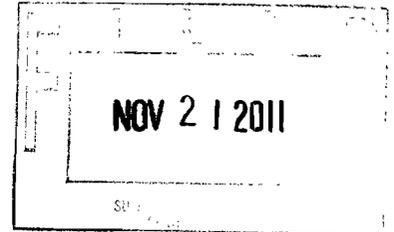


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IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

**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.**

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**REPLY IN SUPPORT OF PETITIONER'S BRIEF**

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COMES NOW the Petitioner, Jonathon Ray Marcus, by counsel, and respectfully submits the following *Reply in Support of Petitioner's Brief* in accordance with this Honorable Court's June 27, 2011 Scheduling Order and W. Va. Rev. Rule App. Pro. 10(g).

**A. THE RESPONDENT WAIVED HER OBJECTION TO RESOLUTION OF THIS CASE ON SUMMARY JUDGMENT BY FILING A CROSS-MOTION FOR SUMMARY JUDGMENT AND FAILING TO LITIGATE THIS ISSUE AT THE TRIAL COURT LEVEL.**

The Respondent first argues that the Petitioner is precluded from appealing the trial court's decision. In support of this argument, she claims that the high-low agreement does not address the possibility of an appeal by either party. *See* Respondent's Brief, p. 9. Upon closer inspection, it is easy to see that the Respondent waived this argument since it was not raised at the trial court level. Moreover, even if the Respondent properly preserved her objection, there is authority from cases interpreting nearly the exact same high-low agreement stating that challenges of a finding of liability are preserved if not specifically mentioned in the agreement.

**1. The Respondent waived her objection relating to the scope of the high-low agreement.**

The Respondent highlights the fact that the high-low agreement does not mention appellate rights. *Id.* Interestingly, though, she does not mention that the agreement does not specifically permit the parties to proceed on summary judgment either. R000139-R000218. Despite the fact that the agreement does not specifically *permit* proceeding on summary judgment, Respondent agreed that this case could be resolved on summary judgment, and, in fact, filed her own cross-motion for summary judgment. At the trial court level, she did not follow the same reasoning that she does in her brief -- that any course of conduct not specifically permitted in the agreement is barred -- as she did not object to resolving the case via motion. As

such, the Respondent waived all objections to limiting the scope of the agreement pursuant to this State's applicable law, since this argument was not preserved below.

The controlling law on this point is simple and straightforward: the "general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995) (citing *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W. Va. 223,226,438 S.E.2d 15, 18, (1993) (citations omitted)). This Court has held that, in limited circumstances, issues not raised in the Circuit Court may be addressed on appeal. See *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005). However in *Louk* the Court was addressing a constitutional question relating to unanimous jury verdicts and specifically held that "a constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." *Id.* at 791.

The issue at hand, specifically, the scope of the agreement, is obviously not jurisdictional or a constitutional issue in this case. Thus, the general rule that it is impermissible to raise issues for the first time on appeal applies and the Respondent has waived the argument that the Petitioner exceeded the scope of the agreement. The Respondent simply cannot raise this question for the first time on appeal. Since this issue was not raised below, the Circuit Court was denied the opportunity to review the evidentiary record and issue findings of fact and conclusions of law. Because the Circuit Court did not have the opportunity to rule on this issue, this Court does not have the benefit of the Circuit Court's rulings on this precise legal issue. Therefore, this Court should reject the Respondent's argument because this issue is being raised for the first time on appeal.

**2. The New York Supreme Court has found that challenges of a finding of liability are preserved if not specifically addressed in the high-low agreement.**

Even in the absence of a waiver argument, sound legal reasoning mandates rejection of Respondent's argument that this matter cannot be addressed on appeal. This Honorable Court has not addressed the issue presented, specifically, whether appellate rights or post-trial motions are preserved if not addressed in a high-low agreement. However, the New York Supreme Court has answered this question in the affirmative. In *Dobrovinskaya v. Dembitzer*, the parties stipulated that, "the jury's verdict on liability would resolve the entire action." 77 A.D.3d 609, 610, 908 N.Y.S.2d 730, 730 (N.Y. 2010). The damages award, they agreed, would be based upon the percentage of fault ascribed to defendant, with a high of \$100,000 and a low of \$25,000, and \$2,500 awarded to plaintiff, within that high-low, for every percentage point of fault against defendant. *Dobrovinskaya v. Dembitzer*, 858 N.Y.S.2d 874, 876-877 (N.Y. Sup. 2008) (the case below, setting forth a more specific account of the facts; overruled on other grounds). They further agreed that "neither side will enter judgment." *Id.* at 877. The case proceeded to a jury trial. The jury found that defendant was negligent, but that that negligence was not "a substantial factor in bringing about the accident." *Id.* The plaintiff moved to set aside the verdict as against the weight of the evidence. The defendant contended that the existence of the high-low agreement deprived the court of the power to set aside the verdict. *Id.*

