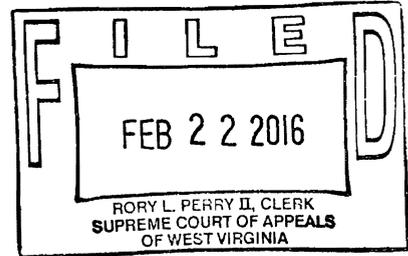


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16-066



STATE OF WEST VIRGINIA ex rel.  
EDLON, INC.,

**Petitioner,**

v.

HONORABLE RONALD E. WILSON,  
JUDGE OF THE CIRCUIT COURT OF  
KANAWHA COUNTY, WEST VIRGINIA,

**Respondent.**

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PETITION FOR WRIT OF PROHIBITION

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**TO THE HONORABLE JUSTICES OF THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA:**

Pursuant to Article VIII, Section 3, of the West Virginia Constitution and Rule 16 of the West Virginia Rules of Appellate Procedure, Petitioner Edlon, Inc., as successor-in-interest to Process Supply, Inc. (“Edlon”) respectfully requests that this Honorable Court grant its Petition for Writ of Prohibition and, in support thereof, states as follows:

**I.**

**QUESTION PRESENTED**

In the absence of any West Virginia authority to support its holding, did the Circuit Court commit clear error when it held that Edlon, a product seller, had a duty to warn the employee of a product manufacturer of the hazards associated with his work?

**II.**

**STATEMENT OF THE CASE**

This petition arises from the underlying action currently pending in the Circuit Court of Kanawha County, styled *Sharon Hudson, Executrix of the Estate of Theodore Ray Hudson, Deceased v. A.O. Smith Corporation, et al.*, Civil Action No. 12-C-636 KAN (the “Action”). See Pl.’s Comp, App. R. [“AR”] AR000001-5. The Action was originally designated in the October 2013 Trial Group in the mass asbestos litigation styled *In Re: Asbestos Personal Injury Litigation*, Civil Action No. 03-C-9600. *Id.*<sup>1</sup>

Theodore Ray Hudson (“Mr. Hudson”) died from mesothelioma on June 14, 2010. See Mem. Op. and Order, AR000508-516. From 1972 to 1983, Mr. Hudson was allegedly exposed to asbestos-containing materials while working for Cyclops Industries, Inc. (“Cyclops”), which manufactured sight glasses to be sold to customers. See Mem. Op. and Order, AR000508-516.

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<sup>1</sup> The Action was ultimately reset for the October 2015 Trial Group.

Process Supply, Inc. (“PSI”),<sup>2</sup> a company owned by John Elliott (“Mr. Elliott”), shared space with Cyclops until 1971. *See* Pl.’s Resp. to Edlon’s Mot. for Summ. J., Ex. 4, AR000031. Mr. Elliott was also one of several shareholders of Cyclops. *Id.* At the time the companies shared space, purchase orders were often sent to Cyclops in care of PSI. *See* Pl.’s Supplemental Resp. to Edlon’s Mot. for Summ. J., Ex. 9, AR000374-406. In 1971, Cyclops moved to its own independent location. *See* Pl.’s Resp. to Edlon’s Mot. for Summ. J., Ex. 8, AR000041-46.

In 1976, Cyclops retained PSI as its general sales agent. *See* Pl.’s Supplemental Resp. to Edlon’s Mot. for Summ. J., Ex. 5, AR000275-285. In 1977, Cyclops designated PSI as its exclusive sales agent in West Virginia and portions of Ohio, Kentucky, Tennessee, and Pennsylvania. *See* Pl.’s Supplemental Resp. to Edlon’s Mot. for Summ. J., Ex. 4, AR000230-274. Cyclops also designated at least eight (8) other companies to be its exclusive sales agents in various states and regions of the country. *Id.*

Randy Fitzpatrick, who worked with Mr. Hudson at Cyclops, testified that Mr. Elliott would visit Cyclops only two or three days per week to deal with customers. *See* Randy Fitzpatrick Dep., pp. 31-37, AR000136-142. Mr. Elliott never worked on the shop floor and was always in the upstairs offices. *Id.* In 1983, Mr. Elliott resigned from Cyclops and the sales relationship between Cyclops and PSI was terminated. *See* Pl.’s Supplemental Resp. to Edlon’s Mot. for Summ. J., Ex. 7, AR000288-295.

