IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

Heather Humphrey, Individually, and
as the Next Friend of Ozzmond Michael,
a Juvenile, and as Administratrix of the
Estate of Raymond Dale Michael,

Plaintiff,

v.

Civil Action No. 2016-C-43
Judge Philip D. Gaujot

GOAL RUSH, LLC, A West Virginia Company,
JOHN DOE, an employee of GOAL RUSH, LLC,
JANE DOE, an employee of GOAL RUSH, LLC,
WESTCHESTER LIMITED LIABILITY COMPANY,
d/b/a WESTCHESTER VILLAGE, A West Virginia
Company, JOHN DOE 2, an employee of WESTCHESTER
VILLAGE, JANE DOE 2, an employee of WESTCHESTER
VILLAGE,

Defendants.

ORDER GRANTING DEFENDANT WESTCHESTER LIMITED LIABILITY COMPANY D/B/A WESTCHESTER VILLAGE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECOND AMENDED COMPLAINT

On August 15, 2017, the above-captioned parties appeared before the Court[1] for oral argument on the Motion for Summary Judgment of Defendant Westchester Limited Liability Company, d/b/a Westchester Village, on Plaintiff's Second Amended Complaint. Plaintiff Heather Humphrey appeared by counsel, Stephen P. New, Esq.; Defendant Goal Rush, LLC appeared by counsel, David B. DeMoss, Esq.; and Defendant Westchester Limited Liability Company d/b/a Westchester Village, appeared by counsel, Heather Noel, and its principal, Anthony Julian.

After thorough review of the record and various pleadings filed in support of and in opposition to the motion, oral arguments of counsel, and due consideration, the Court is

[1] On November 4, 2016, this Court was assigned to preside over this matter by the Supreme Court of Appeals of West Virginia.

of the opinion that Westchester's motion for summary judgment should be **GRANTED**, upon the following findings of fact and conclusions of law.

FACTUAL AND PROCEDURAL SUMMARY

This action arises from the March 30, 2014, death of Raymond Michael in Marion County, West Virginia, which occurred when Mr. Raymond was struck and killed by a motor vehicle operated by Cole Valentine. (Second Amd. Compl., ¶¶ 2, 22.) The car that struck Mr. Michael was owned by Carrie Bragg, who was a passenger in the vehicle at the time it struck him.

The Plaintiff brought this wrongful death action against two identified and named Defendants, Goal Rush, LLC, ("Goal Rush"), and Westchester Limited Liability Company, d/b/a/ Westchester Village ("Westchester"). The Defendant Westchester previously filed a motion for summary judgment, as to the Plaintiff's Amended Complaint, which the Court denied. In conjunction with its denial of Westchester's earlier motion for summary judgment, the Court granted the Plaintiff's oral motion for leave to file a Second Amended Complaint, permitting the Plaintiff to file an amended pleading

> to allege generally as follows: (1) that Westchester knew or should have known that it was serving alcohol to Carrie Bragg, a citizen under the age of twenty-one (21) years, causing Carrie Bragg to become intoxicated; (2) that, as a result of Carrie Bragg's intoxicated state, she negligently entrusted her vehicle to another intoxicated citizen, Cole Valentine; (3) that, as a result of said negligent entrustment, Cole Valentine struck and killed Raymond Michael; and (4) it was reasonably foreseeable to Westchester that, if it allowed alcohol to be served to an underage citizen until they reached a state of intoxication, said citizen could negligently entrust their vehicle to another intoxicated citizen, and said negligent entrustment would lead to a vehicle accident causing death.

(March 27, 2017, Order, 4-5.) In its denial of this Defendant's earlier motion for summary judgment and in conjunction with its allowance of a Second Amended Complaint, the Court, further, recognized that the issues remaining in this case are as follows:

> Having permitted the amendments discussed *supra*, the Court finds that the following issues of fact persist for jury determination: (1) Westchester's duty with regard to preventing Carrie Bragg, a citizen under the age of twenty-one (21) years, from being served and/or consuming alcohol to a state of intoxication while on its premises (2) Westchester's alleged breach of that duty by allowing, knowingly or negligently, alcohol to be served to Carrie Bragg; (3) the proximate causation/foreseeability of an intoxicated Carrie Bragg's entrustment of her vehicle to another intoxicated person; (4) the proximate causation/foreseeability that such entrustment could cause the incident which resulted in the death [of] Raymond Michael; and (4) the existence of any intervening or superseding causes.