The New York Supreme Court, Appellate Division held that the high-low agreement did not bar the post-trial motion. The court reasoned:

Contrary to the defendant's contention, the Supreme Court did not err in considering the merits of the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict in the defendant's favor on the issue of liability. **The parties' "high-low" agreement neither expressly prohibited the plaintiff from making a post verdict motion nor governed the issue of liability.**

*Id.* at 610 (citations omitted) (emphasis added).

*Dobrovinskaya* confirms that when a high-low agreement is in place, and permits the parties to contest liability, the party aggrieved retains the right to challenge the finding of liability. However, once the issue of liability and apportionment of comparative fault is resolved, whether at trial or at the appellate level, the high-low agreement will bind as to damages. This Court should adopt the reasoning of *Dobrovinskaya* and find that appellate rights are preserved if not specifically prohibited by the high-low agreement.

**B. THE PETITIONER HAS STANDING TO APPEAL BECAUSE HE IS THE REAL PARTY IN INTEREST AND A NAMED PARTY IN THIS LAWSUIT.**

Next, the Respondent claims that the Petitioner, a named party in this case, has no standing to appeal the trial court's entry of summary judgment. *See* Respondent's Brief, p. 11. In support of this argument, the Respondent argues that the high-low settlement agreement was between the Respondent and Nationwide, the Petitioner's insurer. *Id.*<sup>1</sup> The Petitioner also urges this Court to find that the Petitioner has no standing because "[a]fter the high-low agreement was executed, it was no longer possible for there ever to be any judgment against the Petitioner or for anything which happened thereafter in this case to affect the Petitioner in any way." *Id.* p. 12.

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<sup>1</sup> The Respondent also repeatedly emphasizes that "Lori Ann Staubs had her own first-party contract with Nationwide." *See, e.g.,* Respondent's Brief, p. 15. It is important for this Court to note that Nationwide did not have an insurance contract with the Petitioner by virtue of the high-low agreement. Nationwide only has a duty to indemnify and defend its insured, the Petitioner. The Respondent's suggestion that Nationwide owes any duties to the Respondent, as an insurer, is a classic red herring.

Not only does this argument fly in the face of common legal principles, it also ignores the very nature of an adversarial case and the effects that it can have on a party.

Nationwide executed the high-low agreement at issue because it has the obligation and right to defend in the name of its insured, the Petitioner, who is the real party in interest. It is well-settled law in this State that an insurer has a right and duty to defend its insured. *Tackett v. American Motorists Ins. Co.*, 584 S.E.2d 158, 213 W.Va. 524 (2003). See, e.g., W. Va. Code § 33-6-30. Although dealing primarily with rights and duties of uninsured and underinsured motorists carriers, the following explanation from *State ex rel. Allstate Ins. Co. v. Karl*, is applicable to the case at bar:

[T]he named defendant is the tortfeasor. It is this party who has due process rights. The underinsured carrier, if properly brought into a case, has a duty under its contract and the language of W.Va.Code, 33-6-31(d), to afford coverage to the plaintiff and to pay up to the policy limits on any judgment obtained against the defendant not covered by the tortfeasor's liability carrier.

190 W. Va. 176, 184-85, 437 S.E.2d 749, 757-58 (1993).

This passage clarifies that it is the Petitioner -- not Nationwide -- that has appellate rights in this case. An insurance company does not gain appellate rights in a lawsuit simply because it has a financial interest in the subject matter. See *Capitol Fuels, Inc. v. Clark Equipment Co.*, 176 W.Va. 277, 342 S.E.2d 245 (1986). To the contrary, the named alleged tortfeasor is the only party that may enforce appellate rights.

