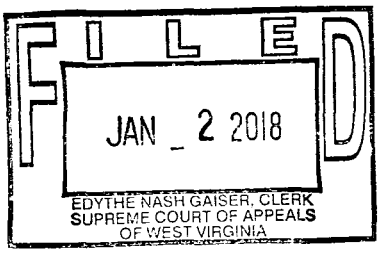

NO. 17-0885

BEFORE THE SUPREME COURT OF APPEALS OF 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 Below, Petitioner,

vs.

Westchester Limited Partnership, d/b/a Westchester Village, John Doe 2, an employee of Westchester Village, and Jane Doe 2, an employee of Westchester Village,

Defendants Below, Respondents.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. The Circuit Court of Marion County erred in deciding questions of proximate cause, intervening cause, and/or superseding cause as a matter of law where genuine issues of material fact exist.

II. The Circuit Court of Marion County erred by misinterpreting and/or misapplying applicable West Virginia Code sections and/or West Virginia common law.

STATEMENT OF THE CASE

On March 7, 2016, Plaintiff filed her Complaint in this action in her individually capacity, and as both the Next Friend of Ozzmond Michael and as the Administratrix of the Estate of Raymond Dale Michael. As set forth further in the Complaint and Amended Complaint, this matter arises from the circumstances and events which occurred on the night of March 29 through the early morning of March 30, 2014, wherein Respondent Westchester Limited Liability Company, d/b/a Westchester Village ["Westchester"] unlawfully served intoxicating beverages to minors, which minors thereafter left Respondent Westchester's premises. Said minors then gathered with other intoxicated minors at Goal Rush, another facility which unlawfully served intoxicating beverages to minors. From Goal Rush, a total of five minors in issue departed in two vehicles, with Carrie Bragg's vehicle in front and Marshall Morris's vehicle following. Carrie Bragg's vehicle proceeded until it struck Raymond Dale Michael, causing pain, suffering, and Mr. Michael's untimely death, and fled the scene. Mr. Michael's death caused great sorrow; mental anguish; loss of solace, loss of society, companionship, guidance, kindly offices, and advice; loss of future services, protection, care and assistant; as well as the incurrence of funeral and burial expenses for their loved one to Mr. Michael's heirs and the beneficiaries of his estate.

After preliminary discovery, Respondent filed a Motion for Summary Judgment and

Petitioner responded. A hearing was held on March 14, 2017. At that time, the Circuit Court denied the motion and granted Petitioner leave to amend the complaint. APP 00235-00243. At that time, the Circuit Court determined "But I would -- I think I would be at risk to grant the summary judgment at this point. Assuming that either side would take it up, I believe the Supreme Court would be more likely to reverse me if I granted summary judgment as opposed to not granting it." APP 0031. Specifically, the Circuit Court stated:

> 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.

APP 00241.

Petitioner amended the complaint and subsequent discovery occurred; however, the discovery did not change the fundamental facts as they existed in March of 2017, but revealed additional issues of fact and called into question the testimony of the witnesses regarding the events. Despite the lack of change, Westchester filed a second Motion for Summary Judgment which the Circuit Court granted on August 30, 2017. APP 00479-00498. Even though the earlier factual issues were not resolved, and additional material facts had been discovered, the Circuit Court granted the Motion for Summary Judgment.

The tragic events of this hit and run were investigated by Chief Steven Ronald Shine of the Fairmont Police Department. Chief Shine's deposition gave rise to several factual issues which merited resolution by the trier of fact. His testimony created a reasonable question

regarding the occurrences of the night in question, as well as the credibility of key players involved. Chief Shine specifically testified that Cole Valentine's "narrative changed as the confession went on." APP 00346. Chief Shine further testified that Cole Valentine and others stopped twice after hitting Mr. Michael and conversed prior to going to their respective destinations. APP 00347-00348. Carrie Bragg's statement to the police also reflected that the individuals in her car and the individuals in the following vehicle had stopped and conversed after striking Mr. Michael. APP 00349-00350. Based on these statements even Chief Shine testified that additional information could have aided in establishing what actually went on the evening Mr. Michael was struck and killed: phone records, social media records, text records, etc. APP 00351-00352. Similarly, notes taken by Chief Shine while interviewing Mr. Valentine give rise to questions regarding Mr. Valentine's credibility and his current iteration of what occurred on the night Mr. Michael was killed. APP 00355-00357. It is evident from Chief Shine's notes that Mr. Valentine told him on the night in issue that the Bragg vehicle had hit a person. *Id.* Nonetheless, Mr. Valentine's current version of the events is that he believed they had struck a bag of trash. APP 00360. This is the same colluded version of events provided by individuals in both the Bragg and Morris vehicles.

