

JONATHON RAY MARCUS,

Petitioner/Defendant below,

vs.

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

LORI ANN STAUBS, as mother and
next friend of JESSICA LYNN STAUBS,
a minor child, and as Administratrix of the
Estate of SAMANTHA NICHOLE DAWN
STAUBS, deceased,

Respondent/Plaintiff below.

RESPONDENT'S BRIEF

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Lori Ann Staubs

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III. ASSIGNMENTS OF ERROR

The Respondent assigns no error in the decision of the Circuit Court of Jefferson County, and in accordance with Rule 10(d) of the West Virginia Rules of Appellate Procedure, the Respondent does not restate the Petitioner's assignments of error.

IV. STATEMENT OF THE CASE

Just after midnight on the morning of December 10, 2006, Samantha Staubs died in a single-vehicle accident on Mission Road in Jefferson County. Samantha was 14 years old. She was a passenger in a stolen truck being driven by another minor girl, M. J., also 14 years old. Samantha Staubs' little sister Jessica, age 13 at the time, was also a passenger in the truck. Jessica suffered a severe brain injury in the accident. The events which led directly to the death of Samantha Staubs and the injuries to Jessica Staubs began with the actions of the Petitioner Jonathon Ray Marcus on December 9, 2006.

Jonathon Ray Marcus ("Ray Marcus") was 18 years old at the time and was already known by his friends to be a drinker and involved in the party lifestyle.¹ On December 9, 2006, Mr. Marcus had been to the movies with his friends Steven Woodward, and Mr. Woodward's two younger brothers, Kevin and Jeremy. Steven Woodward was 26 years old, and he had just been released from a year in jail upon a conviction for receiving stolen property,² Ray Marcus had driven them all to the movie in his Toyota pick-up truck. After the movie, Ray Marcus dropped off Kevin Woodward, and then Mr. Marcus and Steven Woodward drove to the home of Kelly Mazur to pick up two young girls, Kelly Mazur, age 15, and Samantha Staubs, age 14.

¹ Deposition of Steven Woodward; March 16, 2011; page 53, line 7 – page 54, line 19;

² Deposition of Steven Woodward; March 16, 2011; page 51, lines 8-13; page 68, lines 1-5;

Kelly Mazur had called Ray Marcus because she and Samantha Staubs wanted a ride from Kelly Mazur's home to meet Samantha's little sister Jessica Staubs, their friend M. J., and other friends of theirs at the top of Engle Road, near the home of a friend, Adrian Villalobos, age 14. Ray Marcus was someone the girls knew who was old enough to drive. The girls knew Ray Marcus because he had driven them places before and had previously taken them "hill-hopping" in his truck. "Hill-hopping" was what the girls called it when Ray Marcus would load middle school girls in the bed of his small pick-up truck and then drive at high speeds up and down hills, causing the girls to bounce up and down in the bed of the truck.³

At 26 years of age, Steven Woodward was the only person in Ray Marcus's truck old enough to buy alcohol. Petitioner was 18, but not old enough to buy alcohol. Ray Marcus drove Steven Woodward and the two girls into Virginia specifically so that Steven Woodward could buy alcohol for the two girls. Ray Marcus drove these two young girls and Steven Woodward to the Sweet Springs convenience store located in the Commonwealth of Virginia. He parked at the store. The girls gave Steven Woodward \$10.00 or \$15.00, and he went into the store and purchased four or five 40 oz. bottles of Hurricane Malt Liquor, the alcohol which these girls (and their even younger friends) ultimately consumed. Ray Marcus and the two girls remained in Mr. Marcus's truck while Mr. Woodward bought the alcohol.

Q. What did you all discuss before you got to the store?

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

Q. And Ray [Marcus] asked you this?

A. Yeah. Ray asked me this.....

(Deposition of Steven Woodward, March 16, 2011; page 31, lines 14-21)

³ Deposition of Jessica Staubs; February 24, 2011; page 11, line 6 – page 13, line 18;

Steven Woodward was ultimately convicted of contributing to the delinquency of minors and spent 15 months in jail for his offense on December 9, 2006.⁴ More than four years after these events, Mr. Woodward was unequivocal about the fact that Ray Marcus has asked him to get the alcohol for these children:

Q And who was it that asked you?
A Ray asked me.
Q. And as best as you can recall, what were the specific words?
A They wanted to know if I could get them some alcohol.....
(Deposition of Steven Woodward, March 16, 2011; page 57, lines 1-6)

Kelly Mazur testified that when Ray Marcus picked them up at her house, they had started out toward their destination of Engle Road. However, they were interested in getting some alcohol, and Mr. Woodward said he would buy it for them. Mr. Woodward said “yeah, just you don’t know who I am ...”⁵ Executing this very bad plan, and instead of simply taking them to meet their friends, Ray Marcus drove the girls to the store in Virginia so Steven Woodward could buy alcohol for them, a diversion of twenty minutes into Virginia.⁶

After Mr. Marcus had taken these children to Virginia for Mr. Woodward to buy them the malt liquor, and after the alcohol had been procured, Ray Marcus took the two girls to the top of Engle Road, where the girls were to meet their friends.

At the meeting place on Engle Road, Kelly Mazur and Samantha Staubs got out of Mr. Marcus’s truck, where their friends met them. Mr. Woodward took the bottles of Hurricane Malt Liquor out of the truck, and gave them to the girls.⁷ The girls and their friends took the malt

⁴ Deposition of Steven Woodward, March 16, 2011; page 14, lines 9-18;

⁵ Deposition of Kelly Mazur; February 24, 2011; page 30, lines 12-21;

⁶ Deposition of Kelly Mazur; February 24, 2011; page 31, lines 1-16;

⁷ Deposition of Kelly Mazur; February 24, 2011; page 39, line 1 – page 40, line 1;

liquor, and they walked from the meeting place down to the home of Adrian Villalobos. Mr. Marcus and Mr. Woodward then left them and drove off.

Adrian Villalobos was 14 years old and in the eighth grade. Adrian Villalobos lived with his father and stepmother, who were out shopping when the party commenced at his house at around 10:00 p.m.⁸ The testimony establishes that there were seven children at the home of Adrian Villalobos. In addition to Adrian Villalobos, two other boys, friends of his from school, were there. They were Adam Longerbeam and Matt Lonis. Those two boys were planning to spend the night (a Saturday night) at Adrian's house. Jessica Staubs, age 13, and M. J., age 14, arrived on foot, having walked to Adrian Villalobos's house from the Staubs home. The five of them (Adrian Villalobos, Adam Longerbeam, Matt Lonis, Jessica Staubs and M.J.) walked from the Villalobos house a short distance up the hill to the junction of Mission Road and Engle Road, where Ray Marcus dropped off the other two girls, Samantha Staubs and Kelly Mazur and the Hurricane Malt Liquor "40s"⁹

At the home of Adrian Villalobos, these children drank the Hurricane Malt Liquor 40s. Quite predictably, the children became intoxicated. After drinking the malt liquor, some of them also drank some vodka which belonged to Adrian Villalobos's father. The four girls were all planning to spend the night at the Villalobos home as well.¹⁰

The party and the girls' plans to spend the night ended when the adult members of the Villalobos family returned home from grocery shopping at around 11:00 p.m.¹¹ Mr. Villalobos

⁸ Deposition of Adrian Villalobos, March 16, 2011, page 63, lines 19-25;

⁹ During the course of discovery in this case, it was learned that these Hurricane Malt Liquor Beverages are referred to sometimes as "40s," a reference to the volume of malt liquor within each bottle.

¹⁰ Deposition of Kelly Mazur, February 24, 2011, page 115, line 16 – page 116, line 1;

¹¹ Deposition of Adrian Villalobos, March 16, 2011, page 85, lines 15-22;

told his son that the girls had to leave. Adrian's stepmother did not want them spending the night.¹² Adrian broke the news to the girls.

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

After walking around for a while looking for a vehicle, M.J. and Samantha Staubs found a truck with its keys in the ignition. The truck was in a driveway at a house down the road. M.J. opened the door, got in, and started it up. Samantha Staubs got in the passenger seat, and M.J. drove the truck back to the home of Adrian Villalobos.

Jessica Staubs and Kelly Mazur were still at the Villalobos home. They had fallen asleep. They were awakened when Samantha came to the door. Told that it was time for them to leave, they got up and left with the other two girls. They climbed into the back seat of the truck which M.J. was driving. Samantha Staubs again got in the front passenger seat.