On September 27, 2013, Edlon filed its Motion for Summary Judgment, arguing Plaintiff failed to present evidence of exposure to Edlon products. *See* Edlon’s Mot. for Summ. J., AR000006-11. On October 18, 2013, Plaintiff filed her Response to Edlon’s Motion for Summary Judgment. *See* Pl.’s Resp. to Edlon’s Mot. for Summ. J., AR000012-86. Without citing to any supporting authority, Plaintiff argued PSI, as a product seller, had a duty to warn Cyclops,

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<sup>2</sup> Edlon, Inc. is the successor-in-interest to Process Supply, Inc.

the product manufacturer for which Mr. Hudson worked, about the potential hazards associated with the making of its own product. *Id.* On October 23, 2015, Edlon filed its reply brief, arguing PSI had no duty to warn Mr. Hudson under West Virginia law. *See* Edlon’s Reply to Pl.’s Resp. to Edlon’s Mot. for Summ. J., AR000087-94. On October 26, 2015, Plaintiff filed a supplemental response, contending the relationship between Cyclops and PSI gave rise to a duty to warn. *See* Pl.’s Supplemental Resp to Edlon’s Mot. for Summ. J., AR000095-105.

Shortly before the start of trial, the Circuit Court orally denied Edlon’s Motion for Summary Judgment and continued the case in order to make findings of facts and conclusions of law and allow Edlon the opportunity to appeal the decision. *See* Mem. Op. and Order, AR000508-516. On January 27, 2016, the Circuit Court issued a written order denying Edlon’s Motion for Summary Judgment. *Id.* In its order, the Circuit Court expressly acknowledged the lack of any authority supporting Plaintiff’s claim that a product seller owes a duty to warn to the product manufacturer. *Id.* Nonetheless, the Circuit Court concluded that it was “either right or wrong in denying Edlon’s summary judgment motion.” Specifically, the Court held that the relationship between Cyclops and PSI “was so interwoven that it created a duty on [PSI] to warn Mr. Hudson, an employee of Cyclops, of the hazards associated with the handling of blue asbestos.” *Id.*

### III.

#### **SUMMARY OF ARGUMENT**

The Circuit Court committed clear error by denying Edlon’s Motion for Summary Judgment in the absence of any legal authority supporting Plaintiff’s claim that a product seller owes a duty to warn the product manufacturer about potential hazards associated with making

the manufacturer's own product. Therefore, a writ of prohibition is necessary to halt the enforcement of the Circuit Court's denial and prevent trial from going forward.

#### IV.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rules 18 and 19 of the Revised Rules of Appellate Procedure, Edlon asserts that oral argument is necessary. *See* W. Va. R. App. P. 18 (2016); *see also* W. Va. R. App. P. 19 (2016). While many of the facts and legal arguments are adequately presented through briefs and the record below, oral argument pursuant to Rule 19 is necessary because the case involves a narrow issue of law for which no West Virginia law exists. W. Va. R. App. P. 19. A memorandum decision is appropriate in this matter. W. Va. R. App. P. 19.

#### V.

#### **ARGUMENT**

Pursuant to W. Va. Const. Art. VIII, § 3 and Rule 16(a) of the Rules of Appellate Procedure, this Court has original jurisdiction on all cases seeking a writ of prohibition. The Circuit Court denied Edlon's Motion for Summary Judgment without citing to any supporting authority. In fact, the Circuit specifically acknowledged "the absence of any clear West Virginia authority on the issue presented." *See* Mem. Op. and Order, AR000508-516. Given the absence of any authority supporting Plaintiff's claims against Edlon, the Circuit Court's denial of Edlon's Motion for Summary Judgment constitutes clear error. Accordingly, Edlon seeks a writ of prohibition precluding the Circuit Court from denying Edlon Corporation's Motion for Summary Judgment.

## A. STANDARD OF REVIEW

“The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” *See* W. Va. Code § 53-1-1 (2016). This Court will use prohibition

to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

*State ex rel. Charleston Mail Ass’n v. Ranson*, 200 W. Va. 5, 9, 488 S.E.2d 5 (1997). When considering a petition for a writ of prohibition, this Court has held:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, *it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.*

*State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 778 S.E.2d 677, 681 (W. Va. 2015)(quoting *State ex. rel. Hoover v. Berger*, 199 W. Va. 12, 482 S.E.2d 12 (1996) (emphasis in original) (granting writ of prohibition where circuit court clearly erred as a matter of law in interpreting insurance coverage provisions).