Fairmont Police Officer Brian Lemley was the initial officer on the scene of the hit and run. Likewise, his testimony created a genuine issue of material fact.

Q: Did you or anyone else ask Mr. Valentine to submit to testing to determine whether or not he was intoxicated?

A. I do not recall.

Q. Is that something that perhaps, in an incident like this, you would like to know?

A. At the time of the incident, of fresh pursuit, yes. I don't - - I don't recall what time later he came in. But if it was hours afterwards, it would have varying circumstances.

Q. It would depend on how drunk someone was at that point in time; wouldn't it?

A. Yes. That. Or the normal, "I went home and had a drink after the collision" or whatever, whatnot.

Q. Right. Kind of opens itself up to more excuses and more ways out of it, doesn't it?

A. Yes ma'am.

APP 00358.

Q. Likewise, you can't rule out, as we sit here today, that the driver of the Bragg vehicle was not intoxicated at the time Mr. Michael was struck?

A. No.

APP 00359.

Moreover, Mr. Valentine provided deposition testimony that could convince a trier of fact that he was dishonest about the night in issue, because he has historically been dishonest about where he was and whether he drank. To wit, Mr. Valentine testified as follows:

Q. How many times, approximately, prior to March 29, 2014, would you say that you and your friends drank underage?

A. I don't know. Just like any other high school kid, I would say.

Q. Kind of every weekend event?

A. Oh, no, not every weekend. My dad would kill me. Of course, he never

knew.

Q. How many times a month?

A. Once or twice.

Q. How did you get home?

A. We usually just camped out.

Q. On nights where you went home, how did you get home?

A. On nights I went home, that was very rare. I would get a ride somewhere.

Q. You said that this was a once – or twice-a-month occurrence, but that was something that you did not tell your parents or that you kept from your parents, correct?

A. Yes.

Q. You did not want your parents to know that you drank; is that fair?

A. That's fair, as with any high school kid.

Q. Fair in March 2014 that you don't want your parents to know you drank that night? Nothing would have changed that night that made you interested in telling your parents that you drank that night, right?

A. I don't know.

Q. You wouldn't have wanted your parents to know you drank that night, either, right?

A. I wouldn't think so.

APP 00361-00362.

In terms of undisputed facts which may give rise to varying conclusions, Carrie Bragg admitted to drinking underage at Westchester in her deposition in this matter:

Q. You drank at Westchester, right?

A. Yes.

[. . .]

Q. And how old were you?

A. 20.

Q. And you drank at Westchester by approaching the bar, correct?

A. I –both by approaching the bar and drinks being provided me.

[. . .]

A. I stood there and drank openly. I didn't -- I mean, there are places where underage people might have to hide their drinks or, but I didn't, I didn't have to hide it or hide behind anyone to drink.

APP 00363-00364.

In addition to Ms. Bragg's testimony, a portion of which is set forth herein, other witnesses testified that Ms. Bragg consumed alcohol at Westchester. Specifically, Rebecca Mayfield, an individual present at Westchester on the night in question testified as follows:

Q. Did you see Carrie Bragg there at the TBI Elimination Dinner?

A. Yes, I did.

Q. Was Carrie or did Carrie appear to be intoxicated?

A. Towards the end of the night, yes.

Q. Okay. And you said Carrie was younger than you; correct?

A. Correct.

Q. Okay. So she would not have been 21 at that time either?

A. Correct.

Q. And when you say at the end of the night, that would go without saying that toward the beginning of the night, I guess, when you saw her, Carrie Bragg did not appear - - did not seem intoxicated.

A. Correct.

Q. Which would infer that she got intoxicated in her time at Westchester, is that fair?

A. Yes ma'am.

APP 00366-00367.

Q. Did you observe anyone else under 21 order drinks from the bar?

A. Yes, I did.

Q. Did you know if they were carded? Did you observe anyone be carded? Let me ask you that.

A. No, not that I recall.

APP 00368.

