

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16-0166

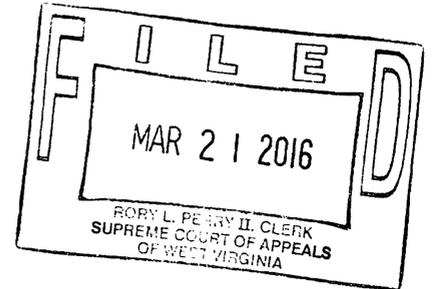
**STATE OF WEST VIRGINIA ex rel.
EDLON, INC**

Petitioner,

v.

**THE HONORABLE RONALD E. WILSON
JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
and SHARON HUDSON, EXECUTRIX OF
THE ESTATE OF THEODORE HUDSON**

Respondents.



**RESPONSE TO EDLON'S
PETITION FOR WRIT OF PROHIBITION**

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I. INTRODUCTION

Petitioner Edlon Inc. (“Edlon”), as successor-in-interest to Process Supply, Inc., seeks the award of a writ of prohibition regarding Judge Wilson of the Circuit Court of Kanawha County’s denial of Edlon’s Motion for Summary Judgment. Edlon argues that it is entitled to prohibition on the grounds that the circuit court abused its power, committed clear error, and exceeded its legitimate authority. Yet, Edlon fails to demonstrate its entitlement to the extraordinary relief it seeks. Judge Wilson’s decision was not clearly erroneous as a matter of law, nor did he abuse his discretion.

Moreover, in filing this Writ of Prohibition, Petitioner Edlon does not accurately state the claim against it. The Respondent, Sharon Hudson’s, claim against Edlon is that it, as successor by merger to Process Supply, a contract marketing and sales agent of Cyclops, it is liable for the failure of Process Supply and its employee, agent and officer, John B. Elliott, to exercise ordinary care of the protection of Mrs. Hudson’s husband, Mr. Theodore Hudson. As the direct and proximate result of that failure, the Mr. Hudson suffered mesothelioma and died. While not strictly a “premises liability” claim or a “product liability” claim, Respondent’s claim is nevertheless appropriate. All “persons” have duty to exercise due care not to harm others. Here, Process Supply and Mr. Elliott had a duty to warn regarding the well-established hazards of crocidolite asbestos between 1972 and 1983, the period when Mr. Hudson was exposed.

The lower court applied well established legal principals to the facts of the case and found that the defendant had a duty of care. It found that there was foreseeability due to the multiple roles assumed by Mr. Elliott, including sales agent, OSHA consultant and manager.

Under the extensive relationship shown by the facts, there is a jury question as to whether the duty was violated.

For these reasons, set forth more fully herein, Respondent Sharon Hudson respectfully requests that this Court deny the instant Petition for Writ of Prohibition.

II. QUESTION PRESENTED

As a preliminary matter, Edlon fails to accurately state the issue, as framed by the Circuit Court of Kanawha County. The issue below was whether Process Supply and Mr. Elliott had a common law duty of reasonable care to warn the plaintiff's decedent that he was in harm's way. This raises no new legal issues or matters of first impression in West Virginia. It is well established that there is a duty to use ordinary care for the protection of others, and the lower court simply found that under the facts of this case, there was a genuine issue of material fact to present to the jury. As the lower court stated,

To get right to the point the Court was either right or wrong in denying Eldon's summary judgment motion when the court concluded that the relationship between John Elliott, Cyclops Industries, Inc. ("Cyclops"), and Process Supply, Inc. ("Process Supply") was so interwoven that it created a duty on Process Supply to warn Mr. Hudson, an employee of Cyclops, of the hazards associated with the handling of blue asbestos.

The court determined that Mr. Elliott's knowledge, combined with his crisscrossed responsibility with Cyclops and Process Supply, conjoined with his duty to investigate and to know how asbestos was being used in the construction of Cyclops glasses, and OSHA guidelines, established upon him, as an agent of Process Supply, a duty to warn employees at Cyclops about the dangers of working with asbestos.

See January 27, 2016 Memorandum Opinion and Order at 2.

III. STATEMENT OF THE CASE

The Respondent contends that there is a relationship between Cyclops and Process Supply sufficient to impose on Process Supply a duty to warn Cyclops employees of the hazards of asbestos. J. B. Elliott was a stockholder in Cyclops, President of Cyclops for many years and was present on the Cyclops premises on a day to day basis. At the same time that he was an owner of Process Supply, Inc. Process Supply was a sales agent under contract for Cyclops, received and sent shipments using its addresses and offices, and provided shop supplies to Cyclops. Taken together, the Respondent contends that this relationship established a duty on the part of Process Supply to warn Mr. Hudson of hazards associated with the use of asbestos containing products, and particularly crocidolite products. Process Supply, Inc. merged with Edlon. Edlon is therefore liable for the acts and omissions to act by Process Supply, including its agent, Mr. Elliott. Edlon sold Process Supply, Inc. to Crane Co. in 2005, according to answers served by Edlon on September 27, 2013.¹ The sale of Process Supply to Crane was an “assets” only purchase and excluded claims arising from activities prior to the date of Crane’s purchase.