(March 27, 2017, Order, 7 (footnote omitted)[2].) The Court was also "satisfied that there is no genuine issue of fact that [Cole Valentine] was driving at the time of the incident." (March 27, 2017, Order, 2 n.2.)

On March 27, 2017, the Plaintiff filed her Second Amended Complaint. With respect to the Defendant Westchester, the Plaintiff's Second Amended Complaint alleges that late March 29, or early March 30, 2014, Westchester "allowed Cole Edward Valentine and/or Carrie Bragg, both individuals under the legal age in West Virginia to consume alcoholic beverages to enter its premises." (Second Amd. Compl., ¶ 16.) The Plaintiff further alleges that Mr. Valentine and/or Ms. Bragg were served alcoholic beverages at Westchester. (Second Amd. Compl., ¶¶ 17-18.) The Plaintiff also alleges that Westchester's employees were negligent in that they "knew or should have known

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[2] The Court also noted that an issue of fact remained whether Carrie Bragg consumed alcohol on the premises of the Defendant Goal Rush after leaving Westchester Village, but before the incident that allegedly resulted in Mr. Michael's death.

that Cole Edward Valentine and/or Carrie Bragg . . . . were underage and therefore prohibited to be in Defendant Westchester's place of business consuming alcoholic beverages," and that Westchester is liable for the negligent acts of its employees that occurred while Cole Edward Valentine and/or Carrie Bragg were on the premises of Defendant Westchester Village i.e., providing alcoholic beverage(s) to underage individuals, to the point of intoxication with a conscious disregard for the safety of others, negligently, carelessly, recklessly, incompetently, willfully, and wantonly disregarding the applicable laws of the state of West Virginia concerning the consumption of alcoholic beverages by an underage individual. (Second Amd. Compl., ¶¶ 28-30.) In addition, the Plaintiff alleges that, after serving alcoholic beverages to "Mr. Valentine and/or Ms. Bragg, Westchester employees were aware that they "were intoxicated and that they intended to operate a motor vehicle while under the influence of alcoholic beverages, and did not take action to prevent Valentine and/or Bragg from operating said motor vehicle." (Second Amd. Compl., ¶¶ 19-20.)

Contrary to the Court's finding in its March 27, 2017, Order, in which the Court allowed the Plaintiff to file a Second Amended Complaint, that there is no genuine issue of fact that Cole Valentine was driving at the time of the incident, the Plaintiff alleges that either Mr. Valentine or Ms. Bragg subsequently "operat[ed] Ms. Bragg's motor vehicle while under the influence of alcoholic beverages, did strike Raymond Dale Michael with said motor vehicle, inflecting [*sic*] bodily injuries that resulted in [his] death on or about the 30th day of March, 2014." (Second Amd. Compl., ¶ 22.) Likewise, the Plaintiff alleges "[t]hat Carrie Bragg, having been served alcohol to the point of intoxication by Defendants, did either operate the motor vehicle that struck Raymond

Dale Michael causing his death or did negligently and recklessly entrust the operation of said motor vehicle to Valentine, who upon information and belief, was also under the influence of alcohol." (Second Amd. Compl., ¶ 23 (emphasis added).)

The undisputed evidence in this case, through the testimony of Carrie Bragg and Cole Valentine, demonstrates that Cole Valentine was not present at Westchester on the evening of March 29 or early morning of March 30, 2014, prior to Mr. Michael's death. The Plaintiff has presented no evidence to create a genuine issue of material fact in that regard. Mr. Valentine, therefore, could not have been served alcohol by, or consumed any alcohol on the premises of Westchester and could not have become intoxicated as a result of its conduct. It is further undisputed that Mr. Valentine, and not Ms. Bragg, was operating the vehicle owned by Carrie Bragg at the time of Raymond Michael was struck by that vehicle. Both Mr. Valentine and Ms. Bragg so testified, and Mr. Valentine admitted to police that he was driving the vehicle when it struck Mr. Michael. Again, the Plaintiffs have presented no evidence to the contrary. *See also* March 27, 2017, Order, 2 n.1.)