Moreover, Westchester's bartender Lisa Schneider, testified that an abundance of alcohol was served at Westchester on the night in question:

Q. What were the policies at Westchester for determining whether someone was of age, or 21 years old, to consume alcohol?

A. You check their ID.

Q. Whose job was that?

A. Mine

Q. As the bartender?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. Did Westchester have anyone at the door to check identification as patrons came in?

A. No.

APP 00369.

Q. Where was the beer located?

A. If the bar is here, it would be on the side, outside, up against a wall.

Q. When you say "outside" – do you mean –

A. On the floor, not behind the bar.

Q. Okay. Was – was the beer provided in botlles oI cans Ir both?

A. Kegs.

Q. How many kegs were there?

A. Two at a time.

Q. Who was manning the kegs, for lack of a better phrase?

A. Nobody. I mean, they would notify somebody when they were empty, and they would replace them up until – as many as they paid for.

[. . .]

Q. And was an employee from Westchester in charge of the keg?

A. Yes.

[. . .]

Q. Who was in charge of monitoring the situation at the kegs to ensure that only people with wristbands were drinking alcohol at the kegs.

A. I don't believe there was anybody standing there monitoring.

Q. So is it true that an underage patron could go over the keg and drink?

A. Yes.

APP 00370-00371, 00374-00375.

Q. Do you know why it was decided there would only be one bartender?

A. Usually to help control the consumption of alcohol.

Q. You told me that the liquor was behind the bar, correct?

A. Correct.

[. . .]

Q. How much and in what quantities?

A. They would be – they would have liter bottles. They would have half-gallon bottles. They probably had about 15 different types of liquor. And there was a lot. I would say – at least seven cardboard boxes full.

Q. Did you have any guidance on how much liquor could serve that night?

A. Westchester had a policy that it was two drinks at a time.

Q. Okay. And I guess my specific question is: Was there anything to prevent you from serving all of the alcohol, all of the liquor that had been brought in by the frat?

A. No.

Q. And no one said to you, "Hey. Only serve three boxes versus all of it."

A. They wouldn't have brought it in. No.

Q. They brought it in to have it drank.

A. Yes.

APP 00372-00373.

Westchester was issued a violation of W.Va. Code §60-7-12 from the WV Alcohol Beverage Control Administration for the incident that occurred on March 29, 2014. APP 00256. That provision states, in pertinent part:

> (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;

W.Va. Code § 60-7-12. Petitioner also relied upon W.Va. Code §6-3-22 titled "Sales to certain persons prohibited," 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. That statute states, in pertinent part:

> (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:
>
> (1) Less than twenty-one years of age; [. . .]
>
> (3) Intoxicated; [. . .].

After consideration of this conflicting evidence and the applicable statutory law, the Circuit Court ruled, "no recognized cause of action exists 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." APP 00487. The Circuit Court also ruled, "there is insufficient evidence under W. Va. R. Civ. P. 56 to support a cognizable claim of negligence against Westchester." APP 00493. Finally, the Circuit Court determined "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." APP 00496.

In this appeal, Petitioner Heather Humphrey respectfully requests that this Honorable Court reverse the Circuit Court's grant of summary judgment and remand this matter for a trial on the merits.

SUMMARY OF ARGUMENT

The law governing the grant or denial of summary judgment in West Virginia favors allowing plaintiffs a trial on the merits of the case. Rule 56(c) of the West Virginia Rules of Civil Procedure requires a party moving for summary judgment to establish that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W.Va. R. Civ. P., Rule 56 [1998]. The Plaintiff notes that the Court must view all inferences and underlying facts in her favor as they relate to Westchester's Motion. See *Collard v. Smith Newspapers, Inc.*, 915 F.Supp. 805 (S.D.W.Va. 1996). Moreover, Westchester, despite its best efforts to limit the definitions of materiality and relevance, bears the burden of proving the absence of a genuine issue concerning any material fact. *See Allstate, Inc. v. Aohley*, 833 F.Supp. 583 (S.D.W.Va. 1993)

In West Virginia, the standard for summary judgment is well-settled. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to

be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Evidence related to a material fact should be viewed in the light most favorable to the non-moving party. *Gentry v. Magnum*, 195 W.Va. 519, 466 S.E.2d 451 (1995). "If there is any evidence in record from any source from which a reasonable inference can be drawn in favor of nonmoving party, summary judgment is improper." *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, *Painter v. Peavey*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In fact, so disfavored is summary judgment that the Supreme Court of Appeals of West Virginia has stated; "[e]ven if the trial judge is of the opinion to direct a verdict he should nevertheless ordinarily hear evidence and upon a trial direct a verdict rather than try the case in advance on a motion for summary judgment." *Thomas v. Goodwin*, 164 W.Va. 770, 776, 266 S.E.2d 792, 795 (1980).