M.J., who had no license to drive, headed down Mission Road. She was driving much too fast. She was intoxicated. On Mission Road, a winding, hilly country road, as she was

¹² Deposition of Adrian Villalobos, March 16, 2011, page 87, line 21 to page 88, line 7;

¹³ Deposition of Adrian Villalobos, March 16, 2011, page 91, line 16 – page 92, line 20;

¹⁴ Deposition of Kelly Mazur, February 24, 2011, page 119, lines 1-2; Deposition of Steven Woodward, March 16, 2011, page 20, lines 13-19;

¹⁵ Deposition of Steven Woodward, March 16, 2011, page 20, lines 13-19;

driving 70 miles per hour,¹⁶ the inevitable happened. M.J. lost control of the truck. It went left of center, crashed into an embankment and flipped. (R000362).

Jessica Staubs, age 13, who had been in the back seat of the truck, suffered a skull fracture that caused a subdural hematoma. She was flown to Fairfax Inova Hospital where she underwent brain surgery. (R00362-R000366) Following a lengthy recovery, Jessica still has memory deficits. Her medical bills were tens of thousands of dollars.

Jessica's older sister, Samantha Staubs, did not survive the collision. Samantha was 14, and she had been sitting in the front passenger seat of the truck. Samantha's autopsy report lists multiple injuries, including a cerebral contusion with a subdural hemorrhage, pulmonary contusions and the avulsion of her medial upper teeth. Samantha was pronounced dead by the paramedic who arrived at the scene. (R00362-R00366).

The Respondent/Plaintiff below, Lori Ann Staubs, filed suit on December 8, 2008, as next friend for her minor daughter Jessica and as administratrix of the estate of her daughter Samantha. (R000019). The Petitioner Ray Marcus did not answer the Complaint, and on May 15, 2009, the Circuit Court of Jefferson County granted default judgment against him on the issue of liability. (R000418 and R000421). After a long, torturous process of trying to ascertain whether there was any insurance coverage which might indemnify Ray Marcus,¹⁷ it was revealed by Ray Marcus's father, Sherman Marcus, that he had a Nationwide homeowner's policy providing liability coverage for the residents of his home. Lori Staubs immediately made her claim with Nationwide. Nationwide engaged counsel for the Petitioner Ray Marcus who then

¹⁶ Deposition of Kelly Mazur, February 24, 2011, page 58, lines 12-18;

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

moved to set aside the default judgment which had been entered against him on the issue of liability. (referenced at R000411). Nationwide also issued a reservation of rights letter to the Petitioner on the question of whether or not Nationwide would indemnify him. (referenced at R000410). Nationwide claimed, *inter alia*, that it had been prejudiced by Marcus's failure to notify Nationwide of the claim and suit and by Marcus allowing a default judgment to be entered against him.

On November 18, 2010, Petitioner's insurer Nationwide and the Respondent Lori Ann Staubs entered into a high-low settlement agreement. (R000410 - R000413). The circuit court appointed a guardian ad litem for Jessica Staubs to review the high-low settlement agreement and to protect her interests. (R000403 – R000404). The circuit court conducted a hearing, and based upon the agreement of all of the parties and the recommendation of the guardian ad litem, the circuit court approved the high-low settlement agreement between Lori Staubs and Nationwide. (R000414 – R000419).

The high-low agreement provided that Lori Ann Staubs would agree to the entry of an order by the circuit court that would vacate her default judgment against Ray Marcus on the issue of liability, and that the parties would have a trial solely on the issue of Ray Marcus's liability. If the verdict at trial determined that Ray Marcus was liable, then Nationwide would pay the Respondent Lori Ann Staubs \$125,000.00. If the verdict at trial determined that Ray Marcus was not liable, then Nationwide would pay \$50,000.00. (R000415). The circuit court scheduled the case for trial to be held on May 5, 2011 on the issue of liability alone. (R000418).

On April 5, 2011, the Petitioner moved for summary judgment on the issue of liability. (R000003 - R000018). On April 22, 2011, the Respondent filed her opposition and cross-motion for summary judgment on the issue of liability. (R000140 - R000166). Having been advised by

both parties that the case was amenable to resolution by summary judgment, the circuit court cancelled the trial which had been scheduled for May 5, 2011, and instead took the cross-motions for summary judgment under advisement. On May 25, 2011, the circuit court entered the order from which the Petitioner appeals in this case. (R000311 – R000334).

V. SUMMARY OF THE ARGUMENT

The high-low settlement agreement precludes this appeal for two reasons. First, the agreement does not provide for a right of appeal by the Petitioner. Secondly, because the high-low settlement agreement was entered into between Lori Ann Staubs and Nationwide, Petitioner has no standing to appeal in this case.

The circuit court's order was correct and fully supported by the evidence. The Petitioner broke the law and violated his legal duties under two statutes. His violation of statutes is *prima facie* evidence of his negligence. The negligent actions of the Petitioner in furnishing alcohol to middle school children were proximate causes of tragedy which followed. While Petitioner claims that the subsequent events of that fateful evening were intervening acts, that is not the case. The subsequent events were the foreseeable consequences of the Petitioner's actions in facilitating the intoxication of young children.

VI. STATEMENT REGARDING ORAL ARGUMENT

The Respondent does not believe that oral argument is necessary in this case, and Respondent does not request oral argument.

VII. ARGUMENT

A. THE STANDARD OF REVIEW

The Respondent agrees that the Supreme Court applies a *de novo* standard of review to a circuit court's decision to grant a summary judgment. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

B. UNDER THE HIGH-LOW SETTLEMENT AGREEMENT IN THIS CASE, THERE IS NO RIGHT TO APPEAL.

The high-low agreement in this case is specific. (R000410 - R000413). The single factor determining what Nationwide would be required to pay was "trial and verdict on the question of liability in the case." (R000411; ¶2). The agreement does not provide for a right of appeal by either party.

In that regard, the facts presented by this case are similar to *Smith v. Settle*, 254 Va. 348, 492 S.E.2d 427 (1997). *Smith* arose out of a motor vehicle accident in Virginia. In *Smith*, there was a high-low agreement before trial providing that if the verdicts were less than \$350,000, plaintiffs would receive \$350,000, and if the verdicts exceeded \$1,000,000, the maximum recovery would be \$1,000,000. *Id.*, at footnote 4. The jury in that case returned verdicts for the defendant Smith. Smith tendered \$350,000 to the plaintiffs in accordance with the high-low agreement. The plaintiffs refused the tender and moved for a new trial. The defendant moved to enforce the high-low agreement. The circuit court denied the motion to enforce the high-low agreement and granted a new trial, finding that a new trial was warranted because the court had given erroneous instructions to the jury.

A second trial ended in a hung jury. At the third trial, the jury again returned a defense verdict. Smith refused to pay the \$350,000.00, claiming that the plaintiffs had breached the high-low agreement by refusing to accept the money when it was tendered after the first trial.

The circuit court ordered enforcement of the high-low agreement, and ordered Smith to pay the \$350,000 called for by the agreement.

On appeal, the Supreme Court of Virginia found that there had been no provision in the high-low agreement requiring that the jury be “properly instructed,” nor had the agreement provided for a right to move for a new trial. Specifically, the court held:

“Recognizing that there is no explicit provision in the agreement requiring the jury to be ‘properly instructed on the law,’ plaintiffs assert that it ‘was an implicit term of the agreement [and] ... there was no agreement not to seek post verdict relief in the trial court.’ “

“Finding nothing in counsel’s statement implying that a ‘properly instructed’ jury was part of the agreement or that either party could seek post-verdict relief in the trial court, we will not rewrite the agreement to impose provisions that are neither stated nor implied therein. *Addison v. Amalgamated Clothing and Textile Workers Union of America*, 236 Va. 233, 236, 372 S.E.2d 403, 405 (1988).” *Id.*, at 429.

The Supreme Court of Virginia found that the plaintiffs had breached the high-low agreement by refusing to accept the tender of \$350,000 after the first trial and by moving for a new trial instead. The court found that based upon this breach of the agreement by the plaintiffs, the defendant Smith was no longer bound by the high-low agreement and reversed the circuit court’s order which had directed the defendant to pay. Instead, the Supreme Court of Virginia directed entry of judgment for the defendant Smith.

