

11-0994

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

LORI ANN STAUBS, as mother and
next friend of JESSICA LYNN STAUBS,
an infant, and as Administratrix of the
Estate of SAMANTHA NICHOLE DAWN
STAUBS, deceased,

Plaintiff,

vs.

MISTY JOHNSON,
LEROY GLENN ZIEGENFUSS,
MACK JENKINS,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
STEVEN WOODWARD, and
RAY MARCUS,

Defendants.

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CIVIL ACTION NO. 08-C-488
Judge Sanders

ORDER DENYING DEFENDANT RAY MARCUS'S MOTION FOR
SUMMARY JUDGMENT and GRANTING THE PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT RAY MARCUS

This matter became mature for a decision on the date set forth below upon the Motion by Defendant Jonathan Ray Marcus ("Ray Marcus") for Summary Judgment; upon the Plaintiff Lori Staubs' Opposition to said Motion and her Cross-Motion for Summary Judgment against the Defendant Ray Marcus; upon all of the briefs, memoranda, and exhibits submitted by the parties in support of and in opposition to the parties' respective motions and position. The Court deems itself to be fully informed of the relevant facts of this case and the issues of law upon which the Motion and the Cross-Motion turn.

Based upon all of the foregoing, and for the reasons set forth below, the Court does hereby **DENY** the Motion for Summary Judgment filed by the Defendant Ray Marcus, and the Court does hereby **GRANT** the Cross-Motion for Summary Judgment filed by Plaintiff Lori Ann Staubs.

I. FACTS AND PROCEDURAL HISTORY OF THE CASE

The Court finds that the facts of this tragic case are not in dispute. Just after midnight on the morning of December 10, 2006, Samantha Staubs died in a single-vehicle motor vehicle accident on Mission Road in Jefferson County. Samantha was 14 years old. Her little sister Jessica, age 13 at the time, suffered a severe brain injury in the same accident. The events which led directly to the death of Samantha Staubs and the horrible injuries to Jessica Staubs began with the actions of Defendant Ray Marcus on December 9, 2006, who, as an 18-year-old adult, helped facilitate their intoxication, the cause of the tragedy.

The record demonstrates that Ray Marcus, who was 18 years old, was already known as a drinker and was known by his friends to be involved in the party lifestyle.¹ On December 9, 2006, Mr. Marcus had been to the movies with his friends Steven Woodward, and Mr. Woodward's two younger brothers, Kevin and Jeremy. Steven Woodward was 26 years old, and he had just been released from spending a year in jail upon a conviction for receiving stolen property.² Ray Marcus had driven them all to the movie in his Toyota pick-up truck. After the movie, Ray Marcus dropped off Kevin Woodward, and then Mr. Marcus and Steven Woodward

¹ Deposition of Steven Woodward; March 16, 2011; page 53, line 7 – page 54, line 19. (Exhibit #1 to the Plaintiff's Cross-Motion for Summary Judgment);

² Deposition of Steven Woodward; March 16, 2011; page 68, lines 1-5; page 51, lines 8-13; (Exhibit #2 to the Plaintiff's Cross-Motion for Summary Judgment);

drove to the home of Kelly Mazur to pick up two very young girls, Kelly Mazur, age 15, and Samantha Staubs, age 14.

The record demonstrates that the girls had wanted a ride from Kelly Mazur's home to go and meet Samantha Staubs' little sister Jessica Staubs, age 13, and Misty Johnson, age 14, and other friends of theirs at the top of Engle Road, near the home of Adrian Villalobos, age 14.

At 26 years of age, Steven Woodward was the only person old enough to buy alcohol. Although Ray Marcus was an adult and a drinker, he was not old enough to buy alcohol. Notwithstanding the fact that he could not personally buy the alcohol, Ray Marcus took affirmative action to assist Steven Woodward in furnishing alcohol to these very young girls. It is undisputed that Ray Marcus drove these two young girls and Steven Woodward to the Sweet Springs convenience store located across the state line in Virginia. At the store, the girls gave Steven Woodward \$10.00, and Steven Woodward went into the store and purchased four 40 oz. bottles of Hurricane Malt Liquor, the alcohol which these girls and their even younger friends ultimately consumed. The Court notes the following evidence adduced in discovery in this case:

“QUESTION: What did you all discuss before you got to the store?”

ANSWER: Ray [Marcus] and Jeremy asked me if I would get the girls alcohol.”

(Deposition of Steven Woodward, March 16, 2011; page 31, lines 14-17)
(Exhibit #3 to the Plaintiff's Cross-Motion for Summary Judgment).

Kelly Mazur testified that when Ray Marcus picked her and Samantha Staubs up at her house, they started out toward their original destination of Engle Road. However, they were interested in getting alcohol, and Mr. Woodward said he would buy it for them. Mr. Woodward said “yeah, just you don't know who I am”³ Accordingly, instead of taking them to meet

³ Deposition of Kelly Mazur; February 24, 2011; page 30, lines 12-21; (Exhibit #4 to the Plaintiff's Cross-Motion for Summary Judgment);

their friends, Ray Marcus drove the girls first into Virginia so Steven Woodward could get alcohol for them.

After Mr. Marcus took the young girls to Virginia so that Mr. Woodward could buy them the malt liquor, Mr. Marcus took them to the top of Engle Road, where the girls were to meet their friends. After Kelly Mazur and Samantha Staubs got out of Mr. Marcus's truck, Steve Woodward, age 26 and freshly released from a year in jail, retrieved the bottles of malt liquor from the truck and set the bags down on the ground for the children.⁴

The girls and their friends grabbed up the malt liquor, and they walked from the meeting place down to the home of Adrian Villalobos. Mr. Marcus and Mr. Woodward left them and drove off.