Petitioner is permitted to recover under W. Va. Code§ 55-7-9, which 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."

The evidence clearly establishes that Westchester served Carrie Bragg, an underage individual who was also visibly intoxicated. Carrie Bragg then negligently entrusted her vehicle to another intoxicated individual, Cole Valentine, and/or operated the vehicle herself. In either event, Westchester's negligence caused the death of Petitioner's decedent. The Circuit Court failed to appreciate the causation issue: whether an entity which unlawfully serves intoxicating beverages to a minor, and causes that individual to be intoxicated, is responsible for injury or

death to a third party caused by that minor's intoxication. Such causation determinations are for the trier of fact. It was error for the Circuit Court to decide causation, among other things, as a matter of law.[1]

The Circuit Court additionally misinterpreted and/or misapplied applicable West Virginia Code sections and/or West Virginia common law. In fact, the Circuit Court completely ignored the common law and the existence of a claim for negligence, which need not arise from a statute.

A definite miscarriage of justice occurred in the present case. Petitioner was prevented from trying her case on the merits, leaving Mr. Michael's family without recourse. The resulting precedent of the Circuit Court determining factual issues cannot stand as precedent. The Decision should be reversed and remanded.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this Appeal involve assignments of error in the application of well-settled summary judgment fundamental to the civil trial process in a case with factual circumstances and issues of the application of the law regarding Dram Shop liability. Therefore, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

ARGUMENT

I. The Circuit Court of Marion County erred in deciding questions of proximate cause, intervening cause, and/or superseding cause as a matter of law where genuine issues of material fact exist.

It is well-established law in the State of West Virginia that "[t]he questions of negligence, contributory negligence, proximate cause, intervening cause, and concurrent negligence are

[1] The Circuit Court first correctly understood this version of proximate cause and for no apparent reason abandoned this finding upon reconsideration.

questions of fact for the jury where the evidence is conflicting or when the facts, through undisputed, are such that reasonable minds draw different conclusions from them.' *Marcus v. Staubs*, 230 W.Va. 127, 736 S.E.2d 360 (2012) (quoting Syl. Pt. 2, *Evans v. Farmer*, 148 W.Va. 142, 133 s. E.2d 710) (1963)). Questions of whether subsequent acts of minors were foreseeable to an individual or entity providing alcohol to minors are properly within the province of the jury, and summary judgment on the issue improperly invades "the province of the fact-finder in determining whether [. . .] alleged actions were the proximate cause of the accident at issue." *Id.* (whether minors subsequent act of stealing a motor vehicle fell on the individual or entity providing alcohol to the minors was a question for the jury.)

> 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. [. . .]
>
> [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. 77, 89, 394 S.E.2d 61 (1990) (internal citations omitted).

The Circuit Court recognized that: "'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'." *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 64, 543 S.E.2d 338, 345 (2000) (internal citations omitted) (**emphasis** added).

Somehow, the Circuit Court determined Carrie Bragg's negligent entrustment of her motor vehicle to Cole Valentine "operated independently of any other act." The Circuit Court

erroneously reasoned:

> 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.

APP 00497-00498. This reasoning is perplexing given the Circuit Court's reliance upon *Anderson v. Moulder*. In *Anderson*, the defendant sold a keg of beer to 17-year-old Sean Dean Anderson on September 1, 1988, and on September September 2, 1988. "On September 5, 1988, Anderson died in an automobile accident while a passenger in a vehicle driven by eighteen-year-old David Scott Moulder. Both Anderson and Moulder were allegedly intoxicated at the time of the accident due to their consumption of the beer Anderson purchased from [defendant]." *Id.* at 81.