The case at bar is analogous. The high-low agreement in this case contains no provision providing any party with a right to appeal the circuit court’s finding as to the Petitioner’s liability. The Petitioner sought summary judgment instead of a trial and verdict as his chosen methodology for the determination of whether the Petitioner was liable. Of course, once the Petitioner moved for summary judgment on the question of liability, the Respondent was compelled to oppose the motion and to file her own cross-motion for summary judgment. Since the parties chose that path as their methodology for resolution of the single issue on which the

high-low agreement depended, this Honorable Court should not allow the Petitioner to have an appeal where the high-low settlement agreement did not provide for one, simply because the Petitioner does not like the result of the path that he chose below.

C. THE PETITIONER HAS NO STANDING TO PROSECUTE THIS APPEAL.

This Court has said that “standing is defined as ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black’s Law Dictionary 1413 (7th ed.1999)). Ultimately, “the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). *See also Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968) (“In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue [.]”). *See concurring opinion of Justice Davis in State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W.Va. 99, 602 S.E.2d 542 (2004).

Standing is an element of jurisdiction over the subject matter. *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 256, 496 S.E.2d 198, 206 (1997) (quoting 21A Michie’s Jurisprudence Words & Phrases 380 (1987)). Further, “[s]tanding is a jurisdictional requirement that cannot be waived, and may be brought up at any time in a proceeding.” Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, §12(b), p. 21 (Supp.2004).

In the case at bar, the Petitioner lacks standing to prosecute this appeal. This is so because the Petitioner has no interest whatsoever in the outcome of this appeal, or more broadly, even in the outcome of the case. The Petitioner’s interest ended when Nationwide and the

Respondent entered into the high-low settlement agreement. That agreement (R000410-R000413) was not an agreement between the Petitioner and the Respondent, such that the Petitioner might claim to have some nominal interest in the result of the trial and verdict which were to follow. Rather, it was an agreement between the Respondent and Nationwide.

After 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. The agreement provides that Nationwide, and not the Petitioner, would pay a sum of money to the Respondent depending upon the verdict. The verdict at trial on the issue of liability would determine whether that sum would be \$50,000.00 or \$125,000.00. (¶2 of the agreement; R000411). In either event, it would be Nationwide, and not the Petitioner, who would pay. Under the agreement, no judgment would ever be entered against the Petitioner. The agreement also provided that in either event, the Petitioner would be entitled to receive a complete release of all of the Respondent's claims against him. (¶7 of the agreement; R000413). The Petitioner was not even a party to the high-low agreement.

This is very different from a situation in which a high-low agreement is entered into between the *parties* to a case, and different even from a high-low agreement where the cap is within an amount of indemnification that an insurer will have to make. In that sort of agreement, it is the party, and not the insurer, who faces the prospect of a judgment being rendered against him (even if it is a judgment for which the party will be completely indemnified by his insurer). Here, no such result is possible. Here, once the high-low agreement was made, even before the question of Petitioner's liability was resolved, the Petitioner faced no possibility of a judgment against him for any sum. The Petitioner would be guaranteed a release no matter what happened thereafter. While not a party to the agreement, the Petitioner did urge the circuit court to approve

the agreement (R000418). The agreement eliminated all of his exposure and risk from any possible outcome in the case thereafter.

In syllabus point 2 of *Burns v. Cities Service Company*, 158 W.Va. 1059, 217 S.E.2d 56 (1975) the Supreme Court said that standing requires “an actual and justiciable interest in the subject matter of the litigation.” In syllabus point 5 of *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002), the Supreme Court held:

“Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an ‘injury-in-fact’-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.”

As to this appeal, the Petitioner cannot meet the test for standing from *Burns* or *Findley*. The Petitioner has no “actual and justiciable interest in the subject matter of the litigation.” Moreover, given the high-low settlement agreement between the Respondent and Nationwide, Petitioner can have no “injury-in-fact” from the circuit court’s order which Petitioner has sought to appeal. This would be true even if the circuit court’s decision were patently wrong, which, for reasons discussed below, it is not. Because Petitioner can have no injury, Petitioner has no standing to prosecute this appeal.

The requirements for first party standing are “constitutional requirements.” *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1116 (11th Cir.2003). Justice Cleckley stated in *Coleman v. Sopher*, that Sections 3 and 6 of Article VIII of the West Virginia Constitution refer to the word “controversy.” One of the incidents of [the] controversy requirement is that a litigant have standing, 194 W.Va. 90, 95 n. 6, 459 S.E.2d 367, 373 n. 6 (1995). Likewise, this Court has consistently declined to grant “third-party standing” in cases

where a litigant seeks to assert the rights or interest of other persons. In *Guido v. Guido*, 202 W.Va. 198, 503 S.E.2d 511 (1998), this Court reaffirmed this principle and determined that the appellant Mr. Guido had no standing to prosecute an appeal of a circuit court's order imposing a constructive trust upon funds in the possession of his parents.

Here it is the same. The high-low settlement agreement entered into between the Respondent and Nationwide has removed from Ray Marcus any and all legal interest in the outcome of the case, including any interest in this appeal. Nationwide is not the indemnitor of the Petitioner Ray Marcus, as it once was. The high-low agreement changed that. Nationwide's obligation to pay the Respondent is not an obligation that arises from the insurance policy that Nationwide issued to the Petitioner's family. Rather, Nationwide's obligation now arises solely from the high-low agreement into which Nationwide entered with the Respondent.

The circuit court had granted to the Respondent a default judgment against Ray Marcus on the issue of liability. (R000418 and R000421). Lori Ann Staubs surrendered that default judgment. Moreover, Lori Ann Staubs surrendered her right to have damages assessed and her right ever to pursue a judgment for money against Ray Marcus. She surrendered all of these rights in exchange for her own *first-party contract with Nationwide*.

The Petitioner never notified his insurer Nationwide of this lawsuit or of the judgment against him. It was more than a year after the circuit court had granted default judgment on liability before Respondent was able to find out about the existence of the Nationwide policy insuring the Marcus family. Lori Staubs immediately gave notice to Nationwide of her claim. Nationwide then quickly issued a reservation of rights letter to the Petitioner Ray Marcus, claiming, *inter alia*, that Nationwide's rights had been prejudiced by the Petitioner's failure to provide Nationwide with timely notice of the claim and notice of the lawsuit. Nationwide

claimed that its insured, the Petitioner, had deprived Nationwide of its opportunity to investigate the claim and defend the lawsuit. Nationwide hired counsel to defend the Petitioner, but Nationwide expressly reserved the right to deny coverage.

At the time that the high-low agreement was made, it was not clear that Nationwide was ever going to agree to indemnify Ray Marcus for any judgment that the Respondent might obtain against him. One of the purposes of entering into a high-low settlement agreement with Nationwide (as opposed to a high-low agreement between Lori Staubs and the Petitioner Ray Marcus) was to eliminate the issues that had been raised by Nationwide in its reservation of rights letter. The agreement between Lori Staubs and Nationwide disposed of all questions of whether by his conduct (failing to notify Nationwide), the Petitioner had voided the coverage afforded under the Nationwide policy. That issue no longer mattered because under the high-low agreement, Lori Ann Staubs had her own first-party contract with Nationwide.

The question of what Nationwide must pay is a question between the Respondent Lori Ann Staubs and Nationwide. Petitioner is entitled to a complete release in this case no matter what happens. Accordingly, the Petitioner Ray Marcus lacks standing to appeal.

D. THE PETITIONER RAY MARCUS HAD A LEGAL DUTY NOT TO ASSIST IN FURNISHING ALCOHOL TO MIDDLE SCHOOL STUDENTS, AND HE BREACHED THAT DUTY.

Ray Marcus contends that he had no duty to Jessica Staubs or to Samantha Staubs. (Petitioner's Brief, V(B)) The Petitioner is incorrect. The circuit court correctly found that a citizen has a duty to obey the law. *Haymond v. Camden*, 22 W.Va. 180 (1883); *Hedges v. Price*, 2 W.Va. 192 (1867); *Osborne v. Kanawha County Court*, 68 W.Va. 189, 69 S.E. 470 (1910); *Caperton v. Martin*, 4. W.Va. 138 (1870); *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). The Petitioner did not obey the law.

West Virginia Code §11-16-19(c) provides as follows:

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

The Petitioner Ray Marcus had a legal duty not to “knowingly buy for, give to or furnish” Hurricane Malt Liquor “40s” to anyone under 21 years of age. He breached that duty.