## B. LAW AND ANALYSIS

### 1. Prohibition may be used to correct clear error in denying a motion for summary judgment.

A writ of prohibition permits this Court “to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources.” *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87, 90, 511 S.E.2d 498 (1998). This Court may grant a writ of prohibition precluding a denial of a motion for summary judgment where there is no justification for the lower court’s action and there is no genuine issue of material fact warranting submission to the jury. *See State ex rel. Abraham Linc Corp. v. Bedell*, 216 W. Va. 99, 110, 602 S.E.2d 542 (2004) (granting writ of prohibition where lower court erroneously denied employer’s motion for summary judgment as to workers’ compensation immunity). “[I]ssuance of a [w]rit of [p]rohibition is generally the appropriate remedy to forestall unwarranted and useless litigation.” *Id.* at 103 (quoting *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 837 (Mo. App. 1995)).

Prohibition will lie where a lower court’s denial of a motion for summary judgment is clearly erroneous as a matter of law. *See State ex rel. W. Va. Consol. Pub. Ret. Bd. v. Nibert*, 772 S.E.2d 609, 616 (W. Va. 2015); *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 451, 759 S.E.2d 192 (2014) (granting writ of prohibition where trial court committed clear error in denying motion for summary judgment on immunity grounds); *State ex rel. West Virginia Dept. of Health and Human Resources v. Kaufman*, 203 W.Va. 56, 506 S.E.2d 93 (1998) (granting writ of prohibition preventing enforcement of orders denying summary judgment on qualified immunity grounds); *State ex rel. Small v. Clawges*, 231 W. Va. 301, 313, 745 S.E.2d 192

(2013)(granting writ of prohibition where trial court denied summary judgment on claims barred by res judicata).

This Court may grant a writ of prohibition halting enforcement of a denial of a motion for summary judgment where the plaintiff maintains an invalid cause of action. *See State ex rel. Golden v. Kaufman*, 760 S.E.2d 883 (W. Va. 2014). In *Golden*, the plaintiff sued the defendant for conversion, breach of fiduciary duty, and intentional infliction of emotional distress arising out of an allegation that the plaintiff's ex-wife had an affair with the defendant. 769 S.E.2d at 886. The defendant filed a motion for summary judgment, arguing the plaintiff's causes of actions were essentially claims for alienation of affections, which are prohibited by statute. *Id.* After the circuit court orally denied the motion, the defendant filed a petition for writ of prohibition. *Id.* This Court held the circuit court committed clear error because the plaintiff had not asserted a viable cause of action and granted the writ of prohibition barring enforcement of the circuit court's denial. *Id.* at 897.

**2. The Circuit Court committed clear error in denying Edlon's Motion for Summary Judgment.**

**a. A product seller owes no duty to warn a product manufacturer.**

Plaintiff has asserted a simple negligence claim against Edlon, contending PSI (one of several companies that sold Cyclops's products) had a duty to warn employees of Cyclops—the manufacturer for which Mr. Hudson worked—about the alleged hazards of using asbestos-containing materials in manufacturing Cyclops's own products. Plaintiff claims PSI's position as a sales agent for Cyclops gave rise to a duty to warn Mr. Hudson. This is not the law in West Virginia or any other jurisdiction.

In a negligence suit, “[t]he plaintiff must prove that the defendant owed the plaintiff some duty of care; that by some act or omission the defendant breached that duty; and that the act or

omission proximately caused some injury to the plaintiff that is compensable by damages.” *Price v. LaMaster*, 2015 W. Va. LEXIS 176, 6-7 (W. Va. Mar. 13, 2015). Under West Virginia law, “[t]he determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as matter of law.” *Aikens v. Debow*, Syl. Pt. 5, 208 W. Va. 486, 541 S.E.2d 576 (2000).