The events in *Anderson* occurred three days after the sale of alcohol. The events in this case occurred three-and-a-half hours after Carrie Bragg left Westchester. *Anderson* involved the negligence of a third party who was not present at the time of the purchase. If one concludes Cole Valentine was not at Westchester, then he was not present at the time of the supplying of alcohol by Westchester. The defendant in *Anderson* could not prevent the provision of the alcohol to the driver any more than the Circuit Court concluded that Westchester could not stop Carrie Bragg from negligently entrusting her vehicle. Obviously, the question is not whether Westchester could have prevented the circumstances that took place, but whether those circumstances were foreseeable and gave rise to a duty on the part of Westchester.

Further, the Circuit Court erroneously concluded Cole Valentine had "absolutely no

connection with the alcohol or its vendor." APP 00490. This is simply not a correct analysis. As recognized by this Court,

> Experience teaches us, however, what is wrong with serving liquor to drunks. First, if the buyer is an alcoholic, the seller may be feeding his addiction, which is an ongoing harm to the drunk himself. Second, any ink [sic] [drunk] person is a physical danger to himself and others. We know that drunkenness contributes to accidents of all kinds.

Bailey v. Black, 183 W.Va. 74, 76-77, 394 S.E.2d 58 (1990). The fatal flaw in the Circuit Court's reasoning is well-explained by the United States District Court for the Eastern District of Tennessee:

> Similarly, '[t]he act of negligent entrustment and the act of negligent operation of a vehicle are separate and distinct,' or that is, each of these acts is a separate act of negligence. *Ali*, 145 S.W.3d at 564. Even so, these separate acts of negligence do not result in separate injuries but the same injury to the plaintiff—the injury directly caused by the driver's negligent operation of the vehicle. Both the owner's and the driver's independent negligent acts—the acts of negligent entrustment and negligent operation, respectively—are a proximate cause, or substantial factor, in producing the plaintiff's injury. See *West*, 172 S.W.3d at 556 (stating that the plaintiffs had to carry 'the same burden at trial whether pursuing their theory of negligence or negligent entrustment' because '[b]oth claims . . . present the same factual issues to be resolved at trial regarding breach of duty, loss or injury, cause in fact, and proximate cause'); *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 907 (Tenn. 1996) (recognizing that 'one who entrusts another with an automobile knowing of the other's incompetence may be held liable for injuries proximately caused by the [driver's] negligent use of the automobile' (citation omitted)); *Jones v. Windham*, No. W2015-00973-COA-R10-CV, 2016 Tenn. App. LEXIS 182, 2016 WL 943722, at *8 (Tenn. Ct. App. Mar. 11, 2016) (noting that '[i]f the jury found the driver not negligent, the case would be over, inasmuch as the entrustee's negligence as the proximate cause of plaintiff's injury is an essential part of the theory of negligent entrustment' (quotation omitted)).

Steffey v. Beechmont Invests., Inc., E.D.Tenn. No. 3:16-CV-223, 2017 U.S. Dist. LEXIS 138443, at *16-17 (Aug. 29, 2017).

Carrie Bragg was underage and was served alcohol at Westchester to the point where she became too intoxicated to drive. Not only was she too intoxicated to drive, but also she was too intoxicated to exercise sound judgment. Carrie Bragg's negligence in entrusting her vehicle to

Cole Valentine, who was too intoxicated to drive, injured another party. Specifically, Carrie Bragg's negligence and Cole Valentine's negligence are a proximate cause, or substantial factor, causing the death of Raymond Dale Michael, or a jury could so find.

The Circuit Court also erroneously determined that there was no genuine issue of material fact in the face of abundant material facts presented by Petitioner. Petitioner's counsel has presented substantial evidence to call into question the version of facts set forth in the Circuit Court's Order. Specifically, text message records obtained from Cole Valentine's cell phone carrier reveal that in the days following March 30, 2014, Cole Valentine conspired with Carrie Bragg and others to provide a particular version of events to the police officers investigating the circumstances of Mr. Michael's death. APP 00377-00442. Of particular interest is a text in which an individual identified as Marshall Morris inquired of Cole Valentine: "Am I supposed to tell him "absolutely everything", or shud [sic] itell [sic] him what everbody's [sic] else is saying?" APP 00408. This, along with several other text messages to and from Cole Valentine in the days following Mr. Michael's death call in to question whether Ms. Bragg's version of events is, indeed, "undisputed." Further, testimony from Mr. Morris challenges Ms. Bragg's and Mr. Valentine's version of events in that Mr. Morris testified that his purpose on the night in question was to be the "designated driver."