If the girls had been 18, 19, or 20, then what the Petitioner Ray Marcus and Steven Woodward did would still have been illegal. But these girls were not 18, 19, or 20. They were children in middle school.

Because the girls were children, the Petitioner had an additional duty under West Virginia Code §49-7-7, which provides in pertinent part as follows:

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

The Petitioner Ray Marcus contends that he did nothing whatsoever to breach these legal duties. He was “simply driving to the store.” (Petitioner’s brief, page 12). In its decision, the circuit court correctly observed that the fact that Mr. Marcus did not go into the store was not determinative of whether his actions violated the law. The lower court considered and correctly applied the legal principle of expressed in Syllabus Point 11 of *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1990):

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

As the circuit court observed at one hearing on this matter, if the law were as Petitioner urges, it would be welcome news to the drivers of all of the getaway cars. That is not the law, as *Fortner* teaches. It is undisputed that the Petitioner drove the girls in *his* vehicle to the place where the

alcohol was purchased. It is undisputed that he then drove the girls and the alcohol to meet their friends. It is undisputed that the girls and the alcohol left his truck together when he dropped them off at the meeting place. The question of the Petitioner's culpability for furnishing alcohol to these minors turns on the Petitioner's knowledge. Upon the evidence, there can be no factual dispute about that. The Petitioner knew exactly what he was doing:

Q. What did you all discuss before you got to the store?

A. Ray [Marcus] and Jeremy asked me if I would get the girls alcohol...."

(Deposition of Steven Woodward, March 16, 2011; page 31, lines 14-17)

Petitioner's examination of the witness continued:

Q. And Ray asked you this?

A. Yeah. Ray asked me this....

(Deposition of Steven Woodward, March 16, 2011; page 31, lines 20-21)

Later during the same deposition, Mr. Woodward reaffirmed his testimony:

Q. And who was it that asked you?

A. Ray asked me.

(Deposition of Steven Woodward, March 16, 2011; page 57, lines 1-6)

The Petitioner suggests that this evidence should be disregarded because "Obviously, [Steven Woodward] has an interest in skewing his testimony to cast himself in an innocent light,..." (Petitioner's brief, page 14). However, at the time of Mr. Woodward's deposition on March 16, 2011, Mr. Woodward had already entered a plea to the crime of contributing to the delinquency of a minor and spent 15 months in jail as his sentence for the crime. (Deposition of Steven Woodward, page 14). Moreover, a judgment on liability had been rendered against him in this case. Contrary to the Petitioner's suggestion, Mr. Woodward was well beyond any point when he could benefit in any way from "casting himself in an innocent light."

Kelly Mazur's testimony also stands in contrast to the Petitioner's argument as well. "Well, we started driving to Engle Road, which is where we were supposed to get dropped

off,...” (Deposition of Kelly Mazur, February 24, 2011, page 30, lines 12-13). After a discussion about getting alcohol which occurred in the truck with the Petitioner driving, the Petitioner changed course and drove in a different direction. “And so we went to Sweet Springs *instead of getting dropped off.*” (Deposition of Kelly Mazur, February 24, 2011, page 30, lines 20-21).

Despite the Petitioner’s characterization of his actions as being unconnected to the plan to get alcohol for two middle school girls, a plan which depended completely upon him providing the necessary transportation, the evidence proves otherwise:

- Q. And how did that come up in conversation?
 - A. Because Samantha asked how old are you, can you buy us alcohol?
 - Q. And [Woodward] said what?
 - A. He said yeah, I can get you some....
 - Q. And who made the decision about where to go to get it?
 - A. Steve.
 - Q. And how do you know he made that decision?
 - A. Because he said Sweet Springs was the closest.
 - Q. And so who told Ray where to go?
 - A. Steve.
 - Q. And what did he say, as you recall?
 - A. Go to Sweet Springs.
- (Deposition of Kelly Mazur, February 24, 2011, page 85, line 17 – page 86, line 11)

Kelly Mazur had no doubt that the Petitioner knew the purpose of the trip he was making:

- Q. Ray didn’t say “why are we going all the way over there?”, right?
 - A. I don’t think so.
 - Q. He knew it was so that Steve could get you some alcohol?
 - A. Yes.
-
- Q. Was there discussion in the car about what to get when he went in the store?
 - A. Yes. Before we had gotten to Sweet Springs, me and Samantha had talked about what we wanted to get with her money, and she was saying that what she could get with the amount of money she had was Hurricanes. And she said to Steve here’s the money and get Hurricanes.
- (Deposition of Kelly Mazur, February 24, 2011, page 86, line 20 - page 87, line 4, and page 87, lines 13-20).

The Petitioner, however, claims that he was oblivious not only to the open discussion in the cramped cab of his small truck about getting alcohol for these girls, the money being passed about, and alcohol being purchased and brought back to the truck, but he was also unaware of the very reason that he changed the destination to which he was driving these young girls. Petitioner contends that he is being subjected to unfair attention and scrutiny just for being a “nice guy”:

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

Ray Marcus had a duty, as all citizens do, to obey the law. This duty includes (1) the duty not to furnish alcohol to persons who are underage in violation of W.Va. Code §11-16-19(c); (2) the duty not to contribute to the delinquency of minors in violation of W.Va. Code §49-7-7(a); and (3) the duty not to act in concert with another in the commission of these criminal acts, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1990).

The circuit court found correctly that Ray Marcus had these legal duties. Based upon the record, the circuit court correctly found that Ray Marcus had violated these legal duties. There was no error in these findings by the lower court. Nor is there error in the circuit court’s finding that violation of a statute is *prima facie* evidence of negligence. Syl.Pt. 1, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990); *Waugh v. Traxler*, 186 W.Va. 355, 412 S.E.2d 756 (1991). Ray Marcus was a knowing participant in a plan to violate the law. That plan was fully executed, and the violations of law are *prima facie* evidence of Ray Marcus’s negligence.

E. THE PETITIONER RAY MARCUS WAS NEGLIGENT IN FAILING TO RESPOND TO THE GIRLS’ CALLS FOR HELP.

When the girls were told that they had to leave the Villalobos home, they called Ray Marcus for help. Kelly Mazur testified that Samantha Staubs and M.J. were making the calls, but

she was “sure that she called him [Ray Marcus].” (Deposition of Kelly Mazur, February 24, 2011, page 118, lines 10-13). Steve Woodward testified that he heard about the wreck at 5:00 a.m. the next morning when Ray Marcus called him. The Petitioner told Steven Woodward that the girls had called him [Ray], for a ride home, which he wouldn’t do....” (Deposition of Steven Woodward, March 16, 2011, page 20, lines 13-17). In suggesting that there is no evidence of these calls being made, the Petitioner simply disregards the evidence:

Q. Well, I think you testified you later got a phone call?

A. Yeah. About 5:00 or 6:00 in the morning or so.

.....

Q. And that was Ray?

A. Yeah. I believe so.

.....

Q. [D]id Ray tell you during that call that the girls had called him for a ride home?

A. Yeah. Several times.

Q. And what else did he tell you about that?

A. That he didn’t go back. That he wouldn’t give them a ride...

(Deposition of Steven Woodward, March 16, 2011, page 84, line 17 – page 85, line 18).

In failing to respond to the girls’ call for help and assistance, Ray Marcus was negligent again. The Petitioner knew that these young girls had been drinking. He knew it was late at night, and he knew that these middle school students whose intoxication he had facilitated had no transportation and were in need of help from an adult. The law addresses this failure to act:

“One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.” Syllabus Point 2, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).” Syl. Pt. 10, *Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987). Syllabus Point 1, *Overbaugh v McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990).

Petitioner’s refusal to come to the aid of the children whom he had endangered is negligence.

F. THE CIRCUIT COURT DID NOT FIND THAT THE LAW REQUIRED THE PETITIONER TO PROTECT THE MINORS FROM CRIMINAL ACTS OF OTHERS.

The Petitioner argues that “the law did not require the Petitioner to protect the minors from criminal acts of others.” (Petitioner’s Brief, V(B)(2), pages 16-18). This is a classic red herring. The circuit court did not make the finding that the Petitioner claims the court made. The court did not find that the Petitioner had a duty to protect the girls from third parties. The circuit court premised its finding of the Petitioner’s liability upon the criminal acts of the Petitioner and upon his refusal to respond to the girls’ calls for help later.

