IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

SEP 21 2011

JONATHON RAY MARCUS,
Petitioner/Defendant Below,

v.

No. 11-0994
(Appeal from the Circuit Court of Jefferson County, 08-C-488)

LORI ANN STAUBS, as mother and next friend of JESSICA LYNN STAUBS, and as Administratrix of the Estate of SAMANTHA NICHOLE DAWN STAUBS, deceased,
Respondent/Plaintiff Below.

PETITIONER'S BRIEF

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I. STATEMENT OF THE CASE

On May 25, 2011, the Circuit Court of Jefferson County granted summary judgment to Lori Ann Staubs, the next friend of her minor daughter, Jessica Staubs, and the Administratrix of the Estate of Samantha Nichole Dawn Staubs, her 14-year-old daughter who died on December 10, 2006, as the result of a single-vehicle accident. R000311- R000344. The Court's Order granted summary judgment against the Petitioner, Jonathan Ray Marcus ("the Petitioner"), whose only mistake that night was to give the young Samantha Staubs and her 15-year-old friend, Kelly Mazur, a ride, some five hours *prior to* the tragic accident which resulted in Jessica Staubs' injuries and her sister's death.[1] *Id.* Incredibly, despite the parties' agreement on the undisputed material facts, the Court erroneously concluded that the Petitioner negligently provided alcohol to the minors; that the minors' independent criminal acts did not act as intervening/superseding causes; and that the girls themselves were not negligent. *Id.* It is from this Order that the Petitioner appeals.

The night of the accident, the Petitioner had received a phone call from 14-year-old Samantha Staubs, asking him if he would give her and her friend a ride. 2/24/11 Deposition of Kelly Mazur, pp. 16-17, 22, 27. As he was planning to give his friend Steve Woodward a ride to the store anyway, he agreed, and stopped to pick up the girls. 3/22/10 Deposition of Jonathon Ray Marcus, p. 11.[2] They asked for a ride to the top of Engle Road -- and from there, they

[1] The parties filed cross-motions for summary judgment. While minor changes were made, the Circuit Court largely adopted the Respondent's proposed order granting summary judgment and denying the Petitioner's motion for summary judgment. *Compare* R000311- R000344 with R000193- R000218.

[2] Kelly Mazur testified that the decision to go to the Sweet Springs store was made in the truck, when the girls found out that Woodward was over the age of 21. 2/24/11 Deposition of Kelly Mazur, p 33. However, this is not a material fact.

planned to walk to a party at the home of their 14-year-old friend, Adrian Villalobos. *Id.* 2/24/11 Deposition of Kelly Mazur, pp. 16-17.

As requested, the Petitioner picked up the girls. On the way, he stopped at the Sweet Springs store, and his friend Woodward, age 25, went into the store, where he purchased four 40-ounce bottles of Hurricane Malt Liquor. 2/24/11 Deposition of Kelly Mazur, pp. 33-37. The undisputed facts are that the Petitioner did not go into the store; the Petitioner did not participate in purchasing alcohol for the minors; and the Petitioner did not give the minors any alcohol. *Id.*; R000142; 2/24/11 Deposition of Jessica Staubs, pp. 27-30; 3/15/11 Deposition of M.J., p. 23; 3/16/11 Deposition of Adrian Villalobos, pp. 22-27.

A short time later, the Petitioner dropped the girls off at the end of Engle Road. 2/24/11 Deposition of Kelly Mazur, p. 39. The facts are in dispute about how the girls acquired the alcohol; one version involves Woodward handing the girls the bag with the Hurricanes in it, and the other version has the girls stealing the bag from the back of the Petitioner's pickup. *Compare* 2/24/11 Deposition of Kelly Mazur, pp. 35-36 with 3/16/11 Deposition of Steven Woodward, p. 88. What is undisputed, however, is that the Petitioner never left his vehicle, and that the Petitioner did not provide any alcohol to the girls. R000142; 2/24/11 Deposition of Jessica Staubs, pp. 27-30; 2/24/11 Deposition of Kelly Mazur, pp. 33-37; 3/15/11 Deposition of M.J., p. 23; 3/16/11 Deposition of Adrian Villalobos, pp. 22-27.

It is further undisputed that the Petitioner had no further contact with the girls that night. After they left his pickup, the Petitioner went to Woodward's house, where he watched a movie; and, later, he went home. 3/16/11 Deposition of Steven Woodward, p. 41.

The girls, however, had a much more eventful evening. Their young friend, Adrian Villalobos and two of his friends met them at the end of Engle Road, and, together, they walked, bag in hand, to the Villalobos home. 2/24/11 Deposition of Kelly Mazur, p. 39; 2/24/11 Deposition of Jessica Staubs, p. 32. Although someone dropped the bag and one of the Hurricanes broke en route, when they arrived at the Villalobos residence, at 8:30 or 9:00 that evening, they still had three of the 40-ounce bottles of Hurricane Malt Liquor. 2/24/11 Deposition of Kelly Mazur, p. 26; 3/16/11 Deposition of Adrian Villalobos, p. 35. Adrian's parents and siblings were not home at the time, and Adrian took advantage of the opportunity to have a party. 2/24/11 Deposition of Kelly Mazur, p. 39; 2/24/11; Deposition of Jessica Staubs, p. 32. Altogether, there were seven minors at the Villalobos home that night: Adrian (age 14)[3], Matt Lonas (age 13 or 14)[4], Adam Longerbeam (age 13 or 14)[5], Samantha Staubs (age 14), Jessica Staubs (age 13), and M.J.[6] (age 14), and Kelly Mazur. Together, they spent the evening drinking the Hurricanes, plus some Vodka they had sneaked out of the liquor cabinet at the Villalobos residence. 2/24/11 Deposition of Jessica Staubs, pp. 41-44, 46-47; R000366.

After "chugging" the Hurricanes and the Vodka they had stolen, all of the minors were intoxicated. 2/24/11 Deposition of Jessica Staubs, pp. 41-44; 46-47; 52-53; R000077. Later that evening (about 1.5 to 2 hours later), Villalobos' parents returned, and the girls were advised that they needed to leave. 3/16/11 Deposition of Adrian Villalobos, p. 59. Having lied to their parents about where they were going, none of the girls felt they could call their parents

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[3] 3/16/11 Deposition of Adrian Villalobos, p. 40.

[4] 2/24/11 Deposition of Kelly Mazur, p. 66.

[5] *Id.* at p. 66.

[6] The Petitioner will use the initials M.J. to refer to the minor driving the vehicle, since juvenile proceedings resulted from the accident in question. The juvenile charges are discussed in this Motion. Juvenile proceedings are confidential. *See* West Virginia Code § 49-5-17.

for a ride; so they decided it would be better for them to find their own ride. 2/24/11 Deposition of Kelly Mazur, p. 22. Unable to get any of their friends to give them a ride, they decided to steal a car.[7] *Id.* at 23-26; 2/24/11 Deposition of Jessica Staubs, pp. 50-51; 3/16/11 Deposition of Adrian Villalobos, pp 92-101.