Adrian Villalobos was 14 years old and in the eighth grade. Adrian Villalobos lived with his father and stepmother, who were out shopping for groceries when the party commenced at his house at around 10:00 p.m.⁵ The depositions establish that there were seven children at the home of Adrian Villalobos. In addition to Adrian Villalobos, two of his friends from school were there, Adam Longerbeam and Matt Lonis. Those two boys were planning to spend the night (a Saturday night) at Adrian's house. Jessica Staubs, 13, and Misty Johnson, 14, arrived on foot, having walked to Adrian Villalobos's house from the Staubs home. The five of them (Adrian Villalobos, Adam Longerbeam, Matt Lonis, Jessica Staubs and Misty Johnson) walked up from Mr. Villalobos's house to the junction of Mission Road and Engle Road, where Ray

⁴ Deposition of Adrian Villalobos, March 16, 2011, page 71, line 18 – page 72, line 5; (Exhibit #6 to the Plaintiff's Cross-Motion for Summary Judgment);

⁵ Deposition of Adrian Villalobos, March 16, 2011, page 63, lines 19-25; (Exhibit #5 to the Plaintiff's Cross-Motion for Summary Judgment);

Marcus dropped off the other two girls, Samantha Staubs, 14, and Kelly Mazur, 15, and the Hurricane Malt Liquor "40s."⁶

At the home of Adrian Villalobos, these children climbed into the bed of the Villalobos' truck parked outside and drank the Hurricane 40s. Adrian Villalobos testified that he did not drink any of the malt liquor,⁷ meaning simply that others drank even more than proportional shares.⁸ Quite predictably, they became intoxicated. In addition to drinking the malt liquor, Misty Johnson, Kelly Mazur, Matt Lonis and Adam Longerbeam also drank some vodka which belonged to Adrian Villalobos's father. The Staubs girls did not drink any vodka.⁹ The girls were all planning to spend the night at the Villalobos home as well.¹⁰

The party ended when the adult members of the Villalobos family returned home from grocery shopping at around 11:00 p.m.¹¹ Mr. Villalobos told his son Adrian that the girls had to leave. Adrian's stepmother Carmen did not want them spending the night.¹² Adrian Villalobos broke the news to the girls.

⁶ During the course of discovery in this case, it was learned that these Hurricane Malt Liquor Beverages are referred to sometimes as "40s," a reference to the volume of malt liquor within each bottle.

⁷ Deposition of Adrian Villalobos, March 16, 2011, page 75, lines 1-3; (Exhibit #7 to the Plaintiff's Cross-Motion for Summary Judgment);

⁸ The evidence from numerous depositions is that one of the bottles broke and its contents were not imbibed. However, the Court takes judicial notice of the fact that that even just three 40 oz. bottles contain a combined 120 oz. of malt liquor. This amount is just one cup short of a gallon of malt liquor, quite a volume to be drunk by six children so very young.

⁹ Deposition of Adrian Villalobos, March 16, 2011, page 79, line 25 – page 80, line 3; page 81, lines 2-13; (Exhibit #8 to the Plaintiff's Cross-Motion for Summary Judgment);

¹⁰ Deposition of Kelly Mazur, February 24, 2011, page 115, line 16 – page 116, line 1; (Exhibit #9 to the Plaintiff's Cross-Motion for Summary Judgment);

¹¹ Deposition of Adrian Villalobos, March 16, 2011, page 85, lines 15-22; (Exhibit #10 to the Plaintiff's Cross-Motion for Summary Judgment);

¹² Deposition of Adrian Villalobos, March 16, 2011, page 87, line 21 to page 88, line 7; (Exhibit #11 to the Plaintiff's Cross-Motion for Summary Judgment);

Still quite intoxicated, the girls began making calls on their cell phones to friends to see if someone could come get them.¹³ None of the four girls were old enough to have a driver's license and none of them had a vehicle. Jessica Staubs, just 13 years old, was only in the seventh grade. They called Ray Marcus first and asked for him to come give them a ride home.¹⁴ Ray Marcus refused to help.¹⁵ With no one to come get them, Misty Johnson and Samantha Staubs left the Villalobos house on foot to find transportation.

A bit later, Samantha Staubs came back to the door of the Villalobos home. Misty Johnson was driving a truck that was in the Villalobos driveway. The truck belonged to Mack Jenkins and she had found the truck with its keys left in the ignition in a driveway at a house down the road. Misty Johnson had entered the truck and started it up. With Samantha Staubs in the passenger seat, Misty Johnson drove the truck back to the home of Adrian Villalobos.

Jessica Staubs and Kelly Mazur were still at the Villalobos home and they had fallen asleep. They were awakened by the others when Samantha came to the door. They got up, left with Samantha, and climbed into the back seat of the truck that Misty Johnson was driving. Samantha Staubs got back in the front passenger seat.

Misty Johnson, who had no license to drive and no experience driving, headed down Mission Road. She was driving much too fast and she was intoxicated. She was driving 70

¹³ Deposition of Adrian Villalobos, March 16, 2011, page 91, line 16 – page 92, line 20; (Exhibit #12 to the Plaintiff's Cross-Motion for Summary Judgment);

¹⁴ Deposition of Kelly Mazur, February 24, 2011, page 119, lines 1-2; (Exhibit #13 to the Plaintiff's Cross-Motion for Summary Judgment); Deposition of Steven Woodward, March 16, 2011, page 20, lines 13-19; (Exhibit #14 to the Plaintiff's Cross-Motion for Summary Judgment);

¹⁵ Deposition of Steven Woodward, March 16, 2011, page 20, lines 13-19; (Exhibit #15 to the Plaintiff's Cross-Motion for Summary Judgment);

miles per hour on Mission Road, a winding, hilly country road.¹⁶ Misty Johnson lost control of the truck. It went left of center, crashed into an embankment and flipped.