G. THE ACTIONS OF THE PETITIONER IN FURNISHING ALCOHOL TO YOUNG GIRLS AND THEN LATER, IN FAILING TO RESPOND TO THEIR CALLS FOR HELP, WERE PROXIMATE CAUSES OF THE INJURIES WHICH FOLLOWED. THE OTHER ACTS WHICH CONTRIBUTED TO CAUSING THE TRAGEDY WERE NOT INDEPENDENT AND INTERVENING ACTS BREAKING THE CHAIN OF CAUSATION, BUT RATHER WERE SIMPLY ADDITIONAL LINKS IN THE CHAIN OF CAUSATION FORGED BY THE PETITIONER.

The Petitioner Ray Marcus argues that even if he did have legal duties, and even if he breached them, his actions were not a proximate cause of Samantha Staubs’ death or Jessica Staubs’ injuries. The Petitioner contends that there were intervening acts which broke the chain of causation. The circuit court was correct in finding that the Petitioner’s view of this question is inconsistent with the law of West Virginia. The law recognizes that there can be, and there often is, more than one proximate cause of an injury:

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

It is conceded that M.J.’s driving while under the influence, driving without a license, and driving too fast are also proximate causes of the accident. It is also true, however, that but for the actions of the Petitioner, none of these things would have happened. Had not M.J. been intoxicated, she would not have stolen a truck and driven it. M.J. and the other girls were drunk

because of what the Petitioner did in violation of his duties under the law. Moreover, but for the Petitioner's failure to respond to the calls for help when the girls were told that they had to leave the Villalobos home, the girls would not have been in a truck being driven by M.J. But for the acts and omissions of the Petitioner Ray Marcus, Samantha Staubs would not have died that night and Jessica Staubs would not have suffered a brain injury that night. The law contemplates this combination of causation:

“Where separate and distinct negligent acts of two or more persons continue unbroken to the instant of an injury, contributing directly and immediately thereto and constituting the efficient cause thereof, such acts constitute the sole proximate cause of the injury.” Syllabus Point 1, *Brewer v. Appalachian Constructors, Inc.*, et al., 135 W.Va. 739 [65 S.E.2d 87 (1951), overruled on other grounds, *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978)].” Syllabus Point 6, *Frye v. McCrory Stores Corp.*, 144 W.Va. 123, 107 S.E.2d 378 (1959); Syllabus Point 5, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

The Petitioner, having assisted in furnishing alcohol for children has some responsibility for the stupid and dangerous things they did in the drunken state in which he helped to put them.

The Petitioner's argument is irreconcilable with the principle of the law which holds:

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

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

“Where an act or omission is negligent, it is not necessary to render it the proximate cause of injury that the person committing it could or might have foreseen the particular consequence or precise form of the injury, or the particular

manner in which it occurred, or that it would occur to a particular person.” Syllabus Point 4, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

It is not necessary that Ray Marcus imagined or foresaw every possible way that children whom he was helping to get intoxicated might become injured or die as a result of their intoxication. It is not required that he could or might have foreseen “the particular manner in which the injuries occurred” in this case or that the injuries would befall a particular person. Indeed, that is the very point of laws which prohibit providing alcoholic beverages to middle school girls. The enactment of these laws is an expression of the Legislature’s judgment (reflecting our societal knowledge) that a host of bad things will invariably happen as a result of furnishing alcohol to children. (See Section VII(I) below).

The circuit court was correct in rejecting the Petitioner’s argument that there were intervening causes of the injuries. In rejecting this defense by the Petitioner, the circuit court relied on sound authority:

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

As to the actions of the Petitioner, there were no intervening causes. The subsequent events and acts were not “independent” of Petitioner’s acts such that they became “the only proximate causes of the injury.” Much as the Petitioner may protest, he was the genesis of the tragedy. His early actions set in motion all of the events which followed. His actions created the first link in the chain of causation. His refusal later that night to come get the girls when they called him for

help built a later link in the chain of causation. The Petitioner forged both ends of an unbroken chain of causation.

H. THE PETITIONER MISAPPREHENDS THE HOLDING OF *YOURTEE V. HUBBARD*, 196 W.VA. 683 474 S.E.2D 613 (1996).

The Petitioner assigns as error the circuit court's rejection of his arguments based upon the case of *Yourtee v. Hubbard*, 196 W.Va. 683 474 S.E.2d 613 (1996). The Petitioner's interpretation of *Yourtee* is overly broad. *Yourtee* answered the question of whether the owner of a vehicle who leaves the keys-in-the-ignition is liable to someone who steals the car and is injured driving it. *Yourtee* stands for the proposition that, as between the owner of a car who leaves his keys in the ignition, and a thief who steals the car, the law will treat the theft of the vehicle as an intervening cause. The relevant holding from *Yourtee* was laid down in Syllabus Point 3:

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

The circuit court was correct that the holding in *Yourtee* does not relieve the Petitioner of liability in this case. Petitioner was not the owner of the truck stolen by M.J. The Petitioner is not charged with negligence as a result of having left his keys in a vehicle.

The circuit court did apply the *Yourtee* decision in granting the Motion to Dismiss of Mack Jenkins, an original defendant below. Mack Jenkins was the owner of the truck in which the fatal accident occurred. Mack Jenkins had left his keys in the truck which was stolen by M.J. Based upon *Yourtee*, the circuit court dismissed Respondent's case against Mack Jenkins.

The decision in *Yourtee* turned on the Supreme Court's determination that under the unattended motor vehicle statute, W.Va. Code §17C-14-1, the plaintiff in *Yourtee*, as a car thief, was not "among the class of persons for whose benefit the statute was enacted." *Id.*, at 618. The Court noted that "an exhaustive search failed to yield any cases holding that the unattended motor vehicle statute was designed to protect a miscreant from his own misconduct." (emphasis added).

The circuit court's finding of liability on the Petitioner was not based upon a violation of the unattended motor vehicle statute, but rather because Petitioner provided middle school students with alcohol, which led to their injury and death. Again, while getting the alcohol for little girls led to subsequent acts, the subsequent acts were not "independent" of Mr. Marcus's acts. Rather, they were all caused by what the Petitioner did. But for the actions of Petitioner in furnishing alcohol to children, the tragedy would have been avoided. Consequently, under the law, Mr. Marcus's conduct is a proximate cause of the injuries at bar, and *Yourtee* has no application as to the Petitioner.

The circuit court found a much better precedent than *Yourtee* for this case in the case of *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990). As the circuit court observed, "the Supreme Court's discussion of the law in that case could have been written for the facts of the case at bar":

"The general rule in this regard is that a tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct. (*internal citations omitted*) In *Rappaport v. Nichols*, 31 N.J. at 204-05, 156 A.2d at 10, 75 A.L.R.2d at 832, the New Jersey Supreme Court stated the rationale for the rule, quoting from *Menth v. Breeze Corp., Inc.*, 4 N.J. 428, 441-42, 73 A.2d 183, 189, 18 A.L.R.2d 1071, 1078-79 (1950):

‘[T]he original negligence continues and operates contemporaneously with an intervening act which might reasonably have been anticipated so that the negligence can be regarded as a concurrent cause of the injury inflicted. One who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof although the act of a third person may have contributed to the final result.’” *Anderson v. Moulder*, 183 W.Va. at 89, 394 S.E.2d at 73.

It is true that *Anderson v. Moulder* involved a licensee, but its logic certainly applies here.

Syllabus Point 1 of *Reilley v. Byard*, 146 W.Va. 292, 119 S.E.2d 650 (1961) also applies here:

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

The law should not provide refuge for the Petitioner from the predictable and foreseeable results of his behavior by allowing him to claim that these very same predictable and foreseeable consequences were independent, intervening acts. This Honorable Court should affirm the circuit court’s rejection of that argument by the Petitioner.

I. THE PETITIONER RAY MARCUS IS NOT EXEMPT FROM LIABILITY AS A SOCIAL HOST.

The Petitioner Ray Marcus argues he is exempt from any liability for the consequences of furnishing alcohol to minor girls because he was a “social host.” (Petitioner’s Brief, Section V(D), page23-26). The Petitioner relies upon *Overbaugh v McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990): In syllabus point 2 of *Overbaugh*, this Court held:

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

The protection provided by the law to social hosts does not apply to the facts of this case.