A product seller’s duty to warn extends only to the **ultimate user or consumer** of the product. See *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 442, 307 S.E.2d 603 (1983); *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 876, 253 S.E.2d 666 (1979). Other jurisdictions, including those within the Fourth Circuit, have also held the same. See *Lawing v. Trinity Mfg.*, 406 S.C. 13, 24 (S.C. 2013), reversed in part on other grounds, *Lawing v. Univar, USA, Inc.*, 2015 S.C. LEXIS 398 (S.C. Dec. 2, 2015); *Wilson Foods Corp. v. Turner*, 218 Ga. App. 74, 75, 460 S.E.2d 532 (Ga. Ct. App. 1995); *Ebers v. General Chem. Co.*, 310 Mich. 261, 276, 17 N.W.2d 176 (Mich. 1945); *Hughes v. A.W. Chesterton Co.*, 435 N.J. Super. 326, 338, 89 A.3d 179 (App. Div. 2014); *Reed v. Pennwalt Corp.*, 22 Wn. App. 718, 722, 591 P.2d 478 (Wash. Ct. App. 1979).

Plaintiff would have this Court accept the illogical notion that the duty to warn flows in the opposite direction, such that a product seller would have a duty to warn the manufacturer and its employees of the potential dangers associated with manufacturing *its own product*. Expanding the duty to warn in such a way would create limitless liability, impose undue burdens on defendants, and open the door for an entirely new class of plaintiffs. For instance, an assembly line worker could sue a vehicle dealership for injuries sustained at an automobile manufacturing plant. There is no authority in West Virginia or any other jurisdiction that supports this

proposition. In fact, the Circuit Court openly conceded as much in its order. *See* Mem. Op. and Order, AR000508-516. Furthermore, the Restatement (Second) of Torts states as follows:

Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment 1.<sup>3</sup> Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. o.

Finally, it bears noting that Plaintiff also asked the Circuit Court to carve out an entirely new legal duty between a product manufacturer and a product purchaser in Plaintiff's suit against Union Carbide Corporation. However, the Circuit Court correctly declined to adopt this theory and granted Union Carbide Corporation's Motion for Summary Judgment. *See* Email correspondence dated October 23, 2015 from Heather A. Wood, Esq., Law Clerk to Judge Wilson, to Scott Masterson, et al, advising Judge Wilson granted Union Carbide Corporation's Mot. for Summ. J., AR000507. The Circuit Court should have done the same here. PSI, as a matter of law, had no duty to warn Cyclops and its employees of the alleged dangers associated with making asbestos-containing sight glasses. Accordingly, Plaintiff cannot maintain a valid cause of action against Edlon and the Circuit Court committed clear error in denying summary judgment. *See Golden*, 760 S.E.2d at 897.

**b. The purported relationship between Cyclops and PSI did not create a duty.**

In denying Edlon's Motion for Summary Judgment, the Circuit Court held PSI's duty to warn arose from an apparent "longstanding" and "interwoven" relationship with Cyclops. As an

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<sup>3</sup> "Users" as defined by the Restatement (Second) of Torts "includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased." *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. 1.

initial matter, the Circuit Court wrongly stated the two companies shared space “until at least 1983” and that, during this time, purchase orders were often sent to Cyclops in care of PSI. In fact, Cyclops moved to its own independent location in 1971—one year *before* Mr. Hudson even began working there. *See* Pl.’s Resp. to Edlon’s Mot. for Summ. J., Ex. 4 and 8, AR000031 and AR000041-46; Pl.’s Supplemental Resp. to Edlon’s Mot. for Summ. J., Ex. 9, AR000374-406.

The Circuit Court also highlights the fact that PSI was a sales agent for Cyclops. However, Cyclops designated at least *eight (8) other companies* to be its exclusive sales agents in various states and regions of the country—another fact the Circuit Court incorrectly cited. *See* Pl.’s Supplemental Resp. to Edlon’s Mot. for Summ. J., E. 4, AR000230-274. This begs the question: Did those companies also have a duty to warn Mr. Hudson merely by virtue of their positions as sales agents? Even so, neither the Circuit Court nor Plaintiff cites any authority for such a relationship creating a legal duty in the context of a product liability action such as this case. Furthermore, Mr. Elliott’s interaction and relationship with Cyclops employees was tenuous at best. Mr. Elliott visited Cyclops only two or three days per week to deal with customers. *See* Randy Fitzpatrick Dep., pp. 31-37, AR000136-142. He never worked on the shop floor and was always in the upstairs offices. *Id.* Neither PSI nor Mr. Elliott had any direction, supervision, or control over the manner or method of Mr. Hudson’s work and had no knowledge of or involvement with the safety practices of Cyclops. *See generally, id.*