Jessica Staubs, age 13, who had been in the back seat of the truck, suffered a skull fracture that caused a subdural hematoma. She was flown to Fairfax Inova Hospital where she underwent brain surgery. Following a lengthy recovery, Jessica still has memory deficits. Her medical bills were tens of thousands of dollars.

Jessica's older sister, Samantha Staubs, did not survive the collision. Samantha was 14, and she had been sitting in the front passenger seat of the truck. Samantha's autopsy report lists multiple injuries, including a cerebral contusion with a subdural hemorrhage, pulmonary contusions and the avulsion of her medial upper teeth. Samantha was pronounced dead by the paramedic who arrived at the scene.

This suit was filed in 2008. After a long, torturous process of trying to establish whether there was any insurance coverage which might indemnify Ray Marcus,¹⁷ it was ascertained that Ray Marcus was covered by a Nationwide homeowner's policy providing liability coverage for his father's residence.

Defendant Ray Marcus (and his insurer Nationwide) and the Plaintiff have entered in a settlement agreement which was approved by this Court in an earlier hearing. This agreement provides that the parties will have a trial on the issue of Ray Marcus's liability. If Ray Marcus is determined to be liable, then Nationwide will pay the Plaintiff \$125,000.00. If Ray Marcus is determined not to be liable, then Nationwide will pay the Plaintiff \$50,000.00.

¹⁶ Deposition of Kelly Mazur, February 24, 2011, page 58, lines 12-18; (Exhibit #16 to the Plaintiff's Cross-Motion for Summary Judgment);

¹⁷ Ray Marcus and his father Sherman Marcus were both deposed, and both refused to answer questions in their depositions about the existence of any liability insurance for the Marcus family. Sherman Marcus revealed that he had liability coverage with Nationwide that would indemnify his son Ray only after this Court entered a rule to show cause against him, a hearing was held, and Mr. Marcus was threatened with this Court's contempt power for refusing to provide this information to the Plaintiff.

II. DISCUSSION OF THE LAW

a. Jonathan Ray Marcus breached his legal duties.

In his Motion for Summary Judgment, Ray Marcus contends that he had no duty to Jessica Staubs or to Samantha Staubs. (Defendant's Motion for Summary Judgment; pp.8-9 and 12-14). This Court cannot agree.

A citizen has a duty to obey the law. *Haymond v. Camden*, 22 W.Va. 180 (1883); *Hedges v. Price*, 2 W.Va. 192 (1867); *Osborne v. Kanawha County Court*, 68 W.Va. 189, 69 S.E. 470 (1910); *Caperton v. Martin*, 4. W.Va. 138 (1870); *State v. Chase Securities, Inc.*, 188 W.Va. 356. Ray Marcus did not obey the law.

Starting with the obvious, West Virginia Code §11-16-19(c) provides as follows:

“Any person who shall knowingly buy for, give to or furnish nonintoxicating beer to anyone under the age of twenty-one to whom they are not related by blood or marriage is guilty of a misdemeanor and, upon conviction thereof, shall be fined an amount not to exceed \$100 or shall be confined in jail for a period not to exceed ten days, or both such fine and confinement.”

The definition of “nonintoxicating beer” provided by W.Va. Code §11-16-3(5) includes the beverage Hurricane Malt Liquor:

(5) “Nonintoxicating beer” means all cereal malt beverages or products of the brewing industry commonly referred to as beer, lager beer, ale and all other mixtures and preparations produced by the brewing industry, including malt coolers and nonintoxicating craft beers containing at least one half of one percent alcohol by volume, but not more than nine and six-tenths of alcohol by weight, or twelve percent by volume, whichever is greater, all of which are hereby declared to be nonintoxicating and the word “liquor” as used in chapter sixty of this code shall not be construed to include or embrace nonintoxicating beer nor any of the beverages, products, mixtures or preparations included within this definition.

Ray Marcus had a legal duty not to “knowingly buy for, give to or furnish” Hurricane Malt Liquor “40s” to anyone under twenty-one years of age. He breached that duty. Ray Marcus has argued that he is not legally responsible because all he did was drive the girls and Steve

Woodward to the place where the beverages were purchased. Ray Marcus contends that because Steven Woodward was the person who actually went into the store and obtained the beverages, he was a non-participant who provided transportation because he is "a nice guy."

"...like I said, I mean, I, Kelly Mazur had called my cell phone, wanted a ride, and so I gave them a ride and learned a valuable lesson from that. Never be the nice guy." (emphasis added). (Deposition of Ray Marcus, March 22, 2010, page 9, lines 14-16) (Exhibit #17)

The Court finds that in spite of his view of his own actions, the record demonstrates that Ray Marcus played a role in setting in motion the events which led predictably to the tragedy.

The Defendant is asking this Court simply to disregard the law. As the Court noted previously upon the bench at a hearing in this case, the drivers of getaway cars for every robbery ever committed would like to avail themselves of the defense in which Ray Marcus seeks to wrap himself. The law is to the contrary and is clearly expressed in Syllabus Point 11 of *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1990):

"11. Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator."

Ray Marcus, an adult, picked up two young girls, ages 14 and 15, in his truck. Ray Marcus solicited his 26-year-old friend and companion, Steven Woodward, who was just released from a year of incarceration, to purchase alcohol for these minors:

"QUESTION: What did you all discuss before you got to the store?
ANSWER: Ray and Jeremy asked me if I would get the girls alcohol."
(Deposition of Steven Woodward, March 16, 2011; page 31, lines 14-17)
(Exhibit #3 to the Plaintiff's Cross-Motion for Summary Judgment).