The Respondent, for purposes of this response, adopts the finding of facts as set forth in the lower court’s order:

The following facts that detail the relationship among Cyclops, Process Supply and John Elliott are as contended by the plaintiff, but are, for the most part, when presented as facts, not in dispute:

1. Theodore Ray Hudson (“Mr. Hudson”) died from mesothelioma on June 14, 2010. Mr. Hudson worked at Cyclops from August 1972, when he was about 22 years old, where he was exposed to asbestos until at least 1983. Plaintiff’s contention in this case is that Mr. Hudson was exposed to asbestos-containing materials while working for Cyclops from 1972 until 1983.

¹ “On or about February 3, 1997, Edlon, Inc., which is owned by Robbins & Myers, merged with Process Supply, Inc. (PSI). In 2005, Edlon sold the PSI business to Crane. It is believed that, other than the attached documents, all PSI-related documents in Edlon’s possession at that time were sent to Crane when Edlon sold the PSI business in 2005.” Edlon, Inc., as Successor-in-Interest to Process Supply, Inc.’s Response to Plaintiff’s Request for Production to Edlon, Inc., Response to Request No. 1. Appendix AR00299.

2. Cyclops manufactured sight glasses to be sold to customers. In the Cyclops' website it states:

During the late 40's, early 50's several localized plant explosions were experienced by a major chemical facility were directly attributed to the failure of conventional or sandwich type sight glasses. As a result an engineer, Gene LeRoy was given the task of developing a sight glass that when broken, would maintain its integrity and not rupture or blow out, even while under extreme pressure at high temperature. After much trial and error, he hit upon the idea of peripherally sealing the lens assembly instead of vertically clamping and sealing the sight glass against the top and bottom lens gaskets.

3. In a workers' compensation proceeding Mr. Hudson testified that he worked with African Blue Asbestos Felt at Cyclops, which he used to make sight glasses. Safety sight glass was manufactured at Cyclops pursuant to purchase orders from various customers and was used to allow visual observation of the contents of processing tanks, pipelines, and related equipment at the Kanawha Valley chemical companies. The evidence at trial will be that Mr. Hudson was not provided with any protective mask or respirator while cutting the African Blue Felt that was used to make the glasses. This process, that involved Mr. Hudson's use of a handsaw to cut asbestos material, produced dust, which contributed to his development of the mesothelioma that eventually took his life.

4. It is the belief of plaintiff's counsel that Mr. Hudson never had any significant asbestos employment exposure prior to or subsequent to his work at Cyclops. Mr. Hudson did not work for others during the time that he worked for Cyclops. Mr. Hudson only left his job at Cyclops in 2008.

5. Cyclops, from its inception on June 31, 1959, was owned by John Elliott, Gene LeRoy, and others (the number of other owners is unknown to the court). When Mr. Hudson worked at Cyclops John Elliott was a shareholder and member of Cyclops' Board of Directors and was also its President from 1976 to 1983. Cyclops shared space with Process Supply, until approximately 1971 when Cyclops moved into its present location in South Charleston, West Virginia.

6. Process Supply, Inc. ("Process Supply") was incorporated on February 27, 1958, by John Elliott. During the period of Mr. Hudson's employment at Cyclops, Process Supply, a company owned by John Elliott, was a sales distributor for various

manufacturers. Process Supply was incorporated not just to sell equipment and supplies but also "To render technical and engineering services and advisory and consultative services of a technical nature to industrial and commercial users of all types of instruments, machinery and supplies." Process Supply Incorporated, Agreement of Incorporation, February 27, 1958.

7. In 1976, approximately four years after Mr. Hudson went to work for Cyclops, Cyclops retained Process Supply as its general sales agent. John Elliott, from 1972 to 1983, was stockholder in both Process Supply and a sales representative for Cyclops through Process Supply.

8. In 1977, Cyclops designated Process Supply as its sales agent in West Virginia and portions of Ohio, Kentucky, Tennessee, and Pennsylvania and in at least eight (8) other states to be its sales agents in those states and regions of the country. While a stockholder in Cyclops, Mr. Elliott contracted to distribute its products, and in 1972, was specifically paid to investigate the use of sight glasses in industry, and the OSHA implications.

9. The purchase orders from various customers regularly stated that the products were manufactured according to OSHA regulations. Many of these purchase orders for Cyclops Products were addressed to Process Supply. Mr. Elliott submitted invoices to Cyclops for marketing services on his own and Process Supply letterhead. Those invoices also show that Process Supply received orders "in care of" for Cyclops. Sales commissions were made payable by Cyclops to either Mr. Elliott, personally, or Process Supply, at Mr. Elliott's direction. Ledger pages obtained in discovery also show that on various occasions that Process Supply sold "shop supplies" to Cyclops. One such invoice, dated December 28, 1972, is for research and sales survey for sight glass use in industry and "also OSHA." The purchase orders from various customers regularly stated that the products were manufactured according to OSHA regulations.

10. Although Mr. Elliott was a shareholder of Cyclops, there is no evidence of record that he was involved in the manufacturing process--but that is not an issue in the court's decision on the motion before it. What is an issue is that Plaintiff has circumstantial evidence that Mr. Elliott knew or should have known about the hazards of asbestos. Mr. Elliott knew or should have known that exposure to free crocidolite asbestos fiber is associated with mesothelioma.

11. This knowledge that Mr. Elliott had or should have had is based upon Plaintiff's evidence that OSHA may have inspected the Cyclops facility in 1972, and because of Mr. Elliott's position at both Cyclops and Process Supply, he had a responsibility to know the OSHA regulations. In addition to that argument Plaintiff also assert that there is evidence that Process Supply knew or should have known about the asbestos hazards because it was a distributor of asbestos-containing products during the time of Mr. Hudson's employment sense Process Supply sold asbestos filters to Union Carbide on multiple occasions.

12. Taken together, there exist issues of material fact concerning whether Process Supply itself, as well as by and through Mr. Elliott, knew or should have known of the hazards associated with the use of crocidolite asbestos fibers released by cutting gasket material. If Process Supply had that knowledge could it--considering its knowledge and connection with Cyclops-- stand by and do nothing while Mr. Hudson and others working at Cyclops were risking their lives cutting gasket material that was releasing crocidolite asbestos fibers in the air around them that could--and would-- kill Mr. Hudson.

13. Obviously, by denying Edlon's motion for summary judgment, it is the opinion of this court that they did have a duty to warn Cyclops and its employees of the dangers of released asbestos fibers.

See January 27, 2016 Memorandum Opinion and Order at 3-8.

IV. SUMMARY OF THE ARGUMENT

Petitioner Edlon completely fails to demonstrate that it is entitled to the extraordinary relief it seeks. A writ of prohibition is an extraordinary form of relief that is "designed to remedy miscarriages of justice and [has] consistently been used sparingly and under limited circumstances." *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 593, 730 S.E.2d 368, 376 (2012). Moreover, as this Court recently emphasized, the "Court exercises judicial restraint in granting the extraordinary relief of a writ of prohibition." *SER First State Bank v. Husted*, No. 15-0151, 2015 LEXIS 974 (W. Va. October 8, 2015).

West Virginia statute provides that 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.” W. Va. Code § 53-1-1. However, this Court has been very clear that a writ of prohibition “will not issue to prevent a simple abuse of discretion by the trial court.” *State ex rel Piper v. Sanders*, 228 W.Va. 792, 797, 724 S.E. 2d 763 (2012).

Indeed, as this Court has explained:

Traditionally, the writ of prohibition speaks purely to jurisdictional matters. It was not designed to correct errors which are correctable upon appeal....Indeed, this Court has specifically stated that the writ does not lie to correct “mere errors” and that it cannot serve as a substitute for appeal, writ of error or certiorari.

Because of the nature of the writ, there has been a general reluctance to allow its use in interlocutory matters unless there was exhibited some obvious jurisdictional defect or purely legal error on the part of the trial court. In the absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. These matters are best saved for appeal and, as a general rule, do not present a proper case for issuance of the writ.

State ex rel. Williams v. Narick, 164 W. Va. 632, 636, 264 S.E.2d 851, 854 (1980) (internal citations omitted) (emphasis added). Thus, a writ of prohibition may be used to challenge a court’s jurisdiction. Yet,

Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of power is so flagrant and violative of petitioner’s rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.

State ex rel. State v. Alsop, 227 W. Va. 276, 280, 708 S.E.2d 470, 474 (2009) (emphasis added).

This Court has established five factors for determining whether a writ of prohibition should be entertained:

- (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.

State ex rel. Hoover v. Berger, 199 W. Va. 12, 21, 483 S.E.2d 12, 21 (1996).

Based on these criteria, discussed in greater detail below, Edlon's Petition for Writ of Prohibition should be denied.

V. ARGUMENT

A. **Prohibition is Not an Appropriate Means of Appealing the Denial of Edlon's Motion for Summary Judgment.**

The instant matter is, in essence, Edlon's attempt to appeal the denial of its Motion for Summary Judgment. In support of such an appeal, Edlon claims that the case at bar is analogous to a handful of instances where this Court has granted a writ of prohibition. However, the cases Edlon cites in support of its Petition are entirely inapplicable to the facts at bar. Here, unlike in the cases cited by Edlon, Judge Wilson's denial of Edlon's Motion for Summary Judgment was warranted and well within the circuit court's jurisdiction and discretion. As a result, Edlon's Petition for Writ of Prohibition must be denied.

To argue that a writ of prohibition may be used to appeal the denial of a motion for summary judgment, Edlon first relies on *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 102, 602 S.E.2d 542, 545 (2004). In *Bedell*, although the petition for a writ of prohibition came about after the circuit court denied the petitioner's motion for summary judgment, the underlying issue was that the employer was not in default under the Workers' Compensation Act and thus, was immune from the employee's common law negligence act. *Id.* at 99, 602 S.E.2d 542 (2004). In short, because the circuit court did not properly have jurisdiction over the case, this Court was able to accept a writ of prohibition under the statute. *See* W. Va. Code § 53-1-1 (stating, in part "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").

Edlon also relies on *State ex rel. W. Virginia Consol. Pub. Ret. Bd. v. Nibert*, 235 W. Va. 203, 208, 772 S.E.2d 609, 614 (2015). Once again, the facts of *Nibert* are distinguishable from the case at bar. In *Nibert*, the issue was that an individual had failed to file a timely appeal of the Retirement Board's administrative order concerning his salary. Accordingly, once again, this Court found that the circuit court lacked jurisdiction to later grant a motion for summary judgment on the issue when the civil action itself was an untimely filed petition for administrative review. *Id.* at 210; 772 S.E.2d at 616 (2015). Similarly, *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 451, 759 S.E.2d 192, 194 (2014), also cited by Edlon, once again hinged on this Court's finding that the circuit court improperly asserted jurisdiction over petitioners because the petitioners were actually entitled to legislative immunity.

In nearly every case that Edlon cites in support of its Petition, this Court granted a writ of prohibition on the grounds of a jurisdictional deficiency. Indeed, the only case Edlon is able to

cite to where this was not the case is *State ex rel. Golden v. Kaufman*, 760 S.E.2d 883, 886 (W. Va. 2014). In *Golden*, a writ of prohibition concerning the lower court’s decision was granted on the grounds that the claims at issue – claims for alienation of affection – were explicitly prohibited by West Virginia law. Moreover, because these claims involved allegations of an adulterous affair, the petitioner risked extreme prejudice by way of having “his private and personal life . . . paraded in front of the jury on claims that this Court has said may not be maintained.” *Id.* Here, such considerations are clearly inapplicable.

Thus, each of the cases cited by Edlon are both factually and legally distinguishable from the case at bar. Here, Mrs. Hudson’s claims are not barred by any administrative process such as remedies provided through Workers’ Compensation or the Retirement Board. Nor is Edlon entitled to any legislative immunity that prevents the court from exercising jurisdiction. Further, unlike in *Golden*, the claims brought by Mrs. Hudson are in no way in violation of West Virginia statute and Edlon will not risk extreme and unusual prejudice by waiting to remedy any potential error after a trial on the merits.

B. Edlon Should Not Be Permitted to Appeal the Circuit Court’s Interlocutory Order.

The general rule in most courts is that a non-final order denying a motion for summary judgment is not appealable as a matter of right because such an order does not fully dispose of the case. Instead, it merely prolongs the case by requiring a trial on the merits. *See, e.g., Johnson v. Jones*, 515 U.S. 304 (1995) (noting that review of interlocutory orders is generally discouraged absent certain rare instances, such as a case of “qualified immunity”). In *State ex rel. N. River Ins. Co. v. Chafin*, 233 W. Va. 289, 293, 758 S.E.2d 109, 113 (2014), West Virginia emphasized this principle by holding that a writ of prohibition is inappropriate device for appealing a motion to dismiss, stating that “a writ of prohibition is not available to correct

discretionary rulings.” Notably, in *State ex rel Arrow Concrete Co. v. Hill*, this Court refused to grant a writ of prohibition regarding a court’s refusal to grant a motion to dismiss, reasoning that:

Although for obvious reasons the defendants resist categorizing this prohibition as an appeal of the denial of a motion to dismiss a claim for failure to state a cause of action, essentially that is what this proceeding involves. Accordingly, we hold that ordinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to *West Virginia Rules of Civil Procedure* 12(b)(6) is interlocutory and is, therefore, not immediately appealable. Thus, the defendants may not indirectly raise this issue by seeking a writ of prohibition in order to preclude the trial judge from compelling discovery.

194 W. Va. 239, 245, 460 S.E.2d 54, 60 (1995). In reaching this conclusion, the *Hill* Court relied upon *Wilfong v. Wilfong*, 156 W.Va. 754, 197 S.E.2d 96 (1973). In *Wilfong*, this Court specifically addressed the application of a writ of prohibition to a motion for summary judgment and noted:

The principle of non-appealability in interlocutory rulings is well grounded in reason. It prevents the loss of time and money involved in piece-meal litigation and the moving party, though denied of immediate relief or vindication, is not prejudiced. The action simply continues toward a resolution of its merits following a decision on the motion. If unsuccessful at trial, the movant may still raise the denial of his motion as error on an appeal subsequent to the entry of a final order....By logic, reason, the overwhelming weight of authority, and the principle of Stare decisis, we hold that the effect of the entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial, is merely interlocutory and not then directly appealable to this Court.

Id. at 758-59, 197 S.E.2d at 99-100 (emphasis added).

In the case at bar, Judge Wilson’s Memorandum Opinion and Order denying Edlon’s Motion for Summary Judgment is not a final judgment on the merits. Accordingly, this decision does not prejudice Edlon as it may still raise the denial of its motion on an appeal subsequent to the entry of a final order. *See Wilfong v. Wilfong*, 156 W.Va. 754, 197 S.E.2d 96 (1973) (“If

unsuccessful at trial, the movant may still raise the denial of his motion as error on an appeal subsequent to the entry of a final order”). Further, as the *Wilfong* Court explained, it is precisely the piecemeal litigation that Edlon attempts to create through its instant Petition that is prejudicial, not the eventual resolution of the instant action on its merits. *Id.*

C. Judge Wilson’s Order Denying Summary Judgment Was Not “Clearly Erroneous as a Matter of Law.”

The third factor that must be evaluated in determining whether a writ of prohibition is appropriate is “whether the lower tribunal's order is clearly erroneous as a matter of law.” Once again, this factor weighs heavily against Edlon.

For Judge Wilson’s Order to have been “clearly erroneous as a matter of law,” his decision must have been an “abuse of power” which was so “flagrant and violative of petitioner’s rights” as to render remedy through any other means inadequate. *See State ex rel. State v. Alsop*, 227 W. Va. 276, 280, 708 S.E.2d 470, 474 (2009). In short, Judge Wilson’s ruling must go beyond a mere “abuse of discretion.” *See State ex rel Piper v. Sanders*, 228 W.Va. 792, 797, 724 S.E. 2d 763 (2012) (noting that a writ of prohibition is inappropriate for a “mere abuse of discretion”). As this Court has explained, in applying the abuse of discretion standard, it will “not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances.” *Wells v. Key Comm'ns, L.L.C.*, 226 W.Va. 547, 551, 703 S.E.2d 518, 522 (2010). Here, Edlon simply cannot show that Judge Wilson’s ruling was an abuse of discretion, much less outside the bounds of permissible choices given the circumstances.

1. **Despite Edlon's Repeated Assertions to the Contrary, Judge Wilson Properly Found That There Were Genuine Issues of Material Fact and Did Not Misstate Any of the Facts at Issue.**

Under West Virginia law, a “motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Grim v. E. Elec., LLC*, 234 W. Va. 557, 563, 767 S.E.2d 267, 273 (2014) (internal citations omitted). Critically, West Virginia courts have held that the “circuit court’s function at the summary judgment stage is **not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.**” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (internal citations and quotations omitted) (emphasis added). Further, in assessing the factual record, courts “must grant the nonmoving party the benefit of inferences, as ‘credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.’” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)). Even in the absence of dispute over evidentiary facts in the case, summary judgment should nevertheless be denied if there is dispute over the conclusions that may be drawn from those facts. *Id.*

In the instant case, Judge Wilson properly denied Edlon’s Motion for Summary Judgment after finding that the factual record, viewed in the light most favorable to Mrs. Hudson, permitted the inference that Edlon owed a duty to warn Mr. Hudson of the dangers of asbestos. In its Petition for Writ of Prohibition, however, Edlon repeatedly mischaracterizes Judge Wilson’s reasoning in reaching this conclusion, even going so far as arguing that Judge Wilson has misstated the facts of the case in instances where it is clear that he has not.

For example, Edlon argues that Judge Wilson’s ruling was improper because it was based in the notion that “PSI, as a product seller, had a duty to warn Cyclops, the product manufacturer for which Mr. Hudson worked, about the potential hazards associated with the making of its own

product.” *See* Edlon’s Petition at 2-3. Edlon further argues that “another fact the Circuit Court incorrectly cited” was Judge Wilson’s discussion of PSI’s role as a sales agent for Cyclops. *See Id.* at 10. According to Edlon, because the Circuit Court highlighted the role of Mr. Elliott as a sales agent for Cyclops, it was misrepresenting the fact that several other companies acted as sales agents. *Id.* Finally, Edlon claims that “the Circuit Court wrongly stated the two companies [Process Supply and Cyclops] shared space until at least 1983. *Id.*

Such arguments grossly mischaracterize Judge Wilson’s Memorandum Opinion and Order. Judge Wilson never stated that Process Supply was the exclusive sales agent for Cyclops, nor was his holding informed by the notion that a seller has a duty to a manufacturer. Instead, his Memorandum Opinion simply highlighted the myriad ways in which the facts in question indicated that the relationship between Process Supply and Cyclops was a convoluted agent/agency relationship with the potential to subject Process Supply to “liability to a third party harmed by the agent’s tortious conduct.” *See* January 27, 2016 Memorandum Opinion and Order at 8. Further, Judge Wilson never stated that the two companies shared space until 1983. Instead, he simply stated that the “relationship between Process Supply and Cyclops was long standing, extending from the formation of Cyclops, when it actually shared space with Process Supply, until at least 1983.” *Id.* at 7. Process Supply did, indeed, share building space with Cyclops during the company’s early history. Thus, contrary to Edlon’s claims, Judge Wilson’s findings were in no way an inaccurate reflection of the factual record of this case.

More importantly, however, the issue at bar is not whether Edlon and Cyclops had a simple seller-manufacturer relationship which caused Edlon to owe a duty to Mr. Hudson. Instead, the issue is that although Cyclops and Process Supply were seemingly organized as two separate companies, this was not the functional reality of their relationship. Instead, the

relationship between Process Supply and Cyclops operated on several levels, primarily by way of Mr. Elliott, the owner of Process Supply and an active shareholder in both companies.

2. Considering the Totality of the Evidence in the Light Most Favorable to the Respondent, Edlon Had a Duty to Warn Mr. Hudson Under West Virginia Law and His Failure to Do So Was a Proximate Cause of Mr. Hudson's Injury.

Throughout its Petition, Edlon attempts to characterize this case as being in contravention of the applicable substantive law or as proposing a novel theory of liability between seller and manufacturer. Neither proposition is true. In fixating on the misguided notion that Mrs. Hudson is attempting to extend a product seller's duty under products liability law, Edlon neglects to acknowledge that Mrs. Hudson's claims arise out of simple negligence – a well-established cause of action based upon West Virginia statutory and common law, rather than any novel theory of products liability law.

Indeed, under West Virginia law, “[i]n order to establish a *prima facie* case of negligence...it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff.” *Robertson v. LeMaster*, 171 W. Va. 607, 608, 301 S.E.2d 563, 566 (1983). A duty to exercise reasonable care to prevent injury arises when a party “engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another.” *Id.* at 564.

The claim against J. B. Elliott and Process Supply is one of simple negligence. The employer here is Cyclops. Mr. Hudson was not an employee of Process Supply. The issue is whether Process Supply, by and through Mr. Elliott, knew or should have known of the hazards associated with the use of crocidolite asbestos fibers released by cutting gasket material and had a duty to warn the employees of Cyclops of that hazard. The law in West Virginia is well established regarding foreseeability:

The liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another." This basic expression of policy is a restatement of the general duty which all actors in an organized society owe to their fellow persons. However, in order to form the basis for a valid cause of action, this duty must be brought home to the particular plaintiff, for "a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance ..." T. Cooley, *Law of Torts* § 478 (4th ed. 1932).

Robertson v. LeMaster, 301 S.E.2d. 563, 567 (W. Va. 1983).

Further, the existence of a duty depends on foreseeability. *Id.* at 567-568. As the

Robertson court noted:

Although we have never explicitly addressed the question of the existence of duty as a product of foreseeability of injury, we have held in the past that "[a]ctionable negligence necessarily includes the element of reasonable anticipation that some injury might result from the act of which complaint is made." *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 653, 77 S.E.2d 180, 188 (1953). In a similar vein, we have held that "[d]ue care is a relative term and depends on time, place, and other circumstances. It should be in proportion to the danger apparent and within reasonable anticipation." Syllabus Point 2, *Johnson v. United Fuel Gas Co.*, 112 W.Va. 578, 166 S.E. 118 (1932); see also *State ex rel. Cox v. Sims*, 138 W.Va. 482, 77 S.E.2d 151 (1953). And in syllabus point one of *Dicken v. Liverpool Salt & Coal Co.*, 41 W.Va. 511, 23 S.E. 582 (1895), we held that "[n]egligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstances of time, place, manner, or person." These past decisions implicitly support the proposition that the foreseeability of risk is a primary consideration in establishing the element of duty in tort cases.

Robertson, 301 S.E.2d at 568. This Court has also said:

We have held since the 19th Century that: "Negligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstances of time, place, manner, or person." Syl. pt. 1, *Dicken v. Liverpool Salt & Coal Co.*, 41 W.Va. 511, 23 S.E. 582 (1895).

...

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Syl. pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988); see *Robertson v. LeMaster*, 171 W.Va. 607, 612, 301 S.E.2d 563, 568 (1983). In so holding in *Sewell*, we were in accord with Justice Cardozo's celebrated maxim: "The risk reasonably to be perceived defines the duty to be obeyed" *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

We are quick to recognize, however, that foreseeability is not all that the trier of fact must consider when deciding if a given defendant owed a duty to a given plaintiff, even in the absence of the licensee/invitee distinction:

While the existence of a duty is defined in terms of foreseeability, it also involves policy considerations including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant."

Harris v. R.A. Martin, Inc., 204 W.Va. 397, 401, 513 S.E.2d 170, 174 (1998) (per curiam) (quoting *Robertson v. LeMaster*, 171 W.Va. at 611, 301 S.E.2d at 567). Some factors that other jurisdictions have included in the analysis of whether a landowner or occupier has exercised reasonable care under the circumstances include the seriousness of an injury, see *O'Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D.1977), the time, manner and circumstances under which the injured party entered the premises, and the normal use made of the premises, see *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 606 (1998); *Heins v. Webster Co.*, 250 Neb. at 760-61, 552 N.W.2d at 57.

Mallet v. Pickens, 206 W. Va 145, 522 S.E.2d 436, 446-447 (1999).

