[a] private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land.' Syllabus point 1, *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989)." Syllabus Point 4, *Quintain v. Columbia Natural Resources*, 210 W.Va. 128, 556 S.E.2d 95 (2001). Stated another way,

> A nuisance is anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable. . . . A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort. . . . A condition is

> a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby.

Hendricks, 181 W.Va. at 33, 380 S.E.2d at 200 (citations omitted). The type of conduct that constitutes a private nuisance "includes conduct that is intentional and unreasonable, negligent or reckless, or that results in [] abnormally dangerous conditions or activities in an inappropriate place." *Hendricks*, 181 W.Va. at 33-34, 380 S.E.2d at 200.

In order for an interference to be "substantial" or "significant," the interference must "involv[e] more than slight inconvenience or petty annoyance[,] . . . there must be a real and appreciable invasion of the plaintiff's interests[.]" Restatement (Second) of Torts § 821F(c) (1979). Moreover, "[a]n interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm." Syllabus Point 2, *Hendricks*, *supra*.

In this case, Carter contends that the substantial interference with the private use of his property is a "well-founded fear" regarding the sanctity of peaceful enjoyment of his land. It is well-settled, however, that under private nuisance, fear alone is not a sufficient basis for recovery. "It has variously been said that liability for nuisance is a species of tort liability, and that a nuisance is a tort, which is governed by the rules relating to torts generally." 58 Am. Jur. 2d *Nuisances* § 66 (1989). In other words, before one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and

damages. Usually, the burden is on the plaintiff to prove the elements and to first suffer the expenditure of costs incurred to gather and put on the proof. However, if Carter brings a private nuisance action and prevails, he will recover any damages he has suffered, as well as costs.

Lastly, the plaintiff is not without aid or remedy for assistance in producing and gathering evidence in this case. We note that numerous federal and state agencies exist to which individuals may complain when they believe their property rights have been violated and their land or water contaminated. For instance, an air pollution complaint may be directed to the West Virginia Air Quality Board under Chapter 22, Article 5 of the West Virginia Code. The Air Quality Board's duties include, *inter alia*, making investigations to ensure compliance with the Federal Clean Air Act. W.Va. Code § 22-5-4(6) (1994). A water pollution complaint may be directed to the West Virginia Office of Water Resources which ensures compliance with the Federal Water Pollution Control Act under Chapter 22, Article 11 of the West Virginia Code. The Office of Water Resources studies and investigates all problems concerning water flow and water pollution. W.Va. Code § 22-11-4(5) (1994). The Director of the Division of Environmental Protection is authorized to inspect and investigate all solid waste facilities in the State. Moreover, the Director may "enter any approved solid waste facility, open dump or property where solid waste is present and take samples of the waste, soils, air or water or may, upon issuance of an order, require *any person* to take and analyze

samples of such waste, soil, air or water." W.Va. Code § 22-15-5(e) (1998) (emphasis added).

Further, hazardous waste is regulated under the Hazardous Waste Management Act, West Virginia Code Chapter 22, Article 18. Hazardous waste complaints are directed to the Division of Environmental Protection. The following statutory procedure controls these complaints:

> (a) If the director determines, upon receipt of any information, that (1) the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated or disposed of, or (2) the release of any such waste from such facility or site may present a substantial hazard to human health or the environment, he or she may issue an order requiring the owner or operator of such facility or site to conduct such monitoring, testing, analysis and reporting with respect to such facility or site as the director deems reasonable to ascertain the nature and extent of such hazard.

W.Va. Code 22-18-14(a) (1994). One can also complain to the Environmental Protection Agency. In an emergency situation, such as a flood, the Division of Environmental Protection initially conducts testing when it is deemed necessary for any reason whatsoever. The Federal Emergency Management Agency reimburses the Division for eighty percent of the expense associated with such testing. The record before us does not disclose whether Carter chose to seek assistance from any state or federal agency, although it appears he has not sought their intervention or assistance.

Notwithstanding all the foregoing, we are sympathetic to Carter's problem. Any landowner would be sorely aggrieved to own property adjacent to landfills which contain hazardous chemicals and not know if those chemicals have contaminated his property. If indeed dioxin has escaped from the landfills and migrated onto his property, he has a very real and a very expensive problem. Even though he makes a sound and persuasive argument for property monitoring, such a creation cannot be the most practical or fairest remedy for his genuine concern. Accordingly, we must reject his request to expand our law to include this new cause of action. He has other avenues available to him which he may pursue. The certified question is answered in the negative.

Certified question answered.