Ray Marcus then drove all of the occupants of his vehicle into the Commonwealth of Virginia to facilitate the purchase of alcohol for the minors. Ray Marcus watched the whole thing happen from the driver's seat of his truck. He then drove the girls and the malt liquor to a designated meeting spot, where they were met and joined by five of their friends, who were even younger

than they were. The children who met them were middle school students. Two hours later, when these young girls, whom he knew to be intoxicated as a result of his actions, called him and asked for transportation, he refused. If these girls had been 18, 19, or 20, what Ray Marcus and Steven Woodward did to furnish them with alcohol would still have been illegal. But these girls were not 18, 19, or 20. They were children.

West Virginia Code §49-7-7 provides in pertinent part as follows:

“(a) A person who by any act or omission contributes to, encourages or tends to cause the delinquency or neglect of any child, shall be guilty of a misdemeanor,....”

Ray Marcus escaped what would appear to have been a fairly straightforward criminal prosecution. He has drawn that fact to the Court’s attention himself. (Defendant’s Motion for Summary Judgment, page 7, “Woodward was charged with 4 counts of providing alcohol to a minor. Marcus was not criminally charged.”). The failure of the authorities to bring criminal charges against Ray Marcus, however, does not exonerate him from liability in this case.

At this point, the Court notes that the Plaintiff and Ray Marcus appear to be in agreement on one thing, and that is the legal point made by both that:

“The 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 a matter of law.” *Aikens v. Debow*, 541 S.E.2d 576, (W.Va. 2000).

The Plaintiff and the Defendant Ray Marcus agree that the question of duty is one for the Court to determine as a matter of law. The Plaintiff contends that the law is clear and the Court agrees. Ray Marcus had a duty, as all citizens do, to obey the law. This duty includes, necessarily, (1) the duty not to furnish alcohol to persons who are underage in violation of W.Va. Code §11-16-19(c); (2) the duty not to contribute to the delinquency of minors in violation of W.Va. Code §49-7-7(a); and (3) the duty not act in concert with another in the commission of a criminal act, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1990).

The Plaintiff urges this Court to rule as a matter of law that these duties exist – that Ray Marcus had these duties, and based upon the record before the Court, that Ray Marcus violated these legal duties. The Court so finds.

b. Negligence

West Virginia's law is clear that violation of a statute is *prima facie* evidence of negligence. Syl.Pt. 1, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990); *Waugh v. Traxler*, 186 W.Va. 355, 412 S.E.2d 756 (1991). In this case, Ray Marcus violated multiple statutes, and these violations of law are *prima facie* evidence of Ray Marcus's negligence, all as discussed above.

Defendant Ray Marcus claims that he should not be held liable because he was "only a conduit to providing the alcohol to the minors." (Defendant's Motion for Summary Judgment, page 11). The Court would not adopt the Defendant's use of the adverb "only" in describing Ray Marcus acting as a conduit to providing the alcohol to the minors, especially given what happened as a result of his actions.

The Court finds that Ray Marcus was also negligent in failing to respond to the call for help and assistance that came to him when the girls were told that they had to leave the Villalobos home. The girls called Ray Marcus and asked for transportation. He knew that these minors had been drinking because he helped to procure the alcohol which they drank. He knew it was late at night, now almost midnight, and he knew that these middle school students, whose intoxication he had assisted, were in need of help from an adult. West Virginia's law addresses this failure to act:

"One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." Syllabus Point 2, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983)." Syl. Pt. 10, *Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987).

Syllabus Point 1, *Overbaugh v McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990).

Ray Marcus's refusal to come to the aid of the children whom he had put in danger is yet more negligence on his part.

c. Proximate Cause

Defendant Ray Marcus argues that even if he did have legal duties, and even if he breached them, his actions were not a proximate cause of Samantha Staubs' death or of Jessica Staubs' injuries. Mr. Marcus contends that there were intervening acts which broke the chain of causation. The Court does not agree with this argument.

First, the Court must consider West Virginia's law on the subject of proximate cause. The law recognizes that there can be, and there often is, more than one proximate cause of an injury:

"The proximate cause of an injury or death is a negligent act contributing to the injury or death and without which the injury or death would not have occurred. A party in a civil action for an injury or death is not required to prove that the negligence of one sought to be charged with an injury was the sole proximate cause of an injury." *Stewart v. George*, 216 W.Va. 288, 607 S.E.2d 394 (2004).

The Plaintiff here does concede that Misty Johnson's driving while intoxicated, driving without a license, and driving too fast, are also proximate causes of the accident. The Court finds, based upon the record, however, that it is also true that but for the actions of Ray Marcus, none of these things would have happened. Had not Misty Johnson been intoxicated, she would not have stolen a truck and driven it. Misty Johnson was drunk because of Ray Marcus's actions, in violation of his legal duties under the law. But for the conduct of Ray Marcus, Samantha Staubs would not have died that night. But for the conduct of Ray Marcus, Jessica Staubs would not have suffered a brain injury that night. The law contemplates this combination of causation:

"Where separate and distinct negligent acts of two or more persons continue unbroken to the instant of an injury, contributing directly and immediately thereto and constituting the efficient cause thereof, such acts constitute the sole

proximate cause of the injury.” Syllabus Point 1, *Brewer v. Appalachian Constructors, Inc., et al.*, 135 W.Va. 739 [65 S.E.2d 87 (1951), overruled on other grounds, *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978)].” Syllabus Point 6, *Frye v. McCrory Stores Corp.*, 144 W.Va. 123, 107 S.E.2d 378 (1959); Syllabus Point 5, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