Further, although Carrie Bragg's and other testimony supports the Plaintiff's allegation that Ms. Bragg became intoxicated, the Plaintiff has submitted no evidence to support the allegation that, on the evening of March 29 or early morning of March 30, 2014, Westchester employees were aware that Carrie Bragg was intoxicated, that they observed Carrie Bragg as visibly intoxicated, or that they knew or had any reason to know that she intended to operate a motor vehicle while under the influence of alcohol.

The Plaintiff alleges that, because she was intoxicated, Carrie Bragg negligently entrusted her vehicle to Cole Valentine, because he was also intoxicated. The Plaintiff

has produced no evidence, however, that would support a finding by the jury that Cole Valentine was intoxicated at the time Ms. Bragg's vehicle struck Mr. Michael.

Neither Ms. Bragg nor Mr. Valentine is named as a defendant in this action (the Plaintiff having previously resolved her claims against them pre-suit), but the Plaintiff seeks to hold the Defendant Westchester, along with the Defendant Goal Rush, liable for the direct acts of Ms. Bragg and/or Mr. Valentine.

On July 25, 2017, Westchester filed the present Motion for Summary Judgment on the Plaintiff's Second Amended Complaint. Subsequently, on August 9, 2017, Plaintiff filed her Response to Westchester's Motion for Summary Judgment. On August 11, 2017, Westchester filed its reply in support of its Motion for Summary Judgment.

STANDARD OF REVIEW

Our Supreme Court has held, with respect to a Rule 56 motion, that

> [s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Williams v. Precision Coil, Inc., syl. pt. 2, 194 W. Va. 52, 459 S.E.2d 329 (1995). *See also, e.g.*, Hosaflook v. Consolidation Coal Co., 201 W. Va. 325, 336, 497 S.E.2d 174, 185 (1997) (affirming summary judgment where plaintiff failed to make a sufficient showing on the essential elements of his claim); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear

the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.").

To avoid summary judgment, the responding party has the option of producing evidence, sufficient to create a genuine issue of material fact as to each of the essential elements of her claim, or an affidavit demonstrating the reason that additional discovery is necessary, under W. Va. R. Civ. P. 56(f). Williams, 194 W. Va. at 60, 459 S.E.2d at 337 (citing Crain v. Lightner, 178 W.Va. 765, 769 n. 2, 364 S.E.2d 778, 782 n. 2 (1987)). *See also* Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996).

> To be specific, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. Anderson, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed.2d at 214. The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a "trialworthy" issue.12 A "trialworthy" issue requires not only a "genuine" issue but also an issue that involves a "material" fact. *See Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211.

Williams, 194 W. Va. at 60, 459 S.E.2d at 337. The court noted that

> [i]n this context, the term 'material' means a fact that has the capacity to sway the outcome of the litigation under the applicable law. If the facts on which the nonmoving party relies are not material or if the evidence "is not significantly probative," Anderson, 477 U.S. at 249-50, 106 S. Ct. at 2511, 91 L. Ed.2d at 212 (citations omitted), brevis disposition becomes appropriate.

Id., n.13.

Further, in Jane Doe-1 v. Corp. of President of Church of Jesus Christ of Latter-day Saints, 801 S.E.2d 443, (W. Va. 2017), the court recognized that, to survive a motion for summary judgment, "[the responding party] cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Id. at 474 (quoting Dellinger v. Pediatrix Med. Group, P.C., 232 W. Va. 115, 122, 750 S.E.2d 668, 675 (2013)). Likewise, in Gibson v. Little General Stores, Inc., 221 W.Va. 360, 655 S.E.2d 106 (2007), the court affirmed summary judgment, where the circuit court found that the responding party failed to produce evidence that was sufficient to permit a jury to consider the plaintiff's claims "without completely basing its determination upon pure speculation and conjecture." Id., 221 W.Va. at 364, 655 S.E.2d at 110.