The exemption from liability for social hosts presumes lawful furnishing of alcohol, (“*Absent a*

....*statutory enactment*, there is generally no liability...”). In West Virginia, there are multiple statutory enactments which should abrogate the exemption from liability enjoyed by social hosts. These statutory enactments include W.Va. Code §11-16-19(c)¹⁸ and W.Va. Code §49-7-7.¹⁹

Assuming *arguendo* that what Ray Marcus and Steve Woodward did qualifies them as “social hosts,” because their actions were illegal, they should not be entitled to rely on the social host exemption from liability.

Petitioner cites cases from other states which have held that the exemption from liability for social hosts extends to situations where alcohol has been provided to a minor and an injury ensues, e.g. *Ricthie v. Goodman*, 161 S.W.3d 851 (Mo.Ct.App. S.D. 2005); *Spivey v. Sellers*, 185 Ga. App.241, 363 S.E.2d 856 (1987); *Charles v. Seigfried*, 165 Ill.2d 482 (1995). These cases, of course, are not binding authority for the courts or citizens of West Virginia. Moreover, while the Petitioner does not mention them, there are a number of states which have decided this question differently. These states, while exempting social hosts from liability, have held that the social host liability exemption does not apply to social hosts who furnish alcohol to minors.

For instance, in *Hanson v. Friend*, 118 Wash.2d 476, 824 P.2d 483 (1992), the Supreme Court of Washington held as follows:

“In conclusion, under RCW 66.44.270(1), it is a criminal act for any person, including a social host, to furnish liquor to a minor. Pursuant to this statute, *social hosts* owe a duty to exercise ordinary care not to furnish liquor to a minor. A minor may maintain an action against a social host where this duty is breached, and the injuries sustained by the minor are proximately caused by this breach.” (emphasis added). *Id.*, at 485.

¹⁸ “Any person who shall knowingly buy for, give to or furnish nonintoxicating beer to anyone under the age of twenty-one to whom they are not related by blood or marriage is guilty of a misdemeanor...”

¹⁹ “(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,....”

Hanson was a wrongful death case brought by the mother of fifteen-year-old Keith Hanson. Keith Hanson's adult friend had provided him beer. He became intoxicated and drowned.

Washington's statute, like West Virginia's, made it a crime to furnish alcohol to a minor. The Supreme Court of Washington considered the Restatement (Second) of Torts § 286 (1965) in determining whether to adopt that legislative enactment as the standard of conduct for a reasonable person. The Restatement (Second) of Torts § 286 (1965) provides:

“The court may adopt as the standard of conduct of a reasonable [person] the requirements of a legislative enactment ... whose purpose is found to be exclusively or in part

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.”

Washington's Supreme Court concluded that when a social host furnishes alcohol to a minor, he removes his cloak of protection from liability.

In the case of *Ely v. Murphy*, 207 Conn. 88, 540 A.2d 54 (1988), the Supreme Court of Connecticut found that Connecticut's exemption from liability for social hosts must yield when alcohol is furnished illegally to minors. *Ely* was a wrongful death action brought by a father whose son was killed by a motor vehicle following a beer party attended by the driver and the decedent. The Connecticut Supreme Court discussed the common-law history of the social host exemption from liability and then gave a thoughtful explanation of why it should not apply when alcohol is furnished to minors:

“At common law it was the general rule that no tort cause of action lay against one who furnished, whether by sale or gift, intoxicating liquor to a person who thereby voluntarily became intoxicated and in consequence of his intoxication injured the person or property either of himself or of another. The reason generally given for the rule was that the proximate cause of the intoxication was

not the furnishing of the liquor, but the consumption of it by the purchaser or donee. The rule was based on the obvious fact that one could not become intoxicated by reason of liquor furnished him if he did not drink it.’ *Nolan v. Morelli*, supra, 436-37, 226 A.2d 383; see also 45 Am.Jur.2d, Intoxicating Liquors §§ 553-55; 48 C.J.S., Intoxicating Liquors § 430; 75 A.L.R.2d 833.” *Slicer v. Quigley*, supra.

The proposition that intoxication results from the voluntary conduct of the person who consumes intoxicating liquor assumes a knowing and intelligent exercise of choice, and for that reason is more applicable to adults than to minors. With respect to minors, various legislative enactments have placed them at a disability in the context of alcohol consumption. General Statutes § 30-86 provides that with limited exceptions the social host who delivers liquor to a minor shall be criminally liable. Further, General Statutes § 30-89 provides that a minor who purchases liquor or even possesses it in a public place is also criminally liable. These and similar statutes reflect a continuing and growing public awareness and concern that children as a class are simply incompetent by reason of their youth and inexperience to deal responsibly with the effects of alcohol. The legislature has seen fit to amend upward the minimum drinking age three times within the short span of just six years.

This growing public awareness, as reflected by the legislature's frequent, recent amendments to the applicable statutes, causes us to conclude that common law precepts in this area also warrant reexamination. ‘Experience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better.... The adaptability of the common law to the changing needs of passing time has been one of its most beneficent characteristics....’

In view of the legislative determination that minors are incompetent to assimilate responsibly the effects of alcohol and lack the legal capacity to do so, logic dictates that their consumption of alcohol does not, as a matter of law, constitute the intervening act necessary to break the chain of proximate causation and does not, as a matter of law, insulate one who provides alcohol to minors from liability for ensuing injury. To the extent that our earlier rulings in *Slicer v. Quigley*, supra; *Nelson v. Steffens*, supra, and *Moore v. Bunk*, supra, indicate otherwise, we herewith overrule them.” *Id.*, at 56-58.

Many other states have reached the same conclusion as Washington and Connecticut. *Langemann v. Davis*, 398 Mass. 166, 168 n. 2, 495 N.E.2d 847 (1986) (service of alcohol to minor in violation of statute “could be evidence of negligence supporting a civil action against the provider”); *Traxler v. Kuposky*, 148 Mich.App. 514, 384 N.W.2d 819 (1986) (social host liable in tort for harm caused by furnishing alcohol to a minor motorist); *Batten v. Bobo*, 218

N.J.Super. 589, 528 A.2d 572 (1986) (intoxicated minor guest can maintain cause of action against social host who provided cause of intoxication); *Montgomery v. Orr*, 130 Misc.2d 807, 498 N.Y.S.2d 968 (1986) (adult social host is liable under common law negligence for injuries caused by violation of statute prohibiting furnishing alcohol to minors who, because of their immaturity, are unable to make informed judgments as to alcohol); *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515 (1983) (social host negligent per se in serving alcohol to point of intoxication to a minor and could be liable for injuries resulting therefrom); *Harmann v. Hadley*, 128 Wis.2d 371, 382 N.W.2d 673 (1986) (social hosts liable for personal injury caused by minor driver to whom they had negligently furnished intoxicating beverages).

Generalizations about a court's jurisprudence are always dangerous. However, if there is a central theme that can be extracted from the decisions of the Supreme Court of Appeals of West Virginia over the last thirty years, a center pillar as it were, it is this. This Court's decisions have consistently honored the law's enactments which are designed to protect children. It is unnecessary to set forth the dozens of citations. This case should not be the one which history will mark as this Court's point of departure from that which it has so steadfastly adhered for so long. This Honorable Court has not yet spoken precisely to the point framed by this argument, but if it chooses to do so in this case, surely the rule of law adopted by Washington, Connecticut and the other states cited above is more in line with West Virginia's law regarding children than are the cases cited by the Petitioner Ray Marcus.

J. THE CIRCUIT COURT'S FINDINGS ARE NOT ERRONEOUS AND ARE ALL BASED UPON THE EVIDENCE CONTAINED IN THE RECORD.

The findings by the circuit court to which the Petitioner objects so strenuously are all based upon the evidence in the record.

1. The Petitioner was a “known party boy,” who engaged in reckless and dangerous behavior with young children.

The circuit court did not conjure this evidence. It comes directly from the testimony of Steven Woodward, the Petitioner’s companion. In fact, the testimony of Mr. Woodward was that the Petitioner Ray Marcus was such a drinker and so involved in drinking and partying that Mr. Woodward believed that the Petitioner was a negative influence on Mr. Woodward’s younger brothers:

“He [Ray Marcus] is just a negative influence to my brothers, so I choose not to be around that. Since this incident occurred, you know, I have been married. You know, I have a family. And he [Ray Marcus] hasn’t taken it to heart and changed anything about his lifestyle. So he just constantly – that same lifestyle is what’s dragging my brothers down...”
(Deposition of Steven Woodward; March 16, 2011; page 16, lines 4-10; see also page 53, line 7 – page 54, line 19).