Ray Marcus had a legal duty not to assist in furnishing alcohol to middle school girls. It is his argument, however, that even if he violated that duty, getting a group of middle school girls intoxicated, he has no responsibility for the dangerous things they did in the drunken state in which he put them. That argument is inconsistent with the law, and particular, of the principle of the law that holds:

“In a concurrent negligence case, the negligence of the defendant need not be the sole cause of the injury, it being sufficient that it was one of the efficient causes thereof, without which the injury would not have resulted; but it must appear that the negligence of the person sought to be charged was responsible for at least one of the causes resulting in the injury.” Syllabus point 5, *Long v. City of Weirton*, [158 W.Va. 741], 214 S.E.2d 832 (1975).’ Syllabus Point 6, *Burdette v. Maust Coal & Coke Corp.*, 159 W.Va. 335, 222 S.E.2d 293 (1976).” Syllabus Point 2, *Peak v. Ratliff*, 185 W.Va. 548, 408 S.E.2d 300 (1991); Syllabus Point 6, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

Moreover, it is not necessary that the specific injury or death, or the process by which it occurred, have been foreseeable:

“Where an act or omission is negligent, it is not necessary to render it the proximate cause of injury that the person committing it could or might have foreseen the particular consequence or precise form of the injury, or the particular manner in which it occurred, or that it would occur to a particular person.” Syllabus Point 4, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

In other words, it is not necessary that Ray Marcus imagined or foresaw every possible way that the minors whom he was helping to get intoxicated might become injured or die as a result of their intoxication. It is not required that he could or might have foreseen “the particular manner in which the injuries occurred” in this case or that the injuries would befall a particular person. Indeed, that is the very point of the law which prohibits providing alcoholic beverages to middle

school girls. The enactment of these laws is the expression of the Legislature's judgment (reflecting our societal knowledge) that many bad things will invariably happen as a result of that behavior. Accordingly, furnishing alcohol to children is proscribed altogether.

Ray Marcus contends that there were intervening causes which insulate him from responsibility. Mr. Marcus misapprehends what an intervening cause is.

"An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." Syllabus Point 16, *Lester v. Rose*, 147 W.Va. 575, 130 S.E.2d 80 (1963) [modified on other grounds, *State ex rel. Sutton v. Spillers*, 181 W.Va. 376, 382 S.E.2d 570 (1989)]." Syllabus Point 1, *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982); Syllabus Point 3, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

As to the actions of Defendant Ray Marcus, there is no intervening cause. This is so because the record demonstrates that the subsequent events and acts were not at all "independent" of Mr. Marcus's acts such that they became "the only proximate causes of the injury." Ray Marcus's actions started the chain of events which produced the unspeakable tragedy.

Mr. Marcus argues vociferously the case of *Yourtee v. Hubbard*, 196 W.Va. 683, 474 S.E.2d 613 (1996), but Mr. Marcus's reliance on *Yourtee* as to his acts is misplaced. *Yourtee* involved the question of whether or not the owner of a vehicle who leaves the keys-in-the-ignition is liable to someone who steals the car and is injured driving it. *Yourtee* stands for the proposition that, as between the owner of a car who leaves his keys in the ignition, and a thief who steals the car, the law will treat the theft of the vehicle as an intervening cause. The relevant holding from *Yourtee* was laid down in Syllabus Point 3:

"A person who participates in the theft of a motor vehicle, and is injured thereafter as a result of the operation of that stolen motor vehicle, is not within the class of persons that the Legislature designed the unattended motor vehicle statute, W. Va.Code 17C-14-1 (1951), to benefit. Therefore, W. Va.Code 17C-14-1 (1951) does not create a private cause of action for a thief against the owner of the automobile whose conduct may have facilitated its theft."

That has nothing to do with Ray Marcus in this case. He was not the owner of the vehicle which was stolen by Misty Johnson. Ray Marcus is not charged with negligence as a result of having left his keys in a vehicle.

In point of fact, this Court has already applied the *Yourtee* decision in this case. By ORDER entered on the 14th day of May, 2009, this Court granted the Motion to Dismiss of the former Defendant Mack Jenkins. Mack Jenkins was the owner of the truck in which the fatal accident occurred. Mack Jenkins had left his keys in his truck, the truck which was stolen by Misty Johnson. This Court dismissed the Plaintiff's claims against Mack Jenkins under the Supreme Court's decision in *Yourtee*.

The decision in *Yourtee* turned on the Supreme Court's determination that in enacting the unattended motor vehicle statute, W.Va. Code §17C-14-1, the plaintiff in *Yourtee*, as a car thief, was not "among the class of persons for whose benefit the statute was enacted." *Id.*, at 618, citing *Hurley v. Allied Chem. Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980). The Court noted in *Yourtee* that in considering the unattended motor vehicle statute, "an exhaustive search failed to yield any cases holding that the unattended motor vehicle statute was designed to protect a miscreant from his own misconduct." (emphasis added). *Yourtee*, at 618.

None of this, of course, has anything to do with Ray Marcus, upon whom the Plaintiff seeks to assign liability not based upon the unattended motor vehicle statute, but rather because he provided middle school students with alcohol, which led to their injury and death.

As to the case against Ray Marcus, there are no intervening causes. While there were subsequent acts, they were not "independent" of Mr. Marcus's acts. Rather, the record before the Court shows that they were caused by what Ray Marcus did. But for the actions of Ray Marcus and Steven Woodward in furnishing alcohol to these children, the tragedy would have

been avoided. Consequently, under the law, Mr. Marcus's conduct is indeed a proximate cause of the injuries at bar.