Samantha Staubs and M.J. did just that -- they left the Villalobos residence, stole a pickup, and returned to pick up the other two girls. 2/24/11 Deposition of Kelly Mazur, p. 33; 2/24/11, Deposition of Jessica Staubs, pp. 53-54. In spite of the fact that all were intoxicated, they climbed inside the vehicle, with 14-year-old M.J. at the wheel, and headed down Mission Road. 2/24/11 Deposition of Jessica Staubs, pp. 53-55; 2/24/11 Deposition of Kelly Mazur, p. 59-61. Just minutes later, the intoxicated M.J. lost control of the vehicle, and it struck an embankment. R000337. Samantha Staubs was killed on impact, and the others girls, including Jessica Staubs, sustained serious injuries. *Id.*

This was a terrible accident, which tragically resulted in the death of a young girl. However, the injustice did not end that night. Instead, the mother of the girls, Lori Staubs, sued to recover damages for the death of one daughter and injuries to the other. The Circuit Court of Jefferson County perpetuated the injustice by finding that the Petitioner negligently provided alcohol to two minors -- Samantha Staubs and her friend Kelley Mazur -- merely because he drove the vehicle which transported them and Steve Woodward to the store, where Woodward bought alcohol which was later consumed by Samantha Staubs, her younger sister, and several

[7] There was some evidence that the girls made phone calls before leaving the Villalobos residence, in an attempt to find a ride, before Samantha Staubs and M.J. left to steal a car. There was even speculation (offered by Steven Woodward, who was not even there), that the girls may have called the Petitioner for another ride. The Petitioner denied having spoken with the girls. No one testified that the Petitioner did, in fact, speak with any of the girls after they became intoxicated. Instead, he, like many others, learned of the girls' fate the next day.

others. There was no evidence whatsoever that the Petitioner, Marcus, ever bought the girls alcohol, provided money for the purchase of the alcohol, handed the girls alcohol, or did anything other than drive his truck to the store. Under even the wildest of theories, the Circuit Court should not have granted judgment to the Respondent/Plaintiff and against the Petitioner/Defendant; and this Court should reverse that unjust decision and, instead, grant judgment in favor of the Petitioner, as the undisputed facts prove that he had no duty, and breached no duty, to the Plaintiff's ward or the Plaintiff's decedent. The undisputed facts further establish that, even if there had been a duty, the criminal and reckless conduct of the girls acted as intervening/superseding causes, thereby cutting off any chain of causation.

II. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that the Petitioner was negligent because he did not owe a legal duty to the Staubses.

2. Even assuming that the Petitioner owed a duty to the Staubses, he should not have been held liable, because the intervening, criminal acts of the minors broke the chain of causation.

3. Even if the Petitioner had supplied alcohol to the minors, which Petitioner denies, the Court erred in finding him liable, because West Virginia does not recognize "social host liability."

4. The Circuit Court erred by making numerous, erroneous findings of fact, and by improperly weighing the evidence, in order to justify entering summary judgment for the Respondent.

III. SUMMARY OF THE ARGUMENT

This Honorable Court should reverse the Circuit Court of Berkeley County's May 25, 2011 Order and, instead, direct the entry of judgment in favor of the Petitioner. As the record demonstrates, the undisputed facts show that the Petitioner had no part in causing the accident that killed Samantha Staubs and injured Jessica Staubs. The Petitioner did not buy or give the minors the alcohol that they drank that night, and he did not drink it with them. Nor did he help them to steal and wreck a truck. The Petitioner merely picked up Samantha Staubs and her friend, Kelly Mazur, drove to the Sweet Springs store (which he did not enter), then dropped them off at a friend's house. These actions do not amount to negligence.

First, the Circuit Court erroneously granted the Respondent's Motion for Summary Judgment because there is no evidence that the Petitioner had or breached any duties to Samantha and Jessica Staubs. The court held that the Petitioner violated criminal laws by contributing to the delinquency of minors by buying, giving, or furnishing alcohol to them, and assisting Woodward in committing these crimes. However, this finding is flawed because there is absolutely no evidence supporting such a conclusion. In fact, both the testimony of the Petitioner and Kelly Mazur show that the Petitioner acted lawfully on the night in question.

Moreover, the Court's finding that the Petitioner breached a duty by failing "to respond to the call for help and assistance" after the intoxicated minors allegedly called him to get a ride at the end of the night is completely unsupported by the evidence. Jessica Staubs never testified that she called the Petitioner to get a ride. Moreover, none of the other girls who were there ever testified that they called the Petitioner to get a ride. It is clear that this finding is not supported by the evidence.

The Circuit Court also ignored well-settled law stating that a person has no legal duty to protect another from a third party's willful, malicious, and criminal acts. In the case *sub judice*, the law of this State does not impose a duty on the Petitioner to prevent the Staubses' illegal consumption of alcohol, the theft of a vehicle, driving under the influence, driving without a license, and reckless driving. Therefore, the Circuit Court committed clear legal error.

Even assuming, *arguendo,* that the Petitioner breached a legal duty, there certainly was no proximate cause. The court claims that the Petitioner's driving a vehicle -- some four or five hours prior to the fatal accident -- somehow equates to the proximate cause of Samantha Staubs' death and Jessica Staubs' injuries. This is illogical and not supported by the law. It is obvious that numerous intentional criminal acts committed in between the time that the Petitioner dropped the girls off at the end of Engle Road, and the time that M.J. stole and wrecked a vehicle, acted to break any chain of events allegedly started by the Petitioner.

The intervening, illegal acts of M.J. and Samantha Staubs acted to break the chain of causation between the Petitioner's alleged actions several hours before the accident, and the minors' injuries and death. It is uncontested that the Petitioner picked up the girls, drove his vehicle to the Sweet Springs convenience store where Woodward purchased alcohol, and then dropped the girls off. It is likewise uncontested that the Petitioner did not purchase the alcohol, or force the minors to drink it. Likewise, he did not steal or wreck the vehicle that M.J. was driving while intoxicated. Finally, it was impossible for the Petitioner to foresee that M.J., a 14-year-old girl, would drive without a license and under the influence of alcohol, or that Samantha Staubs and M.J. would steal a vehicle. The commission of these serious offenses is not the normal consequence of underage drinking. It is apparent that these criminal acts started the chain of events that proximately caused death and injuries. It is absurd to suggest otherwise.

Third, the trial court erred in finding that the Petitioner was not a "social host." Even if the Petitioner furnished alcohol to the minors (which the court found, but Defendant has always denied), he would be a "social host," a term that is broadly defined under the law. It is well known that social host liability has been abolished in this State. The term "social host" is used broadly to designate "anyone who furnishes alcoholic beverages without remuneration." 29 *Causes of Action 2d* 435 (citing *Kapres v. Heller*, 536 Pa. 551, 640 A.2d 888 (1994)). Here, the Respondent alleges that the Petitioner *furnished* alcohol to minors by *driving* them to the Sweet Springs store, where Woodward allegedly bought them alcohol. Thus, even if the lower court were to believe the Respondent's allegations, it would support a finding that the Petitioner is not liable, since he would meet the definition of a "social host."