Moreover, the testimony of Mr. Valentine regarding his past dishonesty about where he was and whether he was drinking calls into question his credibility regarding the events on the night in question. This is sufficient evidence for a jury to conclude that perhaps Ms. Bragg was more responsible than she has let on, or that Mr. Valentine was perhaps somewhere he says he was not, including Westchester Village, on the night in question. There are also sufficient facts upon which Petitioner believes she can prove that Ms. Bragg may have, in fact, been operating

her vehicle when it struck Mr. Michael, after becoming intoxicated at Westchester Village.

Westchester has admitted facts exist which tend to show that Cole Valentine was intoxicated:

THE COURT: The driver of the vehicle to whom she turned the vehicle over to drive was also intoxicated?

MS. NOEL: Allegedly.

THE COURT: Okay.

MS. NOEL: There are allegations.

THE COURT: Okay. There's facts that he's intoxicated?

MS. NOEL: Yes.

APP 00214.

Despite this admission, the Circuit Court found Petitioner produced no evidence that would support a finding by a jury that Cole Valentine was intoxicated at the time Carrie Bragg's vehicle struck the decedent. APP 00494. Further evidence of Cole Valentine's state of intoxication at the time of the accident is a text message on April 3, 2014 at 14:44:49 to Mr. Valentine that states: "Drink don't drive do the watermelon crawl." APP 00423. The "watermelon crawl" refers to lyrics by Tracy Byrd, which references "a hundred gallons of sweet red wine" that can be consumed as long as there is no driving.

(https://www.azlyrics.com/lyrics/tracybyrd/watermeloncrawl.html, accessed December 28, 2017.)

The Circuit Court correctly denied Westchester's initial Motion for Summary Judgment. The subsequent Motion presented no argument that should have caused a reversal of that denial. Unfortunately for Petitioner, the Circuit Court disregarded its role in determining whether to grant summary judgment in consideration of the second motion.

> The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied.

Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (citations and quotations omitted). The Circuit Court violated this mandate and determined credibility, weighed evidenced, and ignored legitimate inferences that could be drawn from the facts.

Petitioner respectfully requests that this Court reverse the decision of the Circuit Court granting summary judgment. Defendants' liability is certainly consistent with the law holding liquor suppliers liable for the harm caused by the intoxicated individual. Further, the Circuit Court failed to abide by the applicable standards for the determination of a grant of judgment as a matter of law. The issues of negligence, contributory negligence, proximate cause, intervening cause, and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, through undisputed, are such that reasonable mend draw different conclusion from them. This is the case here, and Petitioner should be permitted to have her case heard on the merits by the trier of fact.

II. The Circuit Court of Marion County erred by misinterpreting and/or misapplying applicable West Virginia Code sections and/or West Virginia common law.

The Circuit Court erred by deciding that Westchester had no liability under the West Virginia Code or West Virginia common law unless it sold alcohol to minors or provided the same to visibly intoxicated persons. The Circuit Court focused on whether a *prima facie* case of negligence arising from violation of a statute existed. In so doing, the Court considered W.Va.

Code § 60-3-22(a)(1), included in Petitioner's complaint when this matter was against a seller of alcohol and not amended to reflect the evidence which suggested that Westchester provided, rather than sold, alcohol.

The concerns with the Circuit Court's Order are three-fold: (1) a simple amendment would have corrected any concerns regarding Westchester sold versus provided alcohol; (2) the Circuit Court's Order treats violation of statue as the sole mechanism for establishing a prima facie negligence; and (3) even applying the Circuit Court's logic regarding the existence of a cause of action for serving visibly intoxicated persons, there were genuine issues of material fact to be decided regarding the same.

A licensee's provision of alcohol is clearly prohibited by W.Va. Code § 60-7-12, as indicated by the violation issued by the West Virginia Alcohol Beverage Commission to Westchester as a result of the incident arising on the night in question. APP 00256. A simple amendment permitted Plaintiff to set forth allegations regarding provision of the sale of alcohol and the proper statute. Prima facie negligence under W.Va. Code§ 55-7-9 for violation of W.Va. Code § 60-7-12 was proper for decision by the trier of fact.