The Plaintiff in this case has pointed to no specific facts demonstrating any trial-worthy issue in this case, nor has she demonstrated any need for additional discovery. Further, under the Court's Amended Scheduling Order (entered on May 15, 2017), discovery closed July 28, 2017, and during the discovery process, the parties have exchanged written discovery and conducted at least eighteen (18) depositions since this action was filed in March, 2016. Additionally, the Complaint has been amended twice. The Plaintiff has had a more than adequate opportunity to litigate her claim against this Defendant and to develop evidence to support each of the essential elements of the claim against Westchester, if there is any. Again, the failure to point to any specific facts that create a genuine issue of material fact means that the Plaintiff has failed to carry her burden under Rule 56.

I. THERE IS NO RECOGNIZED CAUSE OF ACTION AGAINST ONE WHO ALLEGEDLY SELLS, OR SERVES, ALCOHOLIC BEVERAGES TO AN UNDERAGE INDIVIDUAL WHO DID NOT INJURE HERSELF OR ANOTHER THROUGH THE OPERATION OF A MOTOR VEHICLE, BUT WHO, INSTEAD, IS ALLEGED TO HAVE NEGLIGENTLY ENTRUSTED A MOTOR VEHICLE TO ANOTHER.

The issue now presented in this case is whether Westchester's negligence in violating W. Va. Code § 60-3-22(a)(1), by allegedly providing alcoholic beverages to Carrie Bragg, who was underage, but not to the driver of the vehicle, Cole Valentine, was nevertheless the proximate cause of Mr. Michael's death. Section 60-3-22, on which the Plaintiff bases the claim asserted against Westchester in the Second Amended Complaint (and which, according to Anderson v. Moulder, is co-extensive with common law liability), provides

> (a) Alcoholic liquors and nonintoxicating beer as defined in section three, article sixteen, chapter eleven of this code shall not be sold to a person who is:
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> (1) Less than twenty-one years of age;
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> (2) An habitual drunkard;
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> (3) Intoxicated;
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> (4) Addicted to the use of any controlled substance as defined by any of the provisions of chapter sixty-a of this code; or
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> (5) Mentally incompetent.
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> (b) It shall be a defense to a violation of subdivision (1), subsection (a) of this section if the seller shows that the purchaser:
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> (1) Produced written evidence which showed his or her age to be at least the required age for purchase and which bore a physical description of the person named on the writing which reasonably described the purchaser; or

(2) Produced evidence of other facts that reasonably indicated at the time of sale that the purchaser was at least the required age.

W. Va. Code § 60-3-22 (emphasis added). Plaintiff argues that W.Va. Code §6-3-22 titled "Sales to certain persons prohibited" is a more generalized statute, separate from, and in addition to, the statutory duties owed by Westchester, a private club, with a liquor license from the West Virginia Alcohol and Beverage Commission. *See Plaintiff's Ex. H,* citation issued to Westchester by WV ABC Commission under W.Va. Code §60-7-12, which states: §60-7-12, "Certain acts of licensee prohibited; criminal penalties:"

(a) It is unlawful for any licensee, or agent, employee or member thereof, on such licensee's premises to:
(3) *Sell, give away or permit the sale of, gift to or the procurement* of any nonintoxicating beer, wine, or alcoholic liquors for or to, or permit the consumption of nonintoxicating beer, wine, or alcoholic liquors on the licensee's premises, by any person less than twenty-one years of age;
(4) *Sell, give away or permit the sale of, gift to or the procurement* of any nonintoxicating beer, wine, or alcoholic liquors, for or to any person known to be deemed legally incompetent, or for or to any person who is physically incapacitated due to consumption of nonintoxicating beer, wine or alcoholic liquor or the use of drugs.

In Anderson v. Moulder, 183 W. Va. 77, 394 S.E.2d 61 (1990), the court recognized a *prima facie* cause of action for negligence under W. Va. Code § 55-7-9,[3] by a passenger injured in a motor vehicle accident, against the party who sold him alcoholic beverages -- in that case beer -- which he shared with the underage driver of the vehicle. The court explained that

> [a] licensee who sells beer to a minor in violation of W.Va. Code, 11-16-18(a)(3), may rebut the *prima facie* showing of negligence by demonstrating that the purchaser appeared to be of age and that the

[3] Section 55-7-9 provides that "[a]ny person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages." W. Va. Code § 55-7-9.