Finally, the trial court made numerous, erroneous findings of fact, and inappropriately weighed the evidence in this case, in direct contravention of this Court's mandate in *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). For example, the Circuit Court committed grave error in finding that the Petitioner admitted to helping the minors procure alcohol. Specifically, the Circuit Court stated that, "Petitioner has admitted his actions and there is no dispute regarding what he did." This is completely false. In fact, in the pleadings, his brief, and during oral argument, counsel for the Petitioner stressed several times that the Petitioner disputes that he assisted the minors in procuring alcoholic beverages. R000352-R000360; May 2, 2011 Transcript from Summary Judgment Hearing, p. 6; R000004; R000221; R000223.

Also, the Circuit Court erred in finding that the Petitioner provided alcohol to Jessica Staubs. It is uncontested that the Petitioner *never even had contact* with Jessica Staubs on the night in question. Therefore, this finding completely ignores the evidence.

Incredibly, the trial court even went so far as to state that Respondent Jessica Staubs was "guilty of nothing." This conclusion completely ignores the evidence. Jessica Staubs was not an innocent bystander that night -- she was fully aware that she was drinking illegally -- that was why she did not call her parents that night to give her a ride home. Rather than suffer the wrath of her parents, she thought it preferable to get in a stolen vehicle with an underage, drunk driver. She was an active participant in the events that led up to the accident. As such, the presumption that she is incapable of negligence is broken.

The Circuit Court also inappropriately weighed the evidence in this case to determine the percentage of negligence of both the Petitioner and Jessica Staubs. It is impossible to make this determination without weighing the evidence to determine how much each party was at fault. Therefore, it is apparent that the court haphazardly made factual determinations at the summary judgment stage, which is prohibited by this Court.

For these reasons, this Honorable Court should reverse and vacate the May 25, 2011 Order from which the Petitioner has appealed, and should direct the entry of summary judgment in favor of the Petitioner.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure, the Petitioner respectfully requests that the Court allow oral argument in this matter and, pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, respectfully represents that oral argument is necessary because, although the ultimate issue is relatively straightforward, i.e., whether the Circuit Court erred in granting the Respondent's Motion for Summary Judgment, the legal principles underlying the ultimate issue are such as to require full, detailed development, so oral argument would significantly aid the Court's decisional process.

Pursuant to Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure, the Petitioner also states that the time allotted by Rule 19 of the West Virginia Rules of Appellate Procedure is insufficient and that the extended time provided by Rule 20 of the West Virginia Rules of Appellate Procedure is necessary here because this matter involves issues of the utmost fundamental public importance. i.e., issues surrounding an adult's liability in relation to a minor's illegal consumption of alcohol.

V. POINTS AND AUTHORITIES AND LEGAL ANALYSIS

This case arose because the Respondent alleged ordinary negligence against the Petitioner. In order to establish a cause of action for negligence, the Respondent must prove that the Petitioner owed Respondent's decedent, Samantha Staubs, and minor daughter, Jessica Staubs, a duty; that the Petitioner failed to perform the duty; and that the Petitioner's failure to perform the duty proximately resulted in the death and injuries at issue. *Yeager v. Morgan*, 189 W. Va. 174, 176-78, 429 S.E.2d 61, 63-65 (1993). The Circuit Court erred because the undisputed facts show that that the Respondent failed to prove the essential elements of negligence. A discussion of each of the errors made by the court in its May 25, 2011 Order is presented, *supra.*

A. STANDARD OF REVIEW

This Honorable Court reviews a circuit court's decision to grant summary judgment under a *de novo* standard. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Accordingly, this Court applies the same standards initially applied by the circuit court to determine whether summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995). Summary judgment is mandated when the record,

viewed most favorably to the non-moving party, demonstrates no genuine issues of material fact and the moving party's entitlement to judgment as a matter of law. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE PETITIONER WAS NEGLIGENT BECAUSE HE DID NOT OWE A LEGAL DUTY TO THE STAUBSES.

The first element of negligence -- the presence of a legal duty -- was not proven by the Respondent. To the contrary, the Petitioner proved that he had no legal duty to the Staubses. As the undisputed facts in the record demonstrate, the Circuit Court should have ended its analysis after examining the evidence showing that no legal duty exists.

1. The record is devoid of any credible evidence showing that the Petitioner failed to obey the law or pick up the Staubses after the party.

The Circuit Court committed reversible error by finding that the Petitioner breached a duty to obey the law. Specifically, the Court concluded that the Petitioner "violated multiple statutes" by contributing to the delinquency of the minors, illegally providing them with alcoholic beverages, and assisting Woodward in obtaining alcohol for the minors.[8] R000321. The Court reasoned that "these violations of law are *prima facie* evidence of Ray Marcus's negligence." *Id.* In order to reach this conclusion, the court disregarded the fact that there is no evidence that shows that the Petitioner committed *any* of these crimes. It is absurd to conclude

[8] The Circuit Court cites three statutes that it claims Marcus violated. R000321-R000322. West Virginia Code § 49-7-7 provides in pertinent part that "(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, ..." Next, West Virginia Code § 11-16-19(c) provides, in part, that "[a]ny 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 . . . " Finally, Syl. Pt. 11 of *State v. Fortner*, 182 W.Va. 345,387 S.E.2d 812 (1990) states: "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."

that the Petitioner automatically committed a crime by simply driving to the store where Woodward allegedly bought Samantha Staubs and Kelly Mazur alcohol.

The testimony of Kelly Mazur shows that the Petitioner committed none of the crimes cited by the court. Yet, this evidence was ignored. Ms. Mazur is the only surviving minor that was present in the Petitioner's truck. Likewise, she is the only truly disinterested person to testify about the Petitioner's conduct. Kelly Mazur testified that she and Samantha Staubs asked the Petitioner for a ride to Engle Road on the night of the accident. 2/24/11 Deposition of Kelly Mazur, 16-17. They *never* asked the Petitioner to take them to get alcohol; instead, they simply wanted to get to Adrian Villalobos' house. *Id.* at 17-18. Kelly Mazur's testimony is the only evidence of the minors' intentions in contacting the Petitioner for a ride that night.[9]

When the Petitioner arrived to pick them up, Woodward accompanied him in the vehicle. *Id.* at 28-29. Instead of driving straight to Engle Road to be dropped off, they traveled to Sweet Springs store, after the minors discovered that Woodward was over the age of 21. *Id.* at 29-30. Samantha Staubs asked Woodward if he would buy her alcohol, to which he replied he

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[9] Kelly Mazur explained:

> A. Well, because of the fact that we were doing nothing all day Saturday, we were really bored. And Samantha had called Ray and got him to pick me and her up from my house and drop us off at the end of Engle Road, which is where we met the boys that we were hanging out with that night and Jessie and [M.J.]
>
> Q. So, Samantha called Ray?
>
> A. Yes.
>
> Q. To request a ride basically?
>
> A. Yes.