> 'The purpose of the words "and leave [to amend] shall be freely given when justice so requires" in Rule 15(a) W.Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.' Syllabus Point 3, *Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973).

Muto v. Scott, 224 W.Va. 350, 352, 686 S.E.2d 1 (2008), Syl. Pt. 3. Westchester was well aware of the factual circumstances surrounding the night in issue. Westchester could not argue surprise. The allegations all arise out of acts by Westchester's employees and the law regarding Dram Shop actions. No new theories of liability were presented. Thus, amendment to comply with the

evidence under Rule 15 would have been the proper course of action, rather than reliance on hypertechnical pleading requirements. Indeed, amendment may even occur during or after trial to conform to the facts.

Further, the Circuit Court treated a violation of a liquor liability statute as the sole mechanism for establishing negligence in this case. Violation of statute is not necessary to establish negligence as against a licensee that provides alcohol to minors. The decision in *Anderson v. Moulder* did not foreclose a common law action as determined by the Circuit Court. This Court stated: "We note, however, that some jurisdictions have rejected the common law rule of nonliability and found a cause of action to exist even in the absence of a breach of a statutory duty." *Id.* at 85(citations omitted). This Court went on to cite a number of decisions for that proposition. For example

> It appears to us that it is also probable that the Michigan Liquor Control Act is not applicable where a sale of intoxicating liquor in Illinois produces injuries in Michigan. Defendants so argue in this court and cite a Michigan court decision to support their contention. It would seem to follow that the practical consequence of denying extraterritorial effect to such acts is to leave a vacuum in the law insofar as unlawful sales of intoxicating liquor in one state produce injuries to third persons in another state. Certainly the position of defendants in this court is that the liquor control acts of Illinois and Michigan do not cover such a case.
>
> [. . .]
>
> In applying the common law to the situation presented in this case, we must consider the law of tort liability, even though the chain of events, which started when the defendant tavern keepers unlawfully sold intoxicating liquor to two drunken men, crossed state boundary lines and culminated in the tragic collision in Michigan. We hold that, under the facts appearing in the complaint, the tavern keepers are liable in tort for the damages and injuries sustained by plaintiffs, as a proximate result of the unlawful acts of the former.
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> *Waynick v. Chicago's Last Dept. Store*, 269 F.2d 322, 324-326 (7th Cir.1959)

This Court has also found common law liability may be applicable in situations involving the consumption of alcohol:

> As indicated above, after finding statutory violations to establish *prima facie* evidence of negligence, the trial court went further and found that petitioner was likewise negligent for failing to retrieve the minors after they called him to pick them up, presumably then obviating the subsequent criminal activity of the theft of the vehicle and Misty's reckless and intoxicated driving. To find the existence of petitioner's duty to protect against the subsequent criminal activity, the trial court cited the principle that
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> > "'[o]ne 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).
> >
> > [. . .]
> >
> > As to the instant case, we find that, like the facts in *Strahin*, while it may have been proper for the trial court to determine in *general* terms that Marcus' alleged conduct created an unreasonable risk of harm to the minors, it was within the province of the fact-finder to determine, first, if Marcus engaged in such conduct, and secondly, whether such harm was, in fact, reasonably foreseeable to Marcus.
>
> *Marcus v. Staubs*, 230 W.Va. 127, 136 and 138, 736 S.E.2d 360 (2012).

The Circuit Court completely dismissed any common law liability that would exist on the part of Westchester for its actions. Any conclusion by the Circuit Court that liability would not arise under any statute, does not negate the consideration of any common law liability on the part of Westchester. This nuance was completely ignored or missed by the Circuit Court.

Additionally, the Circuit Court erred in not recognizing that there were sufficient facts in evidence to permit the trier of fact to determine that Westchester was statutorily liable. In fact, Ms. Bragg clearly testified that although she was underage, no one asked for identification while at Westchester; and she was served alcohol to the point of being visibly intoxicated when she left. APP 00288-00289; APP 00366. Once visibly intoxicated, her overall judgment would have been

impaired, as this is the reason the law disfavors intoxication, and the decision she made to either operate her vehicle, or allow Cole Valentine to operate her vehicle could be found by a jury to be an unsound judgment resulting from the intoxication.

West Virginia law provides for a cause of action for negligent entrustment which is set forth as follows:

> In syllabