No. 31373 – Daniel R. Strahin, James A. Strahin and Willa Strahin v. Robert Glenn Cleavenger, Larry Cleavenger, Jr., Mary Cleavenger and Earl Sullivan

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Maynard, Chief Justice, dissenting:

In this case, the majority opinion upholds a jury award of $1,060,556.00 against Appellant Earl Sullivan despite the fact that Mr. Sullivan owed no duty to the victim, Daniel Strahin.

In *Miller v. Whitworth*, 193 W.Va. 262, 266, 455 S.E.2d 821, 825 (1995), this Court explained:

> Generally, a person does not have a duty to protect others from the deliberate criminal conduct of third parties. Some of the policy reasons for this rule . . . include:
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> > judicial reluctance to tamper with a traditional, common law concept; the notion that the deliberate criminal act of a third person is the intervening cause of harm to another; the difficulty that often exists in determining the foreseeability of criminal acts; the vagueness of the standard the owner [in a landlord/tenant relationship] must meet; the economic consequences of imposing such a duty; and conflict with the public policy that

> protecting citizens is the government's duty rather than a duty of the private sector.
>
> *Faheen by Hebron v. City of Parking Corp.*, 734 S.W.2d 270, 272 (Mo.Ct.App.1987) (citation omitted). "Normally [a person] has much less reason to anticipate intentional misconduct than he has to anticipate negligence. . . . This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law." *Restatement (Second) of Torts* § 302B cmt. d (1965). In other words, a person usually has no duty to protect others from the criminal activity of a third party because the foreseeability of risk is slight, and because of the social and economic consequences of placing such a duty on a person. (Citations omitted).

The Court in *Miller*, however, did recognize two exceptions to the general rule:

> (1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct. *Restatement (Second) of Torts* §§ 302B cmt. e and 315 (1965).

193 W.Va. at 266, 455 S.E.2d at 825. Mr. Sullivan did not have a special relationship to Strahin giving rise to a special duty. Therefore, Mr. Sullivan is not liable to Strahin unless his acts or omissions exposed Strahin to a foreseeable *high* risk of harm. I believe that there was no foreseeable high risk of harm in this case as a matter of law.

The majority opinion finds a foreseeable high risk of harm because of Mr.

Cleavenger's *alleged* vandalism of Mr. Sullivan's uninhabited property; Mr. Cleavenger's involvement in a game of "chicken;" instances where Mr. Cleavenger initiated physical confrontations with Mr. Sullivan; and verbal threats. This reasoning expands the scope of foreseeability beyond all bounds of common sense, fairness, and public policy. As an example, under this rule, if I have had a conflict with another person that has erupted into a verbal or physical altercation, I am charged with presuming that person will commit a criminal and violent act against me. Therefore, I arguably commit negligence by permitting a third party simply to ride in my car or visit my property. This turns the traditional presumption that one will not violate the law into the presumption that one will violate the law and commit a violent crime given the slightest provocation. Apparently, we all should now fear that anyone with whom we have a strained relationship will come looking to gun us down.

In conclusion, the verdict in this case is fundamentally unfair, contrary to our well-established law on the foreseeability of criminal acts, and in contravention of our public policy against imposing duties on private citizens in complete disregard of the resulting social and economic consequences. Therefore, I strongly dissent.