The Circuit Court also contends PSI’s position as a sales agent gave rise to a duty to warn because the risk of working with asbestos-containing materials was foreseeable to PSI. Specifically, the Circuit Court claims “Plaintiff has circumstantial evidence that Mr. Elliott knew or should have known about the hazards of asbestos” and cites Plaintiff’s purported “evidence” that “OSHA may have inspected the Cyclops facility in 1972.” *See* Mem. Op. and Order,

AR000508-516 (emphasis added). However, this argument constitutes rank speculation. A plaintiff cannot defeat summary judgment on a nonexistent cause of action by fabricating an issue of fact based on speculation and conjecture:

[W]hile it is true that the nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, [such evidence] cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.

*Dickens v. Sahley Realty Co.*, 233 W. Va. 150, 156, 756 S.E.2d 484 (2014); *see also Dellinger v. Pediatrx Med. Group, P.C.*, 232 W. Va. 115, 122, 750 S.E.2d 668 (2013) (“[u]nsupported speculation is not sufficient to defeat a summary judgment motion”).

Although foreseeability of risk is a consideration in determining the scope of a duty, this Court has recognized:

[T]he existence of duty also involves policy considerations underlying the core issue of the scope of the legal system’s protections. These considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.

*Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 613, 567 S.E.2d 619 (2002) (citations and quotations omitted); *see also Aikens*, 208 W. Va. at 491-493 (discussing at length the restrictions on limitless expansion of duty, including Justice Cardozo’s analysis in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339; 162 N.E. 99 (1928): “The risk reasonably to be perceived defines the duty to be obeyed.”). This is precisely the type of case where public policy and social considerations are applicable. As discussed above, imposing on sales agents a duty to warn employees of product manufacturers would expand liability to unreasonable proportions and place an undue burden on defendants such as Edlon, thereby changing the entire landscape of negligence law in West Virginia. For these reasons, this Court should find that no duty was owed by PSI, lest it open the gates for an entirely new class of asbestos plaintiffs.

**c. Any duty breached by PSI was not the proximate cause of the injury.**

Assuming, *arguendo*, PSI breached some duty it owed to Cyclops or Mr. Hudson, such breach was not the proximate cause of the injury. Under West Virginia law:

Proximate cause must be understood to be that cause which in actual sequence, *unbroken by any independent cause*, produced the wrong complained of, without which the wrong would not have occurred. The proximate cause of an injury is *the last negligent act* contributing to the injury and without which the injury would not have occurred.

*Wilkinson v. Duff*, 212 W. Va. 725, 731, 575 S.E.2d 335 (2002) (emphasis added). An intervening cause relieves a defendant from liability where another negligent act or omission “constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.” *Landis v. Hearthmark, LLC*, 232 W. Va. 64, 76, 750 S.E.2d 280 (2013) (finding that a defendant may assert that the conduct of a parent was an intervening cause of a child’s injuries in a product liability action).

To the extent it is found PSI had some duty to warn Cyclops and its employees about the hazards of including asbestos-containing materials in the sight glasses it sold—a fact that Cyclops already knew—Cyclops’s decision to manufacture the products and the manner in which it made them constituted an intervening cause and superseded any liability on the part of PSI. As Mr. Hudson’s employer, Cyclops was in the best position to direct, supervise, and control Mr. Hudson’s work and ensure the safety of its employees. PSI had no control over Mr. Hudson’s work or the safety procedures at Cyclops. Any duty allegedly owed by PSI was terminated by Cyclops’s breach of its duty to warn its own employees and manufacture the products in a safe manner.

Furthermore, Plaintiff has judicially admitted Cyclops breached its duty to protect Mr. Hudson from an unsafe working condition by asserting a deliberate intent claim against Cyclops.

*See* Pl.’s Compl., AR000001-5. The statements made in Plaintiff’s complaint constitute binding judicial admissions. *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 505, 625 S.E.2d 260 (2005); *Stewart v. Johnson*, 209 W. Va. 476, 483, 549 S.E.2d 670 (2001). Under W. Va. Code § 23-4-2(d), Plaintiff has admitted Cyclops had actual knowledge of the hazards of asbestos and intentionally exposed Mr. Hudson to those hazards. Any alleged knowledge on the part of PSI or Mr. Elliott is irrelevant. Plaintiff’s claim against PSI directly contradicts her claim that Cyclops’s decision to instruct its employees to manufacture sight glasses using asbestos-containing materials was the sole proximate cause of Mr. Hudson’s injury. Plaintiff cannot have it both ways. As such, PSI is entitled to summary judgment.