This Court has also held that foreseeability is a component of duty, but is not a fixed concept:

8. "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Syl. Pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

9. "The most the court can ordinarily do, when the question of care or negligence depends upon a variety of circumstances, is to define the decree (sic) of care and caution required by the law and leave to the practical judgment of the jury the work of comparing the acts and conduct of the parties with the duties required of them under the circumstances." Syl. Pt.2, in part, *Washington v. B. & O. R.R. Co.*, 17 W. Va. 190, 1880 WL 4038 (W.Va. 1880).

10."Questions of negligence . . . present issues of fact for jury determination where the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them. Syl.pt.1, even though undisputed, are such that reasonable men may draw different conclusions from them." Syl. Pt. 1, *Ratlief v. Yokum*, [167 W.Va. 779], 280 S.E.2d 584 (W.Va.1981) (internal citations omitted.)

11. When the facts about foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them, two questions arise - one of law for the judge and one of fact for the jury.

12. A court's overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether the type of conduct at issue is sufficiently likely to result in the kind of harm experienced based on the evidence presented. If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question.

Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197, 2004 W. Va. LEXIS 96 (W. Va. 2004).

This test was relied upon as recently as the case of *Minor v. Jones*, 2016 W. Va. LEXIS 14 (W. Va. Jan. 11, 2016). The Circuit Court below properly applied these well-established principals in making its order, and did not abuse its discretion in denying the motion for summary judgment.

Here, Process Supply also was a sales agent for Cyclops. This meant in order to fulfill its work it had to know about the use of the product. At the same time, through Mr. Elliott, Process Supply knew about the manufacturing process.

The Restatement of Agency, Section 7.01 states the general rule:

§ 7.01 Agent's Liability to Third Party

An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.

In this case, Process Supply, as sales agent and manager, and Mr. Elliott, had the duty to exercise reasonable care in the sales and marketing of sight glasses, which includes the health effects of handling asbestos. Mr. Elliott and Process Supply, knew or should have known, based on the widely disseminated information about the hazards of asbestos from 1972 through 1983 that exposure to free crocidolite asbestos fibers was associated with mesothelioma.

The purchase orders regularly from various customers stated that the products were manufactured according to OSHA regulations. *See e.g.*, AR00465. Many of these purchase orders were addressed to Process Supply. *See, e.g.*, AR00374. Again, Mr. Elliott knew or should have known that OSHA regulations defined asbestos exposure in such a way that only measurement of asbestos fibers would determine whether a work place was safe. Included in the OSHA regulations were warnings required to be posted about the hazards of asbestos.

Mr. Elliott and Process Supply were on notice of all information contained in the OSHA regulations regarding the health hazards of handling crocidolite asbestos, as set forth in the OSHA regulations from 1972 through 1983. In 1982, ASTM distributed a standard that required manufacturers to meet the OSHA standard. *See* AR00069-AR00086. Under well-established law, it is a question of fact whether time, place and other circumstances gave Process Supply a duty of care toward Mr. Hudson. In 1972, Mr. Elliott submitted an invoice to Cyclops on Process Supply letterhead for consulting services regarding the sight glass business, and

“OSHA.” *See* AR00466. Moreover, in 1972, there were 18 references in the Federal Register to “asbestos” and included regulations pertaining to exposure to asbestos dust in the workplace (37 FR 22102), coal mines (37 FR 23645) and employee exposure (37 FR 27503). For purposes of a negligence case, with the experience of Mr. Elliott, and his claim of familiarity with OSHA, again, he knew or should have known of the OSHA regulations pertaining to asbestos.

Records obtained in discovery show that Process Supply also was a distributor of asbestos containing products. It is documented to have sold asbestos filters to Union Carbide on multiple occasions. It sold Durametallic products to Union Carbide. *See, e.g.*, AR00479. Thus, Process Supply was a distributor of asbestos products during the time prior to and during Mr. Hudson’s employment.

Accordingly, Mr. Elliott was on notice of the hazards of asbestos exposure and should have warned Mr. Hudson and the other Cyclops employees of the hazards associated with exposure to Blue African Asbestos. As a result of their failure to investigate and warn, Mr. Hudson continued to handle crocidolite Blue African Asbestos material, with no protection, for 12 years. As a result, he developed and died from mesothelioma.

D. Edlon is a Successor By Merger to Process Supply, Inc. and is Therefore Liable for the Conduct of Process Supply, Inc.

Records show that Process Supply, Inc., merged with Edlon in 1997. *See* AR00299. The merger agreement produced by Edlon showed only two potential liabilities were excluded, both then pending lawsuits. *See* AR00308-AR00346. It is well established under West Virginia law that a merger includes a complete assumption of all liabilities:

In Syllabus Point 2 of *Billmyer Lumber Co. v. Merchants' Coal Co.*, 66 W.Va. 696, 66 S.E. 1073 (1910), we also recognized that an agreement by a corporation to purchase another corporation's assets and assume its liabilities made the purchaser liable for the other's debts:

“When property has been conveyed in consideration of the assumption by the grantee of all the indebtedness of the grantor, any creditor of the latter may charge the property in the hands of the grantee with his debt, and subject the same to payment thereof.”

Moreover, the liability of a successor corporation is statutorily mandated under W.Va. Code, 31-1-37(a)(5) (1974).

Thus, we conclude that a successor corporation can be found liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or if some element of the transaction was not made in good faith. Successor liability will also attach in a consolidation or merger under W.Va. Code 31-1-37(a)(5). Finally, such liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor. (Footnotes omitted).

Davis v Celotex, 187 W.Va. 566, 420 S.E.2d 557, 562-563 (1992).²

Here, Edlon is clearly liable for any actions or omissions attributable to Process Supply, Inc., including actions and omissions committed by Mr. Elliott, its agent, by Process Supply, Inc., in its capacity as sales and marketing agent for Cyclops, and to the extent it sold any asbestos containing products to Cyclops. Discovery from Edlon states that in 2005, Process Supply, Inc. was sold to Crane Co. Edlon contends that all records pertaining to Process Supply, Inc. were sent to Crane, at the time it purchased its business. Again, absent specific contractual exceptions, Crane is now likewise liable for the acts and omissions to act by Process Supply, Inc. and Mr. Elliott.

E. Edlon’s Argument that Judge Wilson’s Order is Contrary to Considerations of Public Policy is Wrong.

² W.Va. Code 31-1-37(a)(5) has been repealed. West Virginia Code §31D-11-107 provides:
Effect of merger or share exchange.

(a) When a merger takes effect:

(5) All liabilities of each corporation or other entity that is merged into the survivor are vested in the survivor;

Edlon argues that “public policy” requires the issuance of a writ to prohibit the lower court from enforcing this order. However, the interests of “public policy” in fact require this Court to deny the writ. First and foremost, the denial of a motion for summary judgment is arguably the least prejudicial order a court can enter. All defenses are preserved, the defendant can make appropriate motions at the conclusion of the plaintiff’s case, and submit any instruction it deems necessary. Unlike granting such a motion, which would be a complete dismissal of the case, simply denying the motion on well-established legal grounds, such as those grounds applied by Judge Wilson, is entirely consistent with the policy of the law. This Court has no interest in encouraging every defendant which has a motion for summary judgment denied to file a writ against the lower court.

In short, public policy considerations require Edlon’s Petition to be denied. The duty on a person or entity in the position of Mr. Elliott or Process Supply is minimal: there was an alternative to the use of asbestos, Teflon, there were protective measures which could have been taken, and the duty to warn imposes little hardship. On the other hand, the magnitude of the harm, certain death from mesothelioma, well-established at the time of Mr. Hudson’s employment, was great. As to Edlon, it made the choice to merge with Process Supply, rather than purchase only assets. The law allowed Edlon an alternative to a merger, which it chose to disregard. Again, there is no policy implication where a defendant exercises its judgment and selects one form of corporate transaction over another.

The public policy factors at issue required the balancing of interests and the definition of the duty, based on foreseeability, was properly considered by the lower court.

VI. CONCLUSION

WHEREFORE, Sharon Hudson, by and through her undersigned counsel, respectfully requests that this Honorable Court DENY Edlon's Petition for Writ of Prohibition. For the foregoing reasons, Petitioner has failed to show entitlement to the extraordinary relief requested, and the Circuit Court of Kanawha County was correct in denying Edlon's Motion for Summary Judgment.

**PLAINTIFF
By Counsel**

/s/ John H. Skaggs

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16-0166

STATE OF WEST VIRGINIA ex rel.
EDLON, INC

Petitioner,

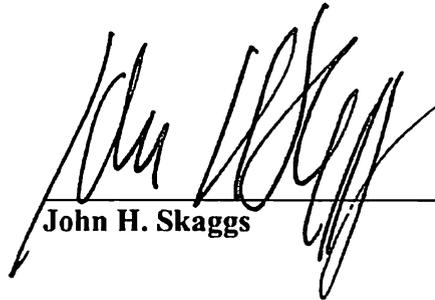
v.

THE HONORABLE RONALD E. WILSON
JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
and SHARON HUDSON, EXECUTRIX OF
THE ESTATE OF THEODORE HUDSON

Respondents.

VERIFICATION

The undersigned, JOHN H. SKAGGS, being first duly sworn, states that he has read the foregoing Response to Edlon's Petition for Writ of Prohibition, that the factual representations contained therein are true to the best of his 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, he believes them to be true.



John H. Skaggs

Sworn to and subscribed before me
this ____ day of March, 2016.

Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16-0166

**STATE OF WEST VIRGINIA ex rel.
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v.

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JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
and SHARON HUDSON, EXECUTRIX OF
THE ESTATE OF THEODORE HUDSON**

Respondents.

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 **RESPONSE TO EDLON'S PETITION FOR WRIT OF PROHIBITION** was served upon counsel of record via U.S. Mail this 21st day of March, 2016, addressed as follows:

Kimberly A. Martin
LEWIS BRISBOIS BISGAARD & SMITH LLP
222 Capitol Street, Fifth Floor
Charleston, West Virginia, 25301

/s/ John H. Skaggs
John H. Skaggs, Esquire (WVSB # 3432)