> vendor used reasonable means of identification to ascertain his age. Brannigan v. Raybuck, 136 Ariz. 513, 667 P.2d 213 (1983); Michnik-Zilberman v. Gordon's Liquor, Inc., *supra*. *See* Davis v. Shiappacossee, *supra*; Rappaport v. Nichols, *supra*; Matthews v. Konieczny, *supra*; Young v. Caravan Corp., 99 Wash.2d 655, 663 P.2d 834, *modified on other grounds*, 672 P.2d 1267 (Wash.1983); Sorenson v. Jarvis, 119 Wis.2d 627, 350 N.W.2d 108 (1984). Whether the licensee was negligent in making the sale is a question of fact that ordinarily must be resolved by a jury. *See* McAllister v. Weirton Hosp. Co., 173 W.Va. 75, 312 S.E.2d 738 (1983); Adams v. Sparacio, 156 W.Va. 678, 196 S.E.2d 647 (1973).

Anderson v. Moulder, 183 W. Va. 77, 84, 394 S.E.2d 61, 68 (1990). Anderson also recognized that, under different facts, civil liability could also be imposed under Section 60-3-22. Anderson, 183 W. Va. at 85 n.10, 394 S.E.2d at 69 n.10.

The undisputed evidence in this case demonstrates the Defendant Westchester did not sell alcoholic beverages to anyone, under the terms of the statute cited by the Plaintiff in her Second Amended Complaint. Lisa Schneider, the bartender on duty at Westchester on the evening of March 29, 2014, testified during her deposition taken in this matter that the alcohol that was consumed by the attendees at the dinner being held at Westchester that evening was not provided by Westchester, but by TBI, the Fairmont State fraternity that was holding the event -- the elimination dinner.

Indeed, Westchester did not provide any alcoholic beverages to Cole Valentine, the driver of the vehicle that struck Raymond Michael, because the undisputed evidence shows that he was not present at Westchester on the evening of March 29 or early morning of March 30, 2014, prior to Mr. Michael's death. Mr. Valentine, therefore, could not have been served alcohol by, or consumed any alcohol on the premises of, Westchester and could not have become intoxicated as a result of the acts of Westchester.

It is further undisputed, based on the evidence that has been developed through the extensive discovery conducted in this case, that Mr. Valentine, and not Ms. Bragg, was operating the vehicle that struck Raymond Michael. *See also* March 27, 2017, Order, 2 n.1.) Accordingly, Carrie Bragg's consumption of alcoholic beverages on the premises of Westchester Village prior to Mr. Michael's death is a fact that is simply not material to the issue of Westchester's liability under a cause of action such as that recognized in Anderson v. Moulder.

The type of action recognized in Anderson is the only type of action against a vendor of alcohol, under the statute cited in the Plaintiff's Second Amended Complaint, that has been recognized in West Virginia -- that is, an action against the person or entity that sells alcohol to an underage or intoxicated individual who directly or indirectly injures himself or others, usually involving operation of a motor vehicle.

The Court has found neither any West Virginia authority nor authority from any other jurisdiction anywhere in this country that recognizes a cause of action against the vendor of alcoholic beverages where the allegedly intoxicated, underage individual was not operating the vehicle herself or sharing the alcohol with the driver, as in Anderson, but instead, where the underage recipient of the alcohol had negligently entrusted a vehicle to a third party who had absolutely no connection with the alcohol or its vendor.

In this case, the undisputed testimony is that Ms. Bragg asked for a ride home and Mr. Valentine and his friends volunteered to take her home, because she was too intoxicated to drive. If a cause of action should be recognized against this Defendant under West Virginia law, based on the Plaintiff's allegations and the undisputed evidence, for Carrie Bragg's negligent entrustment of her vehicle, *i.e.*, allowing a third

party, to Cole Valentine, to operate her vehicle, it would have to be based on the Plaintiff's allegation, consistent with the scope of the amendment permitted by the Court, that Westchester served alcohol to Ms. Bragg as an underage individual in violation of the statute cited in the Plaintiff's Second Amended Complaint, W. Va. Code § 60-3-22(a)(1). As discussed below, the undisputed facts demonstrate that there is no evidence to support the Plaintiff's allegation that the Defendant Westchester served alcohol to Carrie Bragg after Westchester personnel observed her to be intoxicated, as prohibited by W. Va. Code § 60-3-22(a)(3), an allegation that is beyond the scope of the amendment permitted by the Court.