Id. at 16-17.

would.[10] The Petitioner did not participate in this conversation with Woodward, Mazur, and Samantha Staubs.[11] After they stopped at the Sweet Springs store, the Petitioner then drove to Engle Road and dropped off Samantha Staubs and Kelly Mazur. 2/24/11 Deposition of Kelly Mazur, p. 39. Upon arrival, Woodward got out of the vehicle to let the girls out, and he handed the bag of alcohol to Samantha Staubs.[12] The Petitioner did not exit the vehicle. *Id.*; 2/24/11 Deposition of Jessica Staubs, pp. 27-30; 3/15/11 Deposition of M.J., p. 23; 3/16/11 Deposition

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[10] The following testimony was given by Ms. Mazur:

> Q. All right. What did you do after they picked you up?
>
> A. Well, we started driving to Engle Road which is where we were supposed to get dropped off, and we, me and Samantha, had started talking to that guy, Steve. And we found out that he was over 21. And Samantha had asked him if he would buy us something to drink. And he said yeah, just you don't know who I am and da, da, da [sic]. And he actually didn't even tell us his name; he has a nickname, but I don't remember what it was. And so we went to Sweet Springs instead of getting dropped off.

Id. at 30.

[11] Ms. Mazur explained:

> Q. So did he then tell Ray to drive to Sweet Springs?
>
> A. Yes.
>
> Q. What did Ray respond?
>
> A. He just went.
>
> Q. Okay. No discussion about what do you want to buy?
>
> A. Yeah.
>
> Q. Or why he wanted to go there?
>
> A. Yes, not between Steve and Ray, but between Samantha, me and Steve.

Id. at 33.

[12] Woodward contends that the girls stole the alcohol from the bed of the truck. 3/16/11 Deposition of Steven Woodward, pp. 17-18.

of Adrian Villalobos, pp. 22-27. After the dropping the girls off, the Petitioner drove Woodward to his house and watched a movie. 3/16/11 Deposition of Steven Woodward, p. 41.

Importantly, there is no evidence that shows an act or omission by Marcus that contributed to the delinquency of the minors. Likewise, the Petitioner never acted with Woodward to buy alcohol for the minors. In fact, the Petitioner never even discussed buying alcohol with the minors or Woodward. 2/24/11 Deposition of Kelly Mazur, p. 33. All he did was drive his truck.

The only person who has suggested that the Petitioner was criminally involved in any way was Woodward, who was charged with (4) counts of Providing Alcohol to a Minor, and four (4) counts of Contributing to the Delinquency of a Minor. R000366. Obviously, he has an interest in skewing his testimony to cast himself in an innocent light, while making his former friend Marcus, who was never charged with a crime, look culpable. This "evidence" cited by the Circuit Court is precisely what this Court disapproves of, as it is one-sided, problematic, conjectural, and problematic. *See Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (To meet its burden, the nonmoving party on a motion for summary judgment must offer more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor. The evidence illustrating the factual controversy cannot be conjectural or problematic.).

The Court also erroneously concluded that the Petitioner was negligent in failing to "respond to the call for help and assistance" after the girls allegedly called him to get a ride from the Villalobos' home. R000321. However, the Petitioner denies that he spoke to any of the girls that night after dropping Samantha Staubs and Kelly Mazur off at the end of Engle Road,

and there is no evidence that such a phone call ever took place. R000225-R000226. In support of its conclusion, the Court relied on the speculative testimony of just one person: Steven Woodward. R000321-R000322. However, Woodward was not even with the Petitioner when he allegedly received a phone call from the minors. In fact, he did not even know who told him that the girls allegedly called the Petitioner that night. 3/16/11 Deposition of Steven Woodward, p. 20. Kelly Mazur, who was at the party that night, did not know if the Petitioner was called:

> A. I'm just speculating, I'm not one hundred percent his number was called. I just think because Samantha talked to him earlier and we had gotten a ride from him, I think she probably would have called him.

2/24/11 Deposition of Kelly Mazur, p. 122. Likewise, Jessica Staubs never testified that the Petitioner refused to pick them up. After reviewing the record, it is clear that this allegation is not supported by reliable evidence, and the Circuit Could should never have based its finding of summary judgment on this issue.

In sum, there is no evidence that shows that the Petitioner breached a duty to either (1) obey the law; or (2) pick up the Staubses after their night of partying. He has consistently denied that he traveled to the Sweet Springs store to buy the minors alcohol. In fact the only unbiased evidence on this point -- Kelly Mazur's testimony -- shows that the Petitioner *did not* commit any crimes. Moreover, there is no credible evidence that the Petitioner ignored a request to pick up the Staubses from the Villalobos residence. Therefore, granting summary judgment in favor of the Respondent, and denying the Petitioner's Motion for Summary Judgment, was improper as a matter of law.

2. The law did not require the Petitioner to protect the minors from criminal acts of others.

Additionally, the Circuit Court ignored well-settled law stating that a person has no legal duty to protect another from a third party's willful, malicious, and criminal acts. In the case *sub judice*, the Petitioner did not owe a duty to the Staubses to prevent the illegal consumption of alcohol, the theft of a vehicle, driving under the influence, driving without a license, or reckless driving. R000362-R000366. Even if he might have owed a duty, he was not present when these acts occurred. Therefore, the Circuit Court committed clear legal error.

Generally, no person owes a duty to anyone to anticipate that a crime will be committed by another and to act upon that belief. 57A *Am. Jur. 2d Negligence* § 129. In determining the scope of the duty which a person owes to another, this Court has focused on the foreseeability of the harm. In *Robertson v. LeMaster*, it was recognized that:

> the obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.

171 W.Va. 607, 611-612, 301 S.E.2d 563, 568 (1983) (internal citation omitted). Generally, however, "a person does not have a duty to protect others from the deliberate criminal conduct of third parties." *Miller v. Whitworth*, 193 W.Va. 262, 266, 455 S.E.2d 821, 825 (1995) (citations omitted) (refusing to place a duty on landlord to protect tenants from criminal activity of third parties).

The case of *Hartman v. Bethany College* is instructive. 778 F. Supp. 286 (N.D. W. Va. 1991) (Stamp, J.). After drinking at an off-campus inn and being assaulted by other

customers, plaintiff, a seventeen-year-old freshman, and her parents alleged that her college failed to warn her of the drinking age in West Virginia and the unlawfulness of off-campus underage drinking. In finding no duty and dismissing the negligence claim, the United States District Court for the Northern District of West Virginia held:

> Bethany did not have a duty to protect Heather Hartman when she left the college campus and engaged in an illegal non-curricular activity [underage drinking] at Bubba's Bison Inn.... Bethany had no obligation to exercise due care over the specific circumstances that led to Hartman's injuries. So, Bethany did not breach a duty to exercise due care over Hartman under the circumstances.