**d. Edlon has no other adequate remedy.**

Edlon has no other adequate means to obtain its desired relief. Upholding the Circuit Court’s baseless denial of summary judgment will prejudice Edlon in a way that is not correctable on appeal if it is required to defend the merits of a lawsuit in which there is no valid cause of action. Edlon will be forced to try a lengthy and expensive case that will involve charging a jury on a nonexistent cause of action, resulting in a complete waste of judicial resources. Furthermore, given the absence of a valid cause of action, there is a high probability the trial will be completely reversed if the error is not corrected in advance. *See State ex rel. Affiliated Constr. Trades Found. v. Stucky*, 229 W. Va. 408, 412, 729 S.E.2d 243 (2012). The availability of an appeal wholly ignores the essence of summary judgment—the avoidance of trial in the first instance. Therefore, a writ of prohibition is the appropriate remedy to preclude the advancement of this unwarranted litigation. *See Bedell*, 216 W. Va. at 103.

VI.

**CONCLUSION**

Whether PSI owed a duty to warn Mr. Hudson is not a question for the jury. An employee of a manufacturer cannot sue a sales agent for selling a product the manufacturer makes. No court has ever decided or even suggested that a product seller owes a duty to warn a product manufacturer. Finding such a duty would create limitless liability and open the door for an entirely new class of plaintiffs. The Circuit Court's ruling contradicts decades of established product liability jurisprudence. In the absence of a duty owed to Mr. Hudson, Plaintiff's negligence claim against Edlon fails as matter of law. *See Sneberger v. Morrison*, 776 S.E.2d 156, 170 (W. Va. 2015). Because Plaintiff cannot assert a viable cause of action against Edlon, the Circuit Court's denial of Edlon's Motion for Summary Judgment constituted clear error warranting prohibition. *See Golden*, 760 S.E.2d at 897. For the reasons set forth herein, Edlon respectfully requests that this Court issue a writ of prohibition barring the enforcement of the Circuit Court's denial of Edlon's Motion for Summary Judgment and preventing the trial from going forward.

Respectfully submitted this 22<sup>nd</sup> day of February, 2016.

EDLON INC.,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. \_\_\_\_\_

STATE OF WEST VIRGINIA ex rel.  
EDLON INC.,

Petitioner,

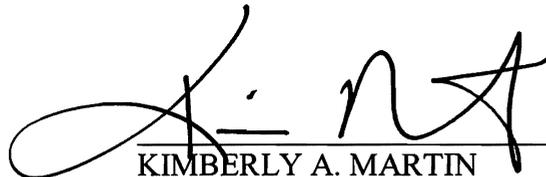
v.

HONORABLE RONALD E. WILSON,  
JUDGE OF THE CIRCUIT COURT OF  
KANAWHA COUNTY, WEST VIRGINIA,

Respondent.

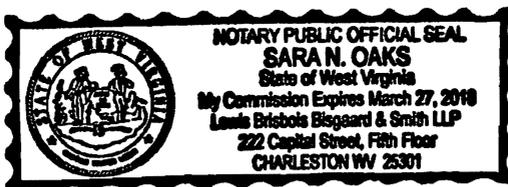
VERIFICATION

The undersigned, KIMBERLY A. MARTIN, being first duly sworn, states that she has read the foregoing Petition for Writ of Prohibition, that the factual representations contained therein are true to the best of her knowledge, except insofar as they are stated to be upon information and belief, and that to the extent they are stated to be upon information and belief, she believes them to be true.

  
KIMBERLY A. MARTIN

Sworn to and subscribed before me  
this 2nd day of February, 2016.

  
Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. \_\_\_\_\_

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HONORABLE RONALD E. WILSON,  
JUDGE OF THE CIRCUIT COURT OF  
KANAWHA COUNTY, WEST VIRGINIA,

**Respondent.**

**CERTIFICATE OF SERVICE**

Pursuant to Rule 37 of the West Virginia Rules of Appellate Procedure, the undersigned hereby certifies that a copy of the foregoing **PETITION FOR WRIT OF PROHIBITION** was served upon counsel of record via U.S. Mail this 22<sup>nd</sup> day of February, 2016, addressed as follows:

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