The Petitioner claims that Kelly Mazur testified that he was a “good boy” who never got in trouble. (Page 27, Petitioner’s brief). However, Petitioner mischaracterizes the testimony of Kelly Mazur. Beginning on page 63, line 7 of her deposition, what Kelly Mazur said was that Ray Marcus told her that his parents were too strict, that “they would force him to go to church, and like he didn’t want to go to the church...” (Deposition of Kelly Mazur; February 24, 2011, page 63, lines 7-15). The testimony of Kelly Mazur is not at all as described by the Petitioner.

The circuit court’s observation about Mr. Marcus’s drinking and partying activities was clearly based upon evidence in the record. There is certainly nothing in the record from the Petitioner himself refuting any of that. Moreover, the record demonstrates without any dispute that in December of 2006, Ray Marcus had been out of school for two years.²⁰ He was 18,

²⁰ Deposition of Jonathan Ray Marcus, March 22, 2010; page 31, lines 8-10;

hanging around with girls in middle school, taking them hill-hopping,²¹ and on December 9, 2006, driving young girls to get alcohol.

Finally, on this point, it must be observed that none of this is material and direct evidence on the critical fact, which is that Ray Marcus knew that his trip to Virginia to the Sweet Springs convenience store was to get alcohol for the girls. The circuit court honed in on this key factual issue in its colloquy with Petitioner's counsel:

Petitioner's Counsel: Meanwhile, Ray Marcus stayed in the vehicle along with the girls, [Woodward] goes back and puts the alcohol in the passenger side bed of the truck and gets back in the car.

The Court: Alcohol that he agreed to purchase for the girls in a conversation that they had in a cab of a pick-up truck with Mr. Marcus driving?

Petitioner's counsel: Right, according to Kelly Mazur they drive back to Engle Road.

The Court: So, a conversation that Mr. Marcus would necessarily have overheard, an act on the part of Mr. Woodward to get alcohol for the girls that Mr. Marcus would have been aware he was doing?

Petitioner's counsel: Well, there is evidence of that, I mean.

The Court: Well, the cab of a pick-up truck is a pretty small place, isn't it?

Petitioner's counsel: Right. But, I mean, the music could have been on, we don't know.

(Transcript from proceedings in the Circuit Court of Jefferson County; May 2, 2011; page 9, line 16-page 10, line 9).

The circuit court based its findings in this case upon the key factual evidence which establishes that the Petitioner was complicit in furnishing alcohol to minor girls, and not upon any observations about the Petitioner's history of drinking and reckless conduct involving young girls, such as "hill-hopping."

²¹ "Hill-hopping" was what the girls called it when Ray Marcus would load middle school girls in the bed of his small pick-up truck and then drive at high speeds up and down hills, causing the girls to bounce up and down in the bed of the truck. Deposition of Jessica Staubs; February 24, 2011; page 11, line 6 – page 13, line 18;

2. The Petitioner misstates the findings of the circuit court.

The Petitioner imagines that the circuit court made findings which it clearly did not make. Citing pages R000328-R000331 of the record, the Petitioner asserts that “the lower court also found that the Petitioner illegally provided alcohol to Jessica Staubs.” (Petitioner’s Brief; page 28). The circuit court made no such finding, even though the circuit court clearly could have made that finding. When Ray Marcus drove Samantha Staubs, Kelly Mazur and the malt liquor to the top of Engle Road, five other young children were there to meet them. This group of children included Jessica Staubs. Although the circuit court did not specifically make the finding which the Petitioner assigns as error, the court could have so found, and it would not be error if the court had.

3. The circuit court’s findings were not erroneous regarding the conduct of Jessica Staubs.

The Petitioner characterizes Jessica Staubs as criminal. (Petitioner’s Brief; page 29). The record in this case establishes what Jessica Staubs did and what she did not do. The circuit court reviewed the evidence and made factual findings about her conduct and actions, all of which are fully established by the record.

At 13, Jessica Staubs was the youngest of any of the children involved in these events. She was a seventh grader. The evidence establishes without question that Jessica Staubs was not the one who called Ray Marcus and asked for a ride to Engle Road. Kelly Mazur and Samantha Staubs are the two children who called and asked Petitioner for a ride. Jessica Staubs was not even with Kelly and Samantha when they called Ray Marcus. Samantha and Kelly were at Kelly Mazur’s house. Jessica Staubs was at her own house.

Jessica Staubs did not go with Ray Marcus and Steve Woodward to get alcohol. Jessica Staubs did not ask Ray Marcus and Steven Woodward to get any alcohol. Jessica Staubs did not

give Steven Woodward money for the Hurricane Malt Liquor. Jessica Staubs was not there when all of these things happened. Jessica Staubs did not know that any of these things were happening.

Jessica Staubs simply walked from her own house with her friend on a Saturday night to the home of her seventh grade classmate Adrian Villalobos. She then walked with all of the older boys and girls to Engle Road to meet her older sister Samantha and Kelly Mazur when they were dropped off by Marcus and Woodward. Later Jessica drank the alcohol that had been provided to her illegally.

Jessica Staubs did not steal a truck. When M.J. and Samantha Staubs left the Villalobos home, Jessica Staubs was not with them. When M.J. stole the pick-up truck belonging to Mack Jenkins, Jessica was not there. She was not a participant in that. M.J. and Samantha Staubs did that alone. Jessica stayed at the Villalobos house and fell asleep. She was still asleep when Samantha and M.J. came back. They woke Jessica up, and Jessica got up and left, as she was told to do by her big sister. Jessica Staubs did not drive the truck. She just got in the back seat of the truck being driven by M.J. The evidence is that she got in the back seat and laid her head down on Kelly Mazur's lap in the back seat. (Deposition of Kelly Mazur, page 56, lines 16-20).

Based upon these undisputed facts, the Petitioner characterizes Jessica Staubs as a criminal. This Honorable Court should see that for what it is, a callous mischaracterization designed to deflect attention and scrutiny from the Petitioner for his own actions.

The evidence on whether or not Jessica Staubs drank any Vodka at the Villalobos home is conflicting. Adrian Villalobos testified that Samantha and Jessica Staubs did not. (Deposition of Adrian Villalobos; March 16, 2011; page 81; lines 7-13). In the face of this conflicting evidence, the circuit court should not have made that particular finding, but it is immaterial.

Before the children went into the Villalobos home where the Vodka was, the children were intoxicated already, having drunk all of the alcohol furnished by the Petitioner. (Deposition of Kelly Mazur; February 24, 2011; page 73, lines 1-6).

The circuit court correctly determined that there is a presumption provided by the law that a child between the ages of 7 and 14 is incapable of negligence. *Pino v. Szuch*, 185 W.Va. 476, 408 S.E.2d 55 (1991); *Belcher v. Charleston Area Medical Center*, 188 W.Va. 105, 422 S.E.2d 827 (1992). Because Jessica was 13 at the time of the tragedy, the court found the presumption to be applicable to her claim. The circuit court specifically recognized that the presumption is rebuttable, but after reviewing the evidence, the court correctly determined that there was insufficient evidence to overcome the presumption.

It is true that Jessica Staubs told her parents that she was just going to her friend's house, when she was really going to a boy's house. The Petitioner characterizes this as one of Jessica's "crimes." (Petitioner's Brief; page 31). Another "crime" was going with her big sister after being awakened at the Villalobos home. *Id.* The circuit court disagreed with the Petitioner's view, as should this Honorable Court.

4. The circuit court was compelled to consider what percentages of negligence should be applied to the various people involved to determine whether the Petitioner was liable.