It is also absurd to suggest that the Petitioner lost all rights and interest in this lawsuit simply because a high-low agreement was executed. The Petitioner has an interest in defending this case so that a judgment is not entered against him. Surely, it is only natural for a

person to avoid a civil judgment. The Respondent has set forth an oversimplified view of the Petitioner's interest in this lawsuit.

In sum, Nationwide was acting on behalf of its insure, the Petitioner, in negotiating and executing the high-low agreement. Therefore, based on clear precedent and indisputable legal principles, it is apparent that the Petitioner alone has a right to appeal the Circuit Court's finding of liability.

**C. THE RESPONDENT IGNORES MARCUS' DENIAL OF BEING INVOLVED IN A PLAN TO GET THE MINORS ALCOHOL.**

Next, the Respondent claims that the trial court correctly found that Marcus breached a duty to the Petitioner's minor children in planning to buy them alcohol. In conspiring to execute this plan, the Respondent argues that a duty was breached because the Petitioner intentionally broke several laws. *See* Petitioner's Brief, p. 15. However, there is a major flaw in this argument: the Petitioner denies being involved in *any* plan to get the minors alcohol.

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. 2/24/11 Deposition of Kelly Mazur, 16-18, 28-30, 33, 39. There is no evidence that shows that the Petitioner breached a duty to obey the law. He has consistently denied that he traveled to the Sweet Springs store to buy the minors alcohol. 3/22/10 Deposition of Jonathon Ray Marcus, p. 13, -14, 19-22. In fact the only unbiased evidence on this point -- Kelly Mazur's testimony -- shows that the Petitioner *did not* commit any crimes. *See, e.g.*, Petitioner's Brief, Section B. Therefore, it is error for the Circuit Court to find that the Petitioner breached a duty by violating the law.

Again, the only person who has suggested that the Petitioner was criminally involved in any way was Steve 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. Though he was adjudicated guilty of these crimes, he nevertheless refuses to accept responsibility for his crimes, and instead seeks to pin the blame on someone else. Moreover, he testified that he had a falling out with the Petitioner after this incident occurred. *See* Exhibit C, Deposition of Steven Woodward, p. 14. This shows a motive to accuse his former friend, the Petitioner, of criminal conduct. Woodward's lack of credibility is also exposed when he testified that he denies ever buying the girls alcohol. 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. Exh. C, Deposition of Steven Woodward, p. 17-18. The Circuit Court's reliance on Woodward's testimony 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.). Therefore, the Circuit Court's finding that the Petitioner breached a legal duty to the Plaintiffs is reversible error.

**D. THE RESPONDENT IGNORES IMPORTANT TESTIMONY WHEN SHE CLAIMS THAT THE PETITIONER FAILED TO "RESPOND TO THE CALL FOR HELP AND ASSISTANCE."**

Next, the Respondent contends that the Circuit Court correctly found that Marcus was negligent in failing to "respond to the call for help and assistance" after the minors allegedly called him to get a ride from the Villalobos' home. *See* Respondent's Brief, p. 19. However,

there is no actual evidence that such a phone call was ever made. Only speculative testimony is contained in the record. Moreover, the Respondent fails to mention important testimony, thereby presenting an incomplete, misleading picture of the facts. Respondents rely upon the unreliable testimony of Steve Woodward. Woodward, interestingly, did not witness a phone call being made to Marcus -- it was just something he believes someone told him. In fact, he was not even sure who told him that the girls allegedly called Marcus:

A. It was either Ray or someone had called and said, did I know that the people that was with us last night had went to a party, you know, that they apparently got in someone's liquor cabinet and stole some Vodka, got drunk, called Ray for a ride home, which he wouldn't do, so they needed a ride still yet so, apparently, they stole a toe [sic] truck or a truck or something and wrecked the truck.

Q. So who was it that made that phone call; do you remember?

A. I believe it was Ray.

Q. But you are not sure?

A. I'm not sure. It's been so long.

Exh. C, Deposition of Steven Woodward, p. 20. The Respondent neglected to cite this portion of the transcript in her brief.

Kelly Mazur, too, admitted that she did not know for sure if Marcus was ever 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.

Exh. A, Deposition of Kelly Mazur, p. 122. The Respondent also neglected to include this testimony in her Brief.

The Circuit 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.

**E. EVEN IF A LEGAL DUTY WAS OWED, THE INTERVENING CRIMINAL ACTS OF THE MINORS BROKE THE CHAIN OF CAUSATION.**

The Respondent continues to maintain that Marcus' driving a vehicle equates to the proximate cause of Samantha Staubs' death and Jessica Staubs' injuries. *See* Respondent's Brief, p. 21. However, the contention is illogical and not supported by law. Certainly, the acts of the Petitioner did not continue unbroken, and were not the "efficient" cause of the injury. *See Brewer v. Appalachian Constructors, Inc.*, Syllabus Point 1, 135 W.Va. 739, 65 S.E.2d 87 (1951) ("[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.") It is obvious that the numerous criminal acts committed in between the time that the Petitioner dropped the girls off, and the time that M.J. stole and wrecked a vehicle, acted to break any chain of events allegedly started by the Petitioner.

This case is a textbook example of intervening cause. The Court has already held that "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). *See also Harbaugh v. Coffinbarger*, 209 W.Va. 57, 543 S.E.2d 338, 345 (2000). This well-settled law must be applied to the case at

hand. The commission of felony grand theft by someone who was not even with the Petitioner that night breaks the alleged chain of causation started by the Petitioner. 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. It is absurd to suggest otherwise.

**F. YOURTEE WAS CITED BECAUSE IT IS CONTROLLING LAW IN THIS CASE.**

The Respondent, like the trial court, argues that *Yourtee v. Hubbard* was inappropriately cited by the Petitioner in his Motion for Summary Judgment. 196 W.Va. 683, 690, 474 S.E.2d 613 (1996); R000324-R000326. A simple examination of the Petitioner's briefs shows why this case was cited. Unfortunately, it appears that neither the Court nor the Respondent took this necessary step. In citing *Yourtee*, the Petitioner emphasized that this Court has held that "[g]enerally, a willful, malicious, or criminal act breaks the chain of causation." *Id.* at 691; R000011. Instead of recognizing the legal principle for which *Yourtee* was cited, the Respondent engages in the same faulty analysis as the trial court.

This Honorable Court must view both the analysis of the trial court and the Respondent in full context. As mentioned in the Petition for Appeal, the Circuit Court entered, nearly verbatim, the Respondent's proposed order denying the Petitioner's motion for summary judgment, and granting the Respondent's cross-motion for summary judgment. *Compare* R000311- R000344 with R000193- R000218. For the same reasons cited in the Petition for Appeal, this analysis squarely ignores the actual legal analysis set forth by the Petitioner in his Motion for Summary Judgment. This Court should find that the trial court's adoption of the

Respondent's proposed order was error, since said proposed order had numerous misstatements of the law and mirrored inappropriate adversarial arguments set forth in the Respondent's Cross-Motion for Summary Judgment.

**G. THE RESPONDENT CITES NO LAW TO SUPPORT HIS ARGUMENT THAT THE PETITIONER SHOULD BE FOUND LIABLE AS A SOCIAL HOST.**

Next, the Respondent argues that the Petitioner is not exempt from social host liability laws. *See* Respondent's Brief, pp. 26-30. However, she cites no West Virginia case law that displaces *Overbaugh v. McCutcheon*, 183 W.Va. 386396 S.E.2d 153, 155-156 (1990) (“[I]n West Virginia there is no ‘dram shop’ or social host liability). She also does not provide a contrary definition of “social host”, which has been defined as “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)). Despite the Respondent's bald assertions to the contrary, our State refuses to impose social host liability. There is no legislation or case law even suggesting that this protection does not apply to the Petitioner.

Additionally, the Respondent claims that finding for the Petitioner on this point is against the public policy of this State. Again, no law is cited in support of this position. To the contrary, imposing social host liability would fly in the face of this Court's prior rulings, which have been in place for decades. The Respondent also claims that refusing to impose liability on the Petitioner would act against this State's general policies in protection of children. However, the Respondent fails to realize that such policies will not be offended here; a person can be held *criminally liable*. Just because the Petitioner is not civilly liable to the Petitioner does not mean that society is left without a remedy for this alleged misdeed. In fact, Woodward was prosecuted and served time in jail for the offense of purchasing alcohol for the minors. He was named as a

party in this civil suit as well, and default has been entered against him. As such, this Court should reject the Respondent's arguments as being without merit

**H. THE RESPONDENT POINTS TO NOTHING IN THE RECORD SHOWING THAT THE CIRCUIT COURT PROPERLY WEIGHED THE EVIDENCE IN GRANTING SUMMARY JUDGMENT.**

The Respondent claims that each and every finding in the Circuit Court of Berkeley County's May 25, 2011 Order entering summary judgment is legally proper and supported by undisputed facts. *See* Respondent's Brief, p. 30. This could not be farther from the truth. For example, it was inappropriate for the Circuit Court to determine that the Petitioner was a "known party boy." R000331. Not only is this evidence irrelevant and inappropriate when considering the real issues in the case, it is also not supported by the facts in the record. The Court made this inappropriate finding based on the testimony of one person - Steven Woodward. 3/16/11 Deposition of Steven Woodward, pp. 53-54. The Court will recall, as explained *supra* in the Petitioner's Brief, that this witness is not credible. *See* Petitioner's Brief, p. 27. However, the trial court still made this unnecessary finding.

Next, the Circuit Court did, in fact, find that the Petitioner illegally provided alcohol to Jessica Staubs, despite the Respondent's claims to the contrary. *See* Respondent's Brief, p. 33. The Court specifically made the following findings:

Jessica Staubs did drink some of the Hurricane Malt Liquor which Ray Marcus and Steven Woodward procured illegally for the minor girls.

\* \* \* \* \*

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.**

R000329; R000330 (emphasis added). These findings unequivocally show that the trial court found that Petitioner illegally provided Jessica Staubs with alcohol. No other conclusion can be reached.

Likewise, it is disingenuous for the Respondent to claim there is no firm evidence that Jessica Staubs drank vodka at the party that night. *See* Respondent's Brief, p. 40. This is patently false. In fact, Jessica Staubs *admitted*, at her own deposition, that she drank vodka -- which she stole from her friend's parents -- during the party:

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 had illegally drunk the vodka. *Id.* The trial court's finding that the Staubs girls did not drink any vodka was directly contrary to the evidence.

Finally, it is incredulous for the Respondent to suggest that the trial court was correct in assigning percentages of negligence by weighing the evidence solely because there was a high-low settlement agreement in place. *See* Respondent's Brief, p. 35. First, the agreement has nothing to do with the legal issue in this case -- Petitioner's liability. This attempt to predict what the trial court was thinking shows that the order being appealed from is riddled with error. If the Court indicated that it was basing its decision on the high-low agreement

(which would be improper), the Respondent would not have to guess what the court was thinking in assigning percentages of negligence to some, but not all of the players in this case. Therefore, this argument must be disregarded.

Second, the Respondent improperly makes another attempt to guess why the court only considered one of the Respondent's daughters -- Jessica Staubs -- in improperly assigning percentages of fault. She reasons that "Jessica Staubs is the easier example." *See* Respondent's Brief, p. 38. However, this is not the way our civil justice system works. Courts are not permitted to pick and choose some, but not all of the parties, in assigning percentages of negligence. Nor are courts entitled to improperly weigh material facts in granting summary judgment. This is exactly what the trial court did. The Respondent's attempt to explain away the Circuit Court's improper findings only highlights the serious errors below.

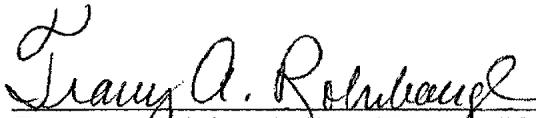
## **I. CONCLUSION**

The Respondent has not presented any evidence or legal authorities that demonstrate that the entry of summary judgment was proper. Therefore, 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. The record below shows that 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. Additionally, 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 legal authority. For these reasons, this Honorable Court should reverse and vacate the May 25, 2011 Order from which the Petitioner has appealed, and direct the entry of summary judgment in favor of the Petitioner.

Respectfully submitted this 18<sup>th</sup> day of November, 2011.

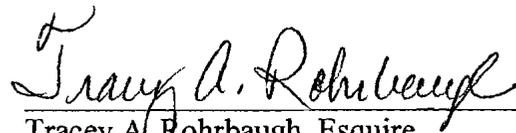
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**CERTIFICATE OF SERVICE**

I, Tracey A. Rohrbaugh, hereby certify that, on the 18<sup>th</sup> day of November, 2011, I served a true and exact copy of the foregoing **REPLY IN SUPPORT OF PETITIONER'S BRIEF**, by United States mail, postage prepaid, upon the following counsel of record:

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