

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

**FILED**

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, Justice, concurring:

While I agree with the majority regarding all issues addressed in the opinion, I write separately to respond to the implication raised by the dissent that we should have made findings of fact – and thereby intrude upon the province of the jury – in order to reach a contrary conclusion regarding foreseeability. Upon a thorough review of the record and in faithful adherence to the principles of law established nearly ten years ago in *Miller v. Whitworth*, 193 W.Va. 262, 455 S.E.2d 821 (1995), the majority determined only that the facts were such that a jury *could* find a high risk of harm was foreseeable. We cannot usurp the role of the jury nor substitute our judgment when we may differ with a fact-driven outcome. Moreover, the alarmist prognostications of the dissent are simply unfounded given the narrow exception which *Whitworth* established, as was cogently explained by the majority.