It is not the law of *Yourtee* which applies to Ray Marcus in this case. Rather, it is the law from *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990). The Supreme Court's discussion of the law in that case could have been written for the facts at bar:

"The general rule in this regard is that a tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct. *See Byrd v. Rector*, 112 W.Va. 192, 163 S.E. 845, 81 A.L.R. 1213 (1932), *overruled on other grounds; State ex rel. Payne v. Walden*, 156 W.Va. 60, 190 S.E.2d 770 (1972). *See generally Prosser & Keeton on the Law of Torts* § 44 at 303-06; 57A Am.Jur.2d *Negligence* § 620 *et seq.* (1989). In *Rappaport v. Nichols*, 31 N.J. at 204-05, 156 A.2d at 10, 75 A.L.R.2d at 832, the New Jersey Supreme Court stated the rationale for the rule, quoting from *Menth v. Breeze Corp., Inc.*, 4 N.J. 428, 441-42, 73 A.2d 183, 189, 18 A.L.R.2d 1071, 1078-79 (1950):

'[T]he original negligence continues and operates contemporaneously with an intervening act which might reasonably have been anticipated so that the negligence can be regarded as a concurrent cause of the injury inflicted. One who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof although the act of a third person may have contributed to the final result.'

See Bissett v. DMI, Inc., supra. Similar reasoning underlies the rule we stated in Syllabus Point 1 of *Reilley v. Byard*, 146 W.Va. 292, 119 S.E.2d 650 (1961):

'Where two or more persons are guilty of separate acts of negligence which in point of time and place concur, and together proximately cause injury to another, they are guilty of concurrent negligence for which they may be held jointly and severally liable in an action by the injured person or, in case death results therefrom, by his personal representative.'

See also Evans v. Farmer, 148 W.Va. 142, 133 S.E.2d 710 (1963). The question, then, becomes whether one who sells beer or alcoholic beverages to a minor can ever reasonably foresee that the underage purchaser will share such beverages with other minors, who will, in turn, become intoxicated and cause injury to themselves or others. Other jurisdictions have concluded that in certain circumstances, such a result is reasonably foreseeable at the time of the unlawful sale. *E.g., Morris v. Farley Enters., Inc.*, 661 P.2d 167 (Alaska 1983); *Floyd v. Bartley*, 727 P.2d 1109 (Colo.1986); *Kvanli v. Village of Watson*, 272 Minn. 481,

139 N.W.2d 275 (1965); *Thompson v. Victor's Liquor Store, Inc.*, 216 N.J.Super. 202, 523 A.2d 269 (1987); *Davis v. Billy's Con-Teena, Inc.*, 284 Or. 351, 587 P.2d 75 (1978); *Matthews v. Konieczny*, 515 Pa. 106, 527 A.2d 508 (1987); *Reber v. Commonwealth*, 101 Pa.Comm. 397, 516 A.2d 440 (1986); *Brookins v. The Round Table, Inc.*, 624 S.W.2d 547 (Tenn.1981).”

In *Anderson v. Moulder*, the Supreme Court answered the same question in the affirmative.

The Defendant Ray Marcus cannot hide from the predictable and foreseeable results of his behavior by claiming that these very same predictable and foreseeable consequences were independent, intervening acts. This Court rejects that argument, and this Court rules as a matter of law that the negligence of Ray Marcus was a proximate cause of the injuries and death which are the subject of this litigation.

d. The Plaintiff is not seeking to impose dram shop or social host liability upon Ray Marcus.

In his Motion for Summary Judgment, the Defendant Ray Marcus contends that the imposition of liability upon him for the events which he caused would contravene West Virginia's law as it relates to social hosts. The Court finds that this argument has no merit. In Syllabus Point 2 of the case of *Overbaugh v McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990): the Supreme Court held that:

“2. Absent a basis in either common law principles of negligence or statutory enactment, there is generally no liability on the part of the social host who gratuitously furnishes alcohol to a guest when an injury to an innocent third party occurs as a result of the guest's intoxication.”

The social host protection provided by West Virginia law does not apply to the facts of this case. Ray Marcus was not a “social host.” The children to whom Ray Marcus provided alcohol were not his guests. The social host protection provided by the law presumes lawful consumption of alcohol. It does not apply in situations where the “host” is illegally furnishing alcohol to minor children.

“The sale of beer to a person under twenty-one years of age in violation of W. Va.Code, 11-16-18(a)(3), gives rise to a cause of action against the licensee in favor of a purchaser or a third party injured as a proximate result of the unlawful sale.” Syllabus Point 2, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).

Again, if being a “social host” exonerates from liability adults who illegally provide alcohol to minors, then the law is turned upon its head. Ray Marcus’s conduct is not governed by rules applying to “social hosts” under *Overbaugh v McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990). It is instead governed by Syllabus Point 2, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990) as set forth above.

e. Jessica Staubs is guilty of nothing.

The Court notes that Plaintiff Lori Staubs sues in two separate capacities. Lori Staubs sues as the administratrix of the estate of her daughter Samantha Staubs in the wrongful death claim for the death of her daughter Samantha Staubs. Lori Staubs also sues as parent and next friend for her daughter Jessica, who is still a minor child.

Throughout his Motion for Summary Judgment, the Defendant Ray Marcus addresses the Staubs girls as a unit, presuming that all of the arguments and points which he has raised apply equally to both claims. This is not the case. The Court finds that there are critically important differences.

Because Jessica was 13 at the time of the tragedy, she is presumed by the law to be incapable of negligence. West Virginia’s law provides a rebuttable presumption that a child between the ages of 7 and 14 is incapable of negligence. *Pino v. Szuch*, 185 W.Va. 476, 408 S.E.2d 55 (1991); *Belcher v. Charleston Area Medical Center*, 188 W.Va. 105, 422 S.E.2d 827 (1992).