If Carrie Bragg's underage status, therefore, is the only factor on which Westchester's liability turns, as to the negligent entrustment portion of the Plaintiff's claim against it, the claim's lack of merit, as a cause of action that should be recognized against Westchester, becomes more evident. The elimination dinner at Westchester occurred on March 29, 2014. Carrie Bragg, although not yet twenty-one, was well over twenty years of age at the time. If Carrie Bragg were to attend that dinner today, at twenty-three, and the events of that evening were to occur as they did that evening, the Plaintiff would not be able to assert a cause of action based on negligent entrustment against Westchester, because, today, there would be no violation of the W. Va. Code § 60-3-22(a)(1). The underage component of the Plaintiff's claim, therefore, does not provide a rational basis for holding the vendor of alcoholic beverages liable for the conduct of an allegedly intoxicated vehicle owner. The standards for negligent entrustment for a twenty-year-old are no different from those for a twenty-three-year-old, or a forty-year-old, and there is no rational basis for believing that Carrie Bragg, in

whatever state of intoxication she was at the time, exercised any poorer judgment, at twenty, than she would today, at twenty-three, in the same condition.

In addition, in Marcus v. Staubs, 230 W. Va. 127, 736 S.E.2d 360 (2012), a case relied on by the Plaintiff in opposition to the Defendant's prior motion for summary judgment, the court also held, in part, that a party in the position that the Plaintiff alleges the Defendant Westchester to be in this case may have an additional duty to prevent the risk of harm its actions have enabled.

> "'"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)." Syl. Pt. 1, Overbaugh v. McCutcheon, 183 W. Va. 386, 396 S.E.2d 153 (1990).

Marcus v. Staubs, syl. pt. 5, 230 W. Va. 127, 736 S.E.2d 360 (2012).

Again, Westchester did not sell Carrie Bragg alcohol, as prohibited by the statute. Further, because any role that Westchester might have played in Carrie Bragg's alleged consumption of alcohol on its premises is so remote from the event of Mr. Michael's death, hours later, after she was escorted from the Westchester premises after the TBI dinner, following her visit to Goal Rush, after going to pick up her car at her workplace, and then being driven home by Mr. Valentine, this Defendant had absolutely no opportunity or reason to realize or to be aware that it had allegedly engaged in conduct that created an unreasonable risk of the harm in this case. Ms. Bragg had not driven herself to the dinner that was held at Westchester, nor did she drive herself away from it, as transportation was provided for her. Even if Westchester had been aware of her intoxicated state -- and no evidence has been produced to permit a finding that it was -- it could not have prevented her from driving, because she was not planning to, and did

not, drive. Westchester, therefore, had no opportunity to take any steps to prevent the threatened harm. To hold a party liable for its unwitting conduct without a corresponding opportunity to protect itself from that liability in accordance with the well-recognized rule reiterated in Marcus v. Staub, therefore, would be incompatible with due process.

For all of these reasons, as a matter of law, this Court does not recognize such a cause of action in this case.

II. THERE IS INSUFFICIENT EVIDENCE UNDER W. VA. R. CIV. P. 56 TO SUPPORT A COGNIZABLE CLAIM OF NEGLIGENCE AGAINST WESTCHESTER .

The Plaintiff alleges specifically that Westchester was negligent by breaching the "duty to refrain from serving alcoholic beverages to underage and intoxicated individuals in compliance with West Virginia Code § 60-3-22, and West Virginia common law."[4] (Second Amd. Compl., ¶32.) Notably, the Supreme Court of Appeals has observed, in essence, that because it recognizes civil liability under the statute making violation of a statute *prima facie* negligence, W. Va. Code § 55-7-9, there is no need to be concerned with a separate basis for common law liability. Anderson v. Moulder, 183 W. Va. 77, 85, 394 S.E.2d 61, 69 (1990). Anderson addressed vendor liability under the Nonintoxicating Beer Act, W. Va. Code §§ 11-16-1, *et seq.*, but noted that such liability could also arise under other statutes, including an earlier version of the statute relied on and cited by the Plaintiff in the Second Amended Complaint, W. Va. Code § 60-3-22.

[4] The separate allegation of service to intoxicated individuals is beyond the scope of the amendment permitted by the Court's March 27, 2017, Order, which permitted allegations based on Westchester's allegedly having served alcohol to Carrie Bragg in her capacity as an underage individual, as prohibited by W. Va. Code § 60-3-22(a)(1), causing her to become intoxicated. (March 27, 2017, Order, 4-5.) The allegation regarding serving alcoholic beverages to an already intoxicated individual, regardless of age, implicates a separate duty imposed by W. Va. Code § 60-3-22(a)(3), and was not a part of the amendment permitted by the Court.

Id. n.10 (citing W. Va. Code § 60-3-22(1)(1986)). Based on the Supreme Court's discussion, therefore, the Plaintiff's assertion of common law liability will not be addressed, inasmuch as Westchester's common law and statutory liability, if any, would be co-extensive.

It is undisputed that the Defendant Westchester did not directly cause the death of Raymond Michael. It is undisputed that Carrie Bragg, who was present at Westchester on the evening of March 29, 2014, did not directly cause the death of Raymond Michael. The undisputed facts developed through the extensive discovery that has been conducted in this case further show that Mr. Michael was struck by a motor vehicle being operated by Cole Valentine. The only evidence relating to Cole Valentine's consumption of alcohol is that he had drunk one or two beers at least four hours prior to the incident in which Ms. Bragg's vehicle struck Mr. Michael; however, that is not sufficient evidence from which a jury could do anything more than speculate that Cole Valentine was intoxicated at the time he struck Mr. Michael with Ms. Bragg's car.

Moreover, because there is no evidence sufficient to create a genuine issue of material fact whether Mr. Valentine was intoxicated at the time, there is not sufficient evidence to submit to a jury to permit it to consider whether Ms. Bragg negligently entrusted her vehicle to Mr. Valentine.

For the foregoing reasons, there is insufficient evidence to create a genuine issue as to a material fact as to the Defendant Westchester's liability to the Plaintiff, based on its alleged violation of W. Va. Code § 60-3-22(a)(1), even if the Court were to recognize a cause of action against Westchester, based on negligent entrustment.

III. TO THE EXTENT THE SECOND AMENDED COMPLAINT CONTAINS AN ALLEGATION OF VIOLATION UNDER W. VA. CODE § 60-3-22(A)(3), IT EXCEEDS THE SCOPE OF THE AMENDMENT PERMITTED BY THE COURT, AND, IN ANY CASE, THERE IS NO GENUINE ISSUE OF FACT TO SUPPORT ANY SUCH A CLAIM.

Although the Court's March 27, 2017, Order did not permit this amendment, the Second Amended Complaint appears to allege, separate from the allegation that Westchester served Carrie Bragg in violation of the prohibition against the sale of alcohol to underage individuals, in its allegation that it served her when she was intoxicated, which is a separate violation of Section 60-3-22(a)(3). (Second Amd. Compl., ¶32.) The Plaintiff did not oppose this aspect of the Defendant's motion. Furthermore, in this case, the Plaintiff has submitted no evidence to support her allegation that, at any time on the evening of March 29, 2014, Westchester employees observed Carrie Bragg to be visibly intoxicated or that they knew or had any reason to know that she intended to operate a motor vehicle while under the influence of alcohol. In fact, Ms. Bragg's deposition testimony is undisputed that she had been escorted to the event that was being held at Westchester that evening and, specifically, that she had been picked up and driven to and from the event by a pledge of the fraternity that was sponsoring the event.

In addition, the evidence is undisputed that even if Westchester or its employees had believed that Carrie Bragg was intoxicated, or if they had somehow discovered that Cole Valentine, who was not even present at Westchester that evening, Westchester, as a matter of law, was so far removed from the events leading up to Mr. Michael's death that it was not in a position to be able to prevent either Carrie Bragg or Cole Valentine from driving her car, several hours after the event at Westchester had ended

at 11:00 p.m., according to Westchester employee Lisa Schneider, after Ms. Bragg and Mr. Valentine had met at Goal Rush, after they left Goal Rush around 2:00 a.m., gone to First Energy to pick up Ms. Bragg's vehicle where she had left it at her place of work, and then started on the trip to take her home with Mr. Valentine driving.

Arguably, Westchester, if there were any evidence that it had been able to observe that Ms. Bragg was intoxicated, could have called her a cab or confiscated her car keys; however, such measures would not have been prevented Ms. Bragg from driving her car, because is undisputed that she had not driven her car to the event, but instead, had been escorted to the event that evening and had been picked up and driven to and from the event by a pledge of the fraternity that was sponsoring the event.

For these reasons, insofar as the Second Amended Complaint alleges a claim based on a violation of W. Va. Code § 60-3-22(a)(3), there is no genuine issue of fact material to any liability whatsoever on the part of the Defendant Westchester in this matter.

IV. INSOFAR AS THE DEFENDANT WESTCHESTER WAS NEGLIGENT, COLE VALENTINE'S NEGLIGENCE IN THE OPERATION OF CARRIE BRAGG'S VEHICLE OR MS. BRAGG'S NEGLIGENCE IN ALLOWING MR. VALENTINE TO DRIVE HER CAR, AS A MATTER OF LAW, ARE SUPERSEDING, INTERVENING CAUSES OF THE INJURIES AND DEATH OF RAYMOND MICHAEL.

Finally, while this Court has found no court recognizing a cause of action, either in West Virginia or anywhere else in the United States, holding anyone in Westchester's position liable for the negligent entrustment of a vehicle by one in Carrie Bragg's position, even if the Court were to recognize that claim in this case, Ms. Bragg's turning

her car keys over to Mr. Valentine and/or Mr. Valentine's negligent operation of the vehicle, is, as a matter of law, an intervening cause(s) of Raymond Michael's death.

In Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000), the court upheld the circuit court's grant of summary judgment, recognizing that the moving defendant's liability was cut off by an intervening cause.

> This Court explained the concept of intervening cause in syllabus point three of Wehner v. Weinstein, 191 W. Va. 149, 444 S.E.2d 27 (1994), as follows:
>
> > "'An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.' 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).

Harbaugh v. Coffinbarger, 209 W. Va. 57, 64, 543 S.E.2d 338, 345 (2000). In Harbaugh, the court recognized that "[t]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." Id. (citing Hairston v. Alexander Tank and Equipment Co., 310 N.C. 227, 311 S.E.2d 559, 567 (1984) (quoting Riddle v. Artis, 243 N.C. 668, 91 S.E.2d 894, 896-97 (1956))) (emphasis added; internal quotation marks omitted).

From the perspective of Westchester, after it closed down for the evening, at 11:00 p.m. on March 29, 2014, and all of the attendees of the TBI dinner had gone and Carrie Bragg had been escorted safely from the Westchester premises, it simply was

not foreseeable, as a matter of law, that some three-and-a-half hours later, Carrie Bragg still would need to find a ride back to her car and that she still would need to have someone else drive her home in her own vehicle. It certainly was not foreseeable that she would ask someone who, according to the Plaintiff, although not according to the evidence, was himself intoxicated to drive her home in her own car. (And because this was not foreseeable, Westchester did not have the opportunity to take any steps to try to avoid the events that were about to occur.)

As a matter of law, the events that occurred after Carrie Bragg left Westchester, which resulted in the death of Raymond Michael, were so remote in time and so remote from any alleged acts or omissions on the part of Westchester as to be completely unforeseeable, and, therefore, the intervening negligence of Ms. Bragg and/or Mr. Valentine cut off any liability that Westchester might otherwise have incurred. There is no genuine issue of fact in this regard, and for this additional reason, Westchester is entitled to summary judgment on the Second Amended Complaint.

Accordingly, for the foregoing reasons, there is no genuine issue as to any material fact that Westchester bears no liability to the Plaintiff on the allegations against it, and, therefore, the Defendant Westchester is entitled to judgment as a matter of law on the Plaintiff's Second Amended Complaint, in accordance with W. Va. R. Civ. P. 56.

The objections and exceptions of the Plaintiff are noted and preserved.

It is further **ORDERED** that the Clerk of this Court forward an attested copy of this Order to all counsel of record.

ENTER: this 30th day of August, 2017.

PHILLIP D. GAUJOT, SPECIAL JUDGE