The Petitioner asserts that it was error for the circuit court to consider the percentages of negligence that should be assigned to the various actors. The Petitioner is absolutely incorrect. Under the high-low settlement agreement in this case (R000410 - R000413), the single factor for determining what Nationwide must pay was "trial and verdict on the question of liability." The provisions of the high-low settlement agreement were incorporated into the terms of an agreed

order entered by the circuit court (R000414-R000419), which provided, in relevant part as follows:

“2. Regardless of the outcome of the CASE, NATIONWIDE agrees to pay to STAUBS and STAUBS agrees to accept from NATIONWIDE, a sum that is either fifty thousand dollars (\$50,000.00) or one hundred and twenty-five thousand dollars (\$125,000.00), in exchange for which, STAUBS will release MARCUS from any and all further liability. To be more specific, if, after trial and verdict on the question of liability in the CASE, judgment is for MARCUS, then NATIONWIDE will pay to STAUBS, and STAUBS will accept, the sum of \$50,000.00. Payment will be in full satisfaction of all claims against MARCUS. If, after trial and verdict on the question of liability in the CASE, judgment is for STAUBS, then NATIONWIDE will pay to STAUBS, and STAUBS will accept, the sum of \$125,000.00. Payment will be in full satisfaction of all claims against MARCUS.”

When the Petitioner decided to submit the issue of the Petitioner’s liability to the circuit court upon a motion for summary judgment, the circuit court was then absolutely required to consider the comparative negligence of all persons involved. West Virginia is a (modified) comparative negligence state. That is how the question of liability is determined. It is not determined in a vacuum. The circuit court correctly recognized that under West Virginia’s law of comparative negligence, “a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.” Syllabus Point 3, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).

Under the principles of comparative negligence, it is impossible for any jury or judge to determine liability without considering the assignment of negligence to the actors involved. Such a determination is mandatory under the law. *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982). This case is no different.

The circuit court correctly recognized that under the high-low settlement agreement, it was not necessary for the court to assign any particular percentage of the overall negligence to

Petitioner, as long as he had some contributing negligence. The circuit court did not assign any particular percentage of the negligence to the Petitioner, even though Petitioner contends incorrectly that the court did (Petitioner's Brief, footnote 15, page 32). Rather, the circuit court correctly determined that in order for Ray Marcus not to be liable, the court would have to find one of two things: (1) that Ray Marcus was guilty of no contributing negligence whatsoever, or (2) that Jessica Staubs was 50% or more at fault herself for what happened to her. The circuit court determined that neither of those choices was possible based upon the evidence:

“Considering the negligence of all of the pivotal players (Steven Woodward and Ray Marcus, who got the alcohol for children, Samantha Staubs and Kelly Mazur who went with Ray Marcus and Steven Woodward to get the alcohol, M. J. and Samantha Staubs, who stole a truck, M. J. who, without a license, drove the truck while under the influence and at high speed, and Ray Marcus, who refused to come and help when he was called, the Court finds as a matter of law that Jessica Staubs is not guilty of 50% or more of the total negligence in the case. She was a 13 year-old child, who is not only presumed by the law to be incapable of negligence, but who was not a participant in getting the alcohol, or in stealing the truck, and who did not drive the truck.” (R000333-R000334).

The circuit court was absolutely correct. The circuit court held:

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

There is an important mistake in footnote 15 of Petitioner's Brief (page 32), which says that Samantha Staubs' “degree of comparative negligence likely would have equaled or exceeded any negligence of Marcus thereby barring recovery against the Defendant/Petitioner.” This statement is incorrect for two different and important reasons.

First, as noted above, there would be no recovery from Petitioner ever. The high-low settlement agreement was made between Lori Ann Staubs and Nationwide. No recovery from Petitioner could ever be had after the high-low settlement agreement had been executed and

approved by the circuit court. Second, under the high-low settlement agreement, Nationwide would have to pay the full \$125,000 if there is liability on either claim. The wrongful death claim for Samantha Staubs and the injury claim for Jessica Staubs are not separated in the high-low settlement agreement. Indeed, ¶3 of the high-low settlement agreement (R000412) describes how the money which Nationwide will pay, whether \$50,000 or \$125,000, will be divided between the wrongful death claim for Samantha and the injury claim for Jessica. Under the high-low settlement agreement, if the Petitioner Ray Marcus were determined to have any liability at all, then the agreement set the settlement at \$125,000. Under the agreement, what triggers the “high” is Petitioner having “liability to the Respondent,” without differentiation between the two capacities in which the Respondent had brought suit and in which she had made the agreement with Nationwide.

Accordingly, in the hypothetical posited by the Petitioner in footnote 15, the Petitioner is incorrect. Even if a jury had determined that Samantha’s degree of comparative negligence equaled or exceeded the negligence of the Petitioner, the “high” for Nationwide would still be triggered if there is any liability assigned to the Petitioner for Jessica’s injuries. No doubt, that is why the circuit court used Jessica for its analysis. Jessica Staubs is the easier example. In looking at how negligence would be apportioned in the claim for Jessica’s injuries, the circuit court correctly concluded that no reasonable mind could assign 50% of the negligence to Jessica. First, there are the actions of Woodward in buying the alcohol, and the actions of the Petitioner in providing the transportation for that enterprise, as well as his refusal to come back for the girls when they called for help. In Jessica’s claim, some of the negligence would be assigned to Samantha Staubs and Kelly Mazur, who had Woodward and Petitioner get the alcohol for them. Certainly, M.J., who stole a truck, drove it while intoxicated, and drove it 70 miles per hour on a

winding road causing it to flip would be assigned a significant percentage of the negligence. The circuit court correctly reasoned that there is simply no way for 50% of the negligence to be assigned to Jessica, especially with a legal presumption operating that presumes her to be incapable of contributory negligence.

VIII. CONCLUSION

The Petitioner violated the law. His negligence is egregious because he knew the girls. He was not some bartender dealing with an unknown 20-year-old who appeared to be 21 or who was presenting false identification. He knew that Kelly Mazur and Samantha Staubs were underage. They were 15 and 14. He knew them. He knew that they were not old enough to drive, much less have alcohol. He took them to get alcohol anyway. When he took the girls and the alcohol to Engle Road, he could see that all of the members of the group which met them there were young children. When the girls called him for help later he refused. He has some degree of responsibility for the tragedy that happened on that night. He set the fire, and when he had a chance later to put it out, he refused. Under the high-low settlement agreement made by the Respondent Lori Ann Staubs with Nationwide, all that the circuit court was required to find was that the Petitioner was guilty of some amount of negligence.

The circuit court's order was correct and fully supported by the evidence. The Petitioner broke the law and violated his legal duties under two statutes. His violation of statutes is *prima facie* evidence of his negligence. The negligent actions of the Petitioner in furnishing alcohol to middle school children were proximate causes of tragedy which followed. While Petitioner claims that the subsequent events of that fateful evening were intervening acts, that is not the

case. The subsequent events were the foreseeable consequences of his actions in facilitating the intoxication of young children.

The high-low settlement agreement precludes this appeal for two reasons. First, the agreement does not provide for a right of appeal by the Petitioner. Secondly, because the high-low settlement agreement was entered into between Lori Ann Staubs and Nationwide, Petitioner has no standing to appeal in this case.

This Honorable Court should dismiss this appeal. It is unauthorized under the high-low settlement agreement. Moreover, this appeal should be dismissed because the Petitioner lacks standing to prosecute it. If this Court considers the Petitioner's appeal, this Court should affirm the decision of the Circuit Court of Jefferson County, which was fully supported by the evidence. Finally, if this Honorable Court considers this appeal and decides that the decision of the Circuit Court of Jefferson County should be reversed, then this Court should not direct the entry of judgment for the Petitioner, as the Petitioner has requested. In that circumstance, the Court should remand the case to the Circuit Court of Jefferson County for trial and verdict on the issue of Petitioner's liability, as provided for by the high-low settlement agreement.

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

JONATHON RAY MARCUS,

Petitioner/Defendant Below,

vs.

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

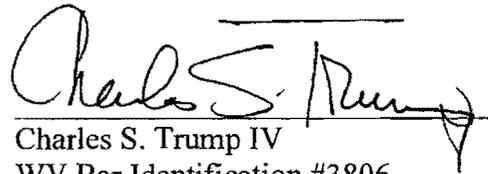
LORI ANN STAUBS, as mother and
next friend of JESSICA LYNN STAUBS,
a minor child, and as Administratrix of the
Estate of SAMANTHA NICHOLE DAWN
STAUBS, deceased,

Respondent/Plaintiff below.

CERTIFICATE OF SERVICE

I, Charles S. Trump IV, counsel for the Respondent, do hereby certify that I have served a true and accurate copy of the foregoing RESPONDENT'S BRIEF upon the following persons at the following addresses, by U.S. Mail, first class, postage prepaid, this 31st day of October, 2011, to-wit:

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