Id. at 292-93 (citation omitted).

Additionally, the Houston Court of Appeals addressed a similar set of facts and held that a duty did not exist. *Kovar v. Krampitz*, 941 S.W.2d 249 (Tex. App. Houston 1996). In *Kovar*, an eighteen-year-old had a party at his grandfather's farm where another eighteen-year-old became intoxicated and was later killed in a car accident. The administrator of the estate sued the eighteen-year-old, his father, and his grandfather. The District Court granted summary judgment in favor of each defendant. *Id.* at 251-252. The Court of Appeals affirmed and held that neither the teenager nor the teenager's father owed a duty to prevent the plaintiff from becoming intoxicated after consuming alcohol at the party. *Id.* *See also Dorris v. Price*, 22 S.W.3d 42 (Tex. App. Eastland 2000) (holding that an adult is not liable under a negligence *per se* cause of action for providing alcoholic beverages to a minor); *Graff v. Beard*, 858 S.W.2d 918, 921-922 (Tex. 1993) (holding that a person has no common law duty to guests that are served alcohol, even if he knows they will be driving later); *Restatement (Second) Of Torts* 315 (1965) (noting that no general duty exists to control the conduct of others).

In light of this established jurisprudence, it defies common sense to find that the Petitioner, who has no relationship with Respondents' children, had a duty to (1) prevent them from breaking the law by drinking underage; and (2) prevent them from entering a stolen vehicle with an intoxicated, underage, unlicensed driver. The Petitioner had no such duty. Therefore, this Honorable Court should conclude that the Circuit Court erred in entering summary judgment for the Respondent. Since the Petitioner had no duty to shield the Staubses from their own criminal actions and the various felonies and misdemeanors committed by their friends, this Court should direct the entry of summary judgment in favor of the Petitioner.

C. EVEN ASSUMING THAT THE PETITIONER OWED A DUTY TO THE STAUBSES, HE SHOULD NOT HAVE BEEN HELD LIABLE, BECAUSE THE INTERVENING, CRIMINAL ACTS OF THE MINORS BROKE THE CHAIN OF CAUSATION.

Even if the record demonstrated a factual scenario giving rise to a duty owed to the Staubses by the Petitioner, proximate cause could never be proven. The presence of multiple, unforeseeable criminal acts broke any chain of causation presumably started by the Petitioner. R000362-R000366. The Circuit Court ignored the law of this State when it concluded that Marcus was negligent and was a proximate cause of Samantha Staubs' death and Jessica Staubs' injuries. By finding proximate cause, the Court committed reversible error.

The Circuit Court concluded that "[M.J.] [the driver of the stolen vehicle] was drunk because of Ray Marcus's actions. . . ." R000322. Though M.J. was not even in the vehicle that Marcus drove to the store earlier that night, the Court cites *Brewer v. Appalachian Constructors, Inc.* in support of its finding that the Petitioner proximately caused the Respondent's damages. Syl. Pt. 1, 135 W.Va. 739, 65 S.E.2d 87 (1951); R000322-R000323. *Brewer* holds that, "[w]here 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." *Id.* When *Brewer* is applied to the case at bar, it is obvious that the numerous criminal acts committed in between the time that the Petitioner dropped off Samantha Staubs and Kelley Mazur, and the time that M.J. stole and wrecked a vehicle, acted to break any chain of events allegedly started by the Petitioner.

1. Willful, malicious, criminal acts broke any potential chain of causation allegedly set in motion by the Petitioner.

This Court explained the concept of intervening cause in syllabus point three of *Wehner v. Weinstein*, as follows:

> 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.'**

191 W.Va. 149, 444 S.E.2d 27 (1994) (emphasis added) (citing Syl. Pt. 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)). *See also* Syl. Pt. 1, *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982). "In determining questions relating to the foreseeability element of proximate cause, the courts have uniformly applied what might be termed a practical, common sense test, the test of common experience." 57A *Am. Jur. 2d Negligence* § 489.

[G]enerally, "a willful, malicious, or criminal act breaks the chain of causation." *Yourtee v. Hubbard*, 196 W.Va. 683, 690, 474 S.E.2d 613 (1996). Although the undersigned could not find a case decided by this Court dealing with the exact issues at hand, other courts have. For example, in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, a

defendant had bought and delivered alcohol to the site of a fraternity party. 485 P.2d 18, 22 (Ore. 1971). At the party, a minor got intoxicated, drove, and had an accident in which a passenger was killed. The Oregon Supreme Court refused to impose liability on the defendant who dropped off the alcohol for the death of the passenger. The court explained that, "liability should not be extended to one who acts only as a conduit in providing alcohol to those who directly serve it to others." *Id.*

Other courts follow this reasoning. For example, in *Sanders By and Through Sanders v. Crosstown Market, Inc.*, a grocery store sold beer to minor who had not been drinking when he bought the beer. 850 P.2d 1061 (Okl. 1993). The Oklahoma Supreme Court held that the store could not be held liable for injury suffered by a second minor who drank beer the first minor bought, and who was subsequently involved in an automobile accident while she was driving under the influence of alcohol. The court reasoned that the remoteness of the second minor's connection with the grocery store, combined with her own willful, intentional misconduct in driving under the influence of alcohol, was not sufficient to impose liability. *Id.*

Here, the Petitioner is alleged to be only a conduit to providing alcohol to the minors -- the Respondent does not allege that the Petitioner bought the alcohol. The Complaint alleges that "[t]he Defendants Steven Woodward and Ray Marcus were negligent in providing intoxicating beverages to the Defendant M.J. and to Samantha Staubs and Jessica Staubs." R000344. In the *Plaintiff's Responses to Marcus' First Set of Interrogatories*, the allegations against the Petitioner are further explained:

> Kelly [Mazur] and Samantha [Staubs] had told Ray Marcus that they had wanted to get some alcohol. **Ray Marcus drove Samantha and Kelly to the Sweet Springs convenience store** in Virginia, **where Steve Woodward went in and bought them the**

> **malt liquor.** Ray then drove Samantha and Kelly and the malt liquor back to Engle Road, where he let them off with the malt liquor.

R000373 (emphasis added). Assuming that these allegations are true, the Petitioner only drove the vehicle to the convenience store and then dropped the girls off. He did not purchase the alcohol, or force the minors to drink it. Likewise, he did not steal and wreck the vehicle that M.J. was driving while intoxicated. Finally, it was impossible for the Petitioner to foresee that M.J. (a minor who was not even present in his vehicle that night) would consume alcohol, drive recklessly, without a license and under the influence of alcohol, or that Samantha Staubs and M.J. would steal a vehicle. Like the Defendant in *Wiener*, the Petitioner should not be held liable.