At 13, Jessica Staubs was the youngest of any of the children involved in these events. She was a seventh grader. In addition to the presumption that she is incapable of negligence, the

evidence establishes that Jessica Staubs is totally innocent of any of the misconduct which Ray Marcus claims were intervening causes. To be specific, the record establishes that Jessica Staubs was not the one who called Ray Marcus and asked for a ride. Kelly Mazur and Samantha Staubs called Ray Marcus for a ride. Jessica Staubs was not even with Kelly Mazur and Samantha Staubs when they called Ray Marcus. Samantha Staubs and Kelly Mazur were together Kelly Mazur's house. Jessica Staubs was not there. She was at her own house.

Jessica Staubs did not go with Ray Marcus and Steve Woodward to get alcohol. Jessica Staubs did not ask Ray Marcus and Steven Woodward to get alcohol. Jessica Staubs did not give Steven Woodward money for the Hurricane Malt Liquor.

The Plaintiff asks rhetorically "What did Jessica Staubs do?" The record establishes that she walked from her own house on a Saturday night to the home of her friend Adrian Villalobos. She then walked with all of the older boys and girls who were there to meet her older sister Samantha and Kelly Mazur when they got dropped off by Marcus and Woodward, and she drank some of Hurricane Malt Liquor that was provided to her illegally.

Jessica Staubs did not steal a truck. When Misty Johnson and Samantha Staubs left the Villalobos home and stole Mack Jenkins' truck, Jessica Staubs was not with them. Jessica stayed at the Villalobos house and fell asleep. The older children woke Jessica up when Samantha came back to the door, and Jessica then left, as she was told to do by the older kids (including her big sister). Awakened, she simply went with her big sister. Jessica Staubs did not drive the truck. She just got in the back seat of the truck being driven by Misty Johnson. The evidence is that she got in the back and laid her head down on Kelly Mazur's lap in the back seat. (See Exhibit #18, Deposition of Kelly Mazur, page 56, lines 16-20).

Even under *Yourtee, infra*, where the Supreme Court held that the unattended motor vehicle statute was not "designed to protect a miscreant from his own misconduct," the Supreme

Court made it clear that its holding did not extend to people who were in Jessica Staubs' position. In footnote 8 of *Yourtee*, the Supreme Court said:

"The more common question raised under a violation of the unattended motor vehicle statute is whether innocent third persons are within the class of persons protected under the statute. Because the factual pattern in this case does not involve innocent third persons, we need not address this facet of the question and reserve opinion on that subject for another day....." Footnote 8, *Yourtee v. Hubbard*, 196 W.Va. 683 474 S.E.2d 613 (1996)

The Court finds that Jessica Staubs is an innocent third person, a thirteen-year-old girl who had no hand in stealing Mack Jenkins' truck.

Jessica Staubs did drink some of the Hurricane Malt Liquor which Ray Marcus and Steven Woodward procured illegally for the minor girls. Ray Marcus argues that by drinking the alcohol, Jessica Staubs was committing her own intervening act. However, the law does not support this argument at all. In Syllabus Point 7 of *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990), the Supreme Court held that the doctrine of complicity does not bar an injured minor's civil action against a licensee for selling beer to such minor in violation of W.Va. Code §11-16-18(a)(3).

Ray Marcus has no right to claim that any of the events which he set in motion are intervening acts. The Court concludes that his negligence is egregious because he knew the girls. He was not some bartender dealing with a 20-year-old who appeared to be 21 or who was presenting false identification. Ray Marcus knew that Kelly Mazur and Samantha Staubs were not old enough to drive, much less have alcohol. When he took the girls and the Hurricane Malt Liquor to the juncture of Mission Road and Engle Road, he could see that the entire group they met up with were young children.

It is incorrect for the Defendant to lump Jessica Staubs and Samantha Staubs together as if they were engaged together in all of the same events. This Court recognizes the distinctions between the two girls and the differences, both legal and factual, of the two claims.

f. Summary Judgment

Rule 56(c) of the West Virginia Rules of Civil Procedure provides in pertinent part as follows:

“[Summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

A summary judgment should be granted when it is clear that there is no genuine issue of fact to be tried. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997).

The purpose of summary judgment is to expeditiously determine cases without necessity for formal trial where there is no substantial issue of fact. *Kern v. Tri-State Ins Co.*, C.A.8 (Mo.) 1967, 386 F.2d 754. *Bland v. Norfolk & S.R. Co.*, C.A.N.C.1969, 406 F.2d 863; *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, C.A.Fla.1967, 378 F.2d 377; *Chambers v. U.S.*, C.A.Mo.1966, 357 F.2d 224; *Chambers & Co. v. Equitable Life Assur. Soc. of the U.S.*, C.A.Ga.1955, 224 F.2d 338; *Hollinghead v. Carter Oil Co.*, C.A.Miss.1955, 221 F.2d 920; *Creel v. Lone Star Defense Corp.*, C.A.Tex.1949, 171 F.2d 964, reversed on other grounds 70 S.Ct. 755, 339 U.S. 497, 94 L.Ed. 1017.

Here, the questions before the Court and framed by the Defendant's Motion for Summary Judgment and the Plaintiff's Cross-Motion for Summary Judgment are particularly amenable to resolution by summary judgment. There are no disputed facts, and the duties are established by law.

Ray Marcus was an adult, but not old enough to buy alcohol. He was known as a party boy and drinker. He and his 26-year old companion, Steven Woodward, who had just been released from spending a year in jail, picked up two girls who were 14 and 15. Ray Marcus drove them into another state for the specific purpose of getting them alcohol. These girls and

their younger companions became intoxicated drinking the Hurricane Malt Liquor "40s" furnished by Ray Marcus and Steven Woodward. One of the intoxicated teenagers stole a truck. She picked up the other girls, and the horrible collision which followed ended one life, caused horrible injuries to another child, and altered the lives of an entire family forever.

There is no dispute as to any material fact. Ray Marcus has admitted his actions and there is no dispute regarding what he did. While Defendant Marcus believes his actions should not impose liability, the Court cannot adopt his view.

Because of the parties' agreement with Nationwide, Summary Judgment ends the case. Under the parties' agreement with each other and with Nationwide, Ray Marcus will get a full release from the Plaintiff, whatever the outcome of the case. The parties have agreed that the liability of Ray Marcus will determine which amount which will be paid.

Summary judgment is a valuable instrument for avoiding unnecessary, lengthy and costly trials. *Merit Motors, Inc. v. Chrysler Corp.*, D.C.D.C.1976, 417 F.Supp. 263, affirmed 569 F.2d 666, 187 U.S.App.D.C. 11. If there were questions regarding any of the facts, that might be a sufficient reason for the Court to deny the Plaintiff's Cross-Motion for Summary Judgment, but there are no factual questions here. The record speaks for itself. Ray Marcus and Steven Woodward violated the law. They got alcohol for minors who drank it and became intoxicated. Everything that happened after that occurred because of what Ray Marcus and Steven Woodward did. The tragic ending of the story was completely predicable and foreseeable. The Court finds that there is ample legal authority for the granting the Plaintiffs' Cross-Motion for Summary Judgment:

"Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when 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, *Ratlief v. Yokum* [167 W.Va. 779], 280 S.E.2d 584 (W.Va.1981), quoting, syl. pt. 5, *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964)." Syllabus Point 6,

McAllister v. Weirton Hosp. Co., 173 W.Va. 75, 312 S.E.2d 738 (1983); Syllabus Point 17, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990)

The facts here are undisputed. The Plaintiff contends that the facts are such that reasonable men and women may draw only one conclusion from them, the conclusion that Ray Marcus has some share of the liability for the injuries to Jessica Staubs and the death of Samantha Staubs.

Again, under the parties' agreement, it is not required that the Court assign any particular percentage of the overall negligence to Ray Marcus. Ray Marcus cannot resist summary judgment because the Court finds that the established facts are such that no reasonable mind could conclude either one of the following two things: (1) that Ray Marcus was guilty of no contributing negligence whatsoever; If he is guilty of even 1% of the total negligence in the case, then he has liability, unless (2) a reasonable mind could find that Jessica Staubs was 50% or more at fault herself for what happened to her. Under West Virginia's law of comparative negligence, "a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident." Syllabus Point 3, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).

Considering the negligence of all of the pivotal players (Steven Woodward and Ray Marcus, who got the alcohol for children, Samantha Staubs and Kelly Mazur who went with Ray Marcus and Steven Woodard to get the alcohol, Misty Johnson and Samantha Staubs, who stole a truck, Misty Johnson who, without a license, drove the truck while under the influence and at high speed, and Ray Marcus, who refused to come and help when he was called), the Court finds as a matter of law that no reasonable person could conclude that Jessica Staubs is guilty of 50% or more of the total negligence in the case. She was a 13 year-old child, who is not only presumed by the law to be incapable of negligence, but who was not a participant in

getting the alcohol, or in stealing the truck, and who did not drive the truck. As noted above, she went with her older sister, and she laid her head upon Kelly Mazur's lap in the back seat of the truck.

Since the Court finds that no reasonable mind could disagree with the proposition that the facts establish that Ray Marcus was guilty of at least 1% of the total negligence in the case and that Jessica Staub's negligence was less than 50% of the total negligence in the case, there remains no issue to be tried in this case.

III. CONCLUSION

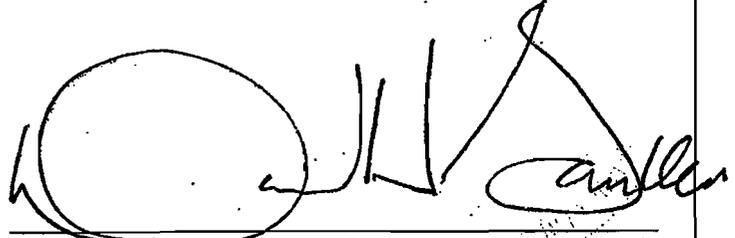
The facts establish that Ray Marcus was guilty of at least 1% of the total negligence in the case. The evidence also establishes that Jessica Staub's negligence was less than 50% of the total negligence in the case. For the reasons set forth above, the Court must **GRANT** the Plaintiff's Cross-Motion for Summary Judgment, determining that Ray Marcus has liability. Accordingly, it is **HEREBY ORDERED** that Ray Marcus is liable.

The Court notes any objections of the parties for the record.

This matter shall be stricken from the Court's docket and placed among causes ended.

The Clerk is directed to enter this Order and transmit copies of this Order to all *pro se* parties and counsel of record.

Entered: 5/25/11

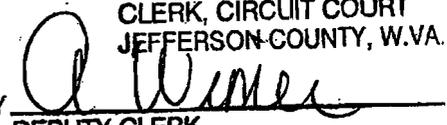


David H. Sanders, Judge of the 23rd Judicial Circuit

A TRUE COPY

ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY 
DEPUTY CLERK

8cc
C. Trump
✓ T. Rohrbaugh
L. Gutsell
M. Whittier
T. Mount
M. Johnson
S. Woodward
L. Ziegenfuss
Staub
AW