Not one (1), but five (5), willful, malicious, and criminal acts intervened to break any chain of causation between the Petitioner's alleged providing of alcohol to Samantha Staubs and Kelly Mazur and the injuries to Samantha and Jessica Staubs. First, Samantha and Jessica Staubs illegally consumed alcohol, since they were under the age of 21, the legal age to consume alcoholic beverages. R000373. Next, M.J. and Samantha Staubs stole a vehicle. *Id.* Then, M.J. drove said vehicle without a license, while intoxicated. R000365-R000366. Samantha and Jessica Staubs willingly entered this vehicle even though they knew that M.J. was drunk and had no driver's license. R000373. Finally, M.J.'s reckless driving caused the accident at issue, resulting in the death of Samantha Staubs and injury to Jessica Staubs. *Id.*; R000365-R000366. None of these acts were taken with innocent intention. All were motivated by the minors' desire to get drunk, and eventually, steal a vehicle.

The Petitioner could in no way have foreseen any of the willful and malicious acts that led up to the accident in question. It is clearly apparent that the commission of felony grand

theft by someone who was not even with the Petitioner that night breaks the alleged chain of causation. If Samantha Staubs and M.J. had not stolen a car, and if M.J. had not driven recklessly while under the influence of alcohol, Samantha Staubs would still be alive and Jessica Staubs would be uninjured. The criminal, intervening acts of M.J. and Samantha Staubs started the chain of events that proximately caused death and injuries. The commission of these serious offenses is not the normal consequence of underage drinking. Given the intervening, willful and malicious actions that could not have been foreseen by the Petitioner, any chain of causation was broken. The Circuit Court's failure to apply the law was serious error.

2. The Circuit Court misunderstands the holdings of *Yourtee* and *Anderson*.

It is worth noting that the Circuit Court criticizes the Petitioner for citing *Yourtee v. Hubbard.* 196 W.Va. 683, 690, 474 S.E.2d 613 (1996); R000324-R000326. Of course, *Yourtee* dealt with the theft of an unattended motor vehicle. However, the Petitioner never compared the facts of *Yourtee* to this case. Instead, this case was cited to show that this Court has held that an intervening negligent or criminal act, if unforeseeable, breaks the chain of causation. R000011. Several other cases in West Virginia also affirm this same exact principle of law. *See Harbaugh v. Coffinbarger*, 209 W.Va. 57, 543 S.E.2d 338, 345 (2000) (holding that decedent's decision to play Russian roulette was "[a]n intervening cause ... making it and it only, the proximate cause of the injury" even though defendant had supplied the loaded gun); *Hartman v. Bethany Coll.*, 778 F.Supp. 286, 292 (N.D.W.Va. 1991) (college's failure to remind a minor of West Virginia's drinking age and the dangers of drinking while underage was not proximate cause of her injuries resulting from drinking); *Ashworth v. Albers Med., Inc.*, 410 F.Supp.2d 471 (S.D.W.Va. 2005) (concluding that a drug manufacturer was not liable for injuries caused by

alleged criminal acts of third parties introducing counterfeit versions of the manufacturer's drug into the stream of commerce).

More importantly, the Court incorrectly contends that *Anderson v. Moulder*, acts to displace *Yourtee's* application to this case. 183 W.Va. 77, 394 S.E.2d 61 (1990); R000326-R000327. First, *Anderson* involves the sale of alcohol to minors by a licensed beer distributorship. Of course, the Respondent does not allege that the Petitioner illegally sold anything to Samantha Staubs and Kelly Mazur. Nor does the evidence suggest that a sale of alcohol was illegally made. Instead, the Respondent alleges that alcohol was illegally furnished to the minors, not sold. R000373. Second, *Anderson* in no way overrules *Yourtee* or any of the other cases holding that the willful, illegal acts of others act to break the chain of proximate causation. As such, *Anderson* has no application to this case.

In essence, the trial court fails to recognize that the intervening, illegal acts of M.J. and Samantha Staubs, which acted to break any chain of causation which may have been started by Petitioner's actions several hours before the accident, are the proximate causes of the minors' injuries and death. The Circuit Court's failure to apply well-established law results in reversible error.

D. EVEN IF THE PETITIONER HAD SUPPLIED ALCOHOL TO THE MINORS, WHICH PETITIONER DENIES, THE COURT ERRED IN FINDING HIM LIABLE, BECAUSE WEST VIRGINIA DOES NOT RECOGNIZE "SOCIAL HOST LIABILITY."

By finding that the Petitioner was liable to the Respondent, the trial court imposed social host liability on the Petitioner, a concept expressly rejected by this Court in *Overbaugh v. McCutcheon*. "[I]n West Virginia there is no 'dram shop' or social host liability." 183 W.Va. 386396 S.E.2d 153, 155-156 (1990); R000327. This Court held that, "absent a basis in either

common law principles or 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." *Id.* at 158.

Although the undersigned could not find a definition of "social host" put forth by this Court, "the term "social host" is used broadly to designate anyone who furnishes alcoholic beverage without remuneration." 29 *Causes of Action 2d* 435 (citing *Kapres v. Heller*, 536 Pa. 551, 640 A.2d 888 (1994)). After relevant jurisprudence is examined, it is clear that persons in many different situations have been found to be "social hosts." For example, it has been held that one who pays for another's drinks at a bar is considered a social host. *Solberg v. Johnson*, 306 Or. 484, 490, 760 P.2d 867 (1988). Here, the Respondent alleges that the Petitioner furnished alcohol to minors by driving them to the Sweet Springs store, where Woodward allegedly bought them alcohol. R000373. Thus, if the trial court were to believe the Respondent's allegations, it would support a finding by this Court that the Petitioner is a social host.

Courts in other jurisdictions without social host liability have rejected the same findings made by the Circuit Court in its attempt to impose liability against the Petitioner. *See, e.g, Wakulich v. Mraz,* 203 Ill. 2d 223, 785 N.E.2d 843 (2003) (complaint by mother whose 16–year–old daughter died after drinking a quart of alcohol, which alleged that social hosts were negligent in providing alcohol to daughter and inducing her to consume a dangerous amount, failed to state a cause of action; apart from the limited civil liability provided in the Dramshop Act, no social host liability existed in Illinois.); *Ritchie v. Goodman*, 161 S.W.3d 851 (Mo. Ct. App. S.D. 2005) (Homeowners, at whose house drinking party was held involving minors, were not responsible for fatal injuries teenager sustained when car of intoxicated minor driver, who

had been drinking at party at homeowners' house, collided with car in which teenager was a passenger; law did not recognize the theory that a social host was civilly liable for providing intoxicants to minors); *Sanders By and Through Sanders v. Crosstown Market, Inc.*, 850 P.2d 1061 (Okl. 1993) ("That Sanders was a minor does not serve to make Crosstown liable for Sanders's intentional misconduct. Sanders became drunk at Scott's party. Sanders violated 47 O.S. 1986 Supp. § 11-902.A.2 when she drove under the influence of alcohol. Without both intentional acts Sanders would not have been injured.").

More narrowly, social host liability cannot be applied to a person who furnishes alcohol to a minor. For example, in *Charles v Seigfried,* the Illinois Supreme Court ruled that social hosts could not be held liable for serving alcoholic beverages to minors who were subsequently injured as a result of their intoxication. 165 Ill 2d 482 (1995). The court reasoned that the Illinois judiciary had steadfastly adhered to the historic common-law rule that there is no cause of action for injuries arising out of the sale or gift of alcoholic beverages. *Id. See, e.g., Spivey v Sellers,* 185 Ga. App 241, 363 S.E.2d 856 (1987) (holding that an adult who purchased whiskey and beer, allegedly enticed a 15-year-old to consume it, then permitted her to drive his father's automobile, could not be held liable for injuries sustained by the minor when she crashed the car); *Estate of Ritchie v Farrell*, 213 Ill. App. 3d 846 (1991) (holding that an adult who purchased alcohol for several minors and then drove them around the city while they consumed the alcohol in his car could not be held liable in negligence for the death of one of the minor passengers who fell unconscious in the car and subsequently died of acute alcohol intoxication.); *Piccalo v. Nix,* 252 Mich. App. 675 (2002) (holding social host not liable to 18-year-old injured passenger who elected to consume alcohol and became intoxicated, and freely chose to accept

ride home from intoxicated driver in vehicle that did not have proper seating or restraints in rear compartment).

The trial court also found that it is impossible to claim that a person cannot be held liable for providing alcohol to a minor. The court reasoned: "[a]gain, if being a "social host" exonerates from liability adults who illegally provide alcohol to minors, then the law is turned upon its head." R000328. However, this ignores the point that a person can be held *criminally liable.* Just because civil liability in this case is not permitted does not mean that society is left without a remedy for this alleged misdeed.

Even if the Petitioner had helped to procure alcohol for the minors (which he denies), his actions would not have made him liable for the damages claimed by the Respondents, as West Virginia does not recognize social host liability. Accordingly, the Circuit Court erred in refusing to grant summary judgment in favor of the Petitioner.

E. THE CIRCUIT COURT ERRED BY MAKING NUMEROUS, ERRONEOUS FINDINGS OF FACT, AND BY IMPROPERLY WEIGHING THE EVIDENCE IN ORDER TO JUSTIFY SUMMARY JUDGMENT FOR THE RESPONDENT.

Finally, the Circuit Court made numerous findings of fact that are radically contrary to the evidence. The court was forced to make these findings in order to justify entering summary judgment for the Respondent. Of course, this Honorable Court has instructed judges that, "[t]he 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." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). For the reasons *supra,* the Circuit Court clearly violated this mandate.

1. **The Circuit Court erred in finding that the Petitioner was a "known party boy," who drove the girls into another state for the specific purpose of getting them alcohol.**

One of the most egregious of the Circuit Court's erroneous factual findings was the finding that Petitioner was a "known party boy", who drove the girls into another state for the specific purpose of getting them alcohol. R000331. The court went on to state that, "Petitioner has admitted his actions and there is no dispute regarding what he did." R000332. It is important to note that the Petitioner has *consistently* maintained his innocence. *See, e.g.,* R000352-R000360; May 2, 2011 Transcript from Summary Judgment Hearing, p. 6; R000004; R000221; R000223. He never admitted that he drove the girls into another state for the purpose of getting them alcohol. He testified that he drove to Virginia because his friend Steve Woodward wanted alcohol. 3/22/10 Deposition of Jonathon Ray Marcus, p. 13. The only thing Marcus ever "admitted" was that he picked up Samantha Staubs and Kelly Mazur to give them a ride; that, en route, he stopped at the Sweet Springs grocery and his friend, Steve Woodward, went into the store and bought Hurricane Malt Liquor; and that he transported the girls to intersection of Engle Road and Mission Road, where he dropped them off. *Id.* at pp. 9-14, 19-22. He never bought them alcohol, or handed them alcohol, or even got out of his vehicle. *Id.* at 19-22. The court's only basis for its conclusion that Marcus was a "known party boy" was Woodward's testimony. 3/16/11 Deposition of Steven Woodward, pp. 53-54. To the contrary, however, Kelly Mazur and M.J. all testified that they were not in the habit of "hanging out" with Marcus, because he was a "good boy" who never got in trouble.[13] Deposition of Kelly Mazur, p. 64; Deposition of M.J., pp. 13-14.

[13] Woodward is the only person that accuses the Petitioner of procuring alcohol for the minors. But, Woodward was the only adult who was criminally charged, so his testimony is aimed at painting his former friend, the Petitioner, in a bad light.

Furthermore, neither Marcus nor Woodward testified that Marcus drove into Virginia for the purpose of getting the girls alcohol. As previously indicated, Marcus drove to Virginia because his friend Steve Woodward wanted alcohol. 3/22/10 Deposition of Jonathon Ray Marcus, p. 13. Even Woodward, who was convicted of contributing to the delinquency of a minor, denies that he bought the Hurricanes for the girls -- he claims that he bought the alcohol for himself, and that the girls stole it out of the back of the truck when they were dropped off at Engle Road. 3/16/11 Deposition of Steven Woodward, pp. 17-18. Kelly Mazur, too, testified that the discussions regarding the purchase of the alcohol were between her, Samantha Staubs, and Steve Woodward -- Marcus was not involved in that conversation. 2/24/11 Deposition of Kelly Mazur, p. 33. She did not think Marcus did anything wrong. *Id.* at p. 61.

The Circuit Court's determination that the Petitioner drove into another state for the specific purpose of procuring alcohol for the girls could not have been reached without weighing the contradictory evidence on that point. As such, the Circuit Court's finding is contrary to the evidence.

2. The Circuit Court erred in finding that the Petitioner provided alcohol to Jessica Staubs.

The lower court also found that the Petitioner illegally provided alcohol to Jessica Staubs. R000328-R000331. The court's finding, however, is logically impossible and completely unsupported by the evidence. It is uncontested that the Petitioner did not purchase the alcohol that the minors illegally drank; that the Petitioner did not give alcohol to the girls that evening; and that the Petitioner never even had any contact with Jessica Staubs on the night in question.[14] R000142; R000158. These material, uncontested facts, however, were completely

[14] *See* Deposition of Kelly Mazur, p. 30.

ignored by the Circuit Court, constituting error. Not only did the trial court's finding that the Petitioner provided alcohol to Jessica Staubs ignore the parties' stipulations, but it also ignored the eyewitness testimony. For example, Kelly Mazur confirmed that the Petitioner did not buy the minors alcohol; Steve Woodward bought the alcohol. 2/24/11 Deposition of Kelly Mazur, p. 30.

Most importantly, Jessica Staubs herself testified that Woodward, not the Petitioner, gave Kelly Mazur alcohol. According to Jessica Staubs, when the Petitioner, Woodward, Mazur, and Samantha Staubs arrived at Engle Road, Woodward got out of the vehicle and handed the bag of alcohol to Samantha Staubs. The Petitioner did not exit the vehicle. *Id.* at 39; 2/24/11 Deposition of Jessica Staubs, pp. 27-30. Thus, even by the Respondent's own admission, the Petitioner never gave Jessica Staubs alcohol. Therefore, the trial court's finding is incorrect and should be reversed by this Honorable Court.

3. The court erred in finding that Respondent Jessica Staubs was "guilty of nothing" because the evidence shows that she was fully aware that her actions were illegal on the night of the accident.

The Circuit Court erred in finding that Jessica Staubs did nothing wrong on the night of the accident. The court held that Jessica Staubs could not be negligent, because, pursuant to West Virginia law, there is a rebuttable presumption that someone who is under the age of 14 is incapable of negligence. R000328-R000330. However, the trial court ignores that all of the facts in the case prove that she was not an innocent bystander that night. She was an active participant who partied all evening and committed several crimes. She even admits that she knew that her actions were wrong.

i. Jessica Staubs admitted that she drank vodka.

First, the Court's finding that "the Staubs girls did not drink any vodka" is patently false, and ignores Jessica's admission that she did, in fact, drink vodka on the night of the accident. R000315. Jessica Staubs did not try to hide this fact:

> Q. Who was drinking and what were they drinking?
>
> A. I was drinking, I know that. I know [M.J.] and me took, prior to drinking the 40s, we drank vodka.

2/24/11, Deposition of Jessica Staubs, pp. 41-42. Obviously, Jessica Staubs knew that drinking the vodka was wrong, too, because she testified that she filled the bottle up with water to hide the fact that they illegally drank Adrian Villalobos' parents' vodka. *Id.* The trial court's finding that the Staubs girls did not drink any vodka was directly contrary to the evidence.

ii. Jessica Staubs admits that she knowingly lied, broke the law, and stole, rebutting the presumption that she was incapable of negligence.

In support of its finding that Jessica Staubs was not negligent, the trial court cited *Pino v. Szuch*, which states that there is a rebuttable presumption that minors aged 7 to 14 are incapable of negligence. 185 W.Va. 476, 479-480, 408 S.E.2d 55, 58 - 59 (1991); R000328. However, *Pino* also explains that, "[t]here is no doubt that the presumption 'grows weaker as the fourteenth year grows closer.'" *Id.* (citing *Berman v. Philadelphia Board of Education*, 310 Pa. Super. 153, 159 (1983)).

Here, Jessica Staubs was six (6) months from turning 14 at the time of the December 10 accident, since her birthday is in June. *See* Action Taken Report, attached to the Petitioner's Motion. When her own admissions are examined, it is revealed that all of her actions were deliberately executed so that she and her friends could get out of their parents'

houses to get drunk. For example, Jessica Staubs' described her actions that night in the following testimony:

> Q. So what were you doing out late on the weekend in the dark?
>
> A. Getting in trouble apparently.
>
> Q. Did you -- were your parents home that night?
>
> A. Um hum.
>
> Q. Is that a yes?
>
> A. Yes.
>
> Q. Did you tell them where you were going before you left?
>
> A. No. I lied and told them I was staying somewhere else.
>
> Q. What did you tell them?
>
> A. I think I said I was staying at Heather's house.

2/24/11 Deposition of Jessica Staubs, p. 24. Jessica Staubs lied to her parents because she had planned to go to Mr. Villalobos' residence to have a party and to drink alcohol. *Id.* at p. 32. Jessica Staubs knew that she was not allowed to drink alcohol. In fact, she confirmed that she had gotten in trouble for drinking prior to the accident. *Id.* at p. 36.

Since Jessica had lied to her parents, telling them that she was staying at a friend's house for the night, she could not have her parents pick her up at the end of the night. 2/24/11 Deposition of Kelly Mazur, p. 22. Instead of owning up to her lies and contacting her parents, she decided to get into a vehicle stolen by Samantha Staubs and M.J. 2/24/11 Deposition of Jessica Staubs, pp. 50-54; Jessica Staubs testified that they knew M.J. had been drinking that night, and that she was intoxicated. Yet, she got into the vehicle anyway, to avoid getting in trouble with her parents. *Id.* at pp. 53-55.

When examining the uncontested evidence, it is clear that the Circuit Court's error is twofold. First, the Circuit Court's finding that Jessica Staubs did not drink vodka is in direct contravention of the evidence. Next, the rebuttable presumption that Jessica Staubs was incapable of being guilty of negligence has been rebutted by her own statements -- Jessica Staubs was completely aware that she was breaking the law on the night in question. As such, the presumption that she is incapable of negligence is broken. Based on the evidence in the record before this Honorable Court, the Circuit Court's findings should be reversed.

4. The Circuit Court inappropriately weighed the evidence to assign percentages of negligence to the Petitioner and the Respondent.

Next, the Circuit Court did precisely what this Court prohibits -- weighed the evidence in this case to determine the percentage of negligence of both the Petitioner and Jessica Staubs. *See Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994), *supra* at p. 26. The Court specifically found that: "[t]he 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 [sic] negligence was less than 50% of the total negligence in the case." R000334. It is impossible to make this determination without weighing the evidence to determine how much each party was at fault.[15] Because weighing the evidence is within the province of the jury, not the Court, this finding, too, constitutes reversible error.

[15] Though the Circuit Court assigned a percentage of negligence to Marcus, and addressed whether there was negligence by Jessica Staubs, it did not consider whether the Plaintiff's decedent, Samantha Staubs, was also guilty of contributory negligence. Had this matter gone to trial by jury, the jury would have been required to assess the percentage of Samantha's negligence. Since Samantha was involved in procuring the alcohol, drinking alcohol while underage, and stealing the vehicle which was ultimately involved in the accident, her degree of comparative negligence likely would have equaled or exceeded any negligence by Marcus, thereby barring any recovery against the Defendant/Petitioner.

VI. CONCLUSION

This Honorable Court should reverse the Circuit Court of Berkeley County's May 25, 2011 Order and direct the entry of summary judgment in favor of the Petitioner. As the record demonstrates, the Circuit Court erroneously found that the Petitioner was guilty of negligence. There is no evidence that the Petitioner breached any alleged duties to Samantha and Jessica Staubs. Even assuming that the Petitioner breached a legal duty, however, any such breach was certainly not a proximate cause of the accident. If it might have been, the numerous criminal acts which occurred thereafter would have acted to cut off Marcus' liability. Moreover, the trial court erred in finding that the Petitioner was not a "social host." Finally, the trial court made numerous, erroneous findings of fact and inappropriately weighed the evidence in this case, in direct contravention of this Court's mandate set forth in *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). For these reasons, this Honorable Court should reverse and vacate the May 25, 2011 Order from which the Petitioner has appealed, and enter summary judgment in favor of the Petitioner.

Respectfully submitted this 20th day of September, 2011.

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By Counsel,

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CERTIFICATE OF SERVICE

I, Tracey A. Rohrbaugh, hereby certify that, on the 20th day of September, 2011, I served a true and exact copy of the foregoing **PETITIONER'S BRIEF,** by United States mail, postage prepaid, upon the following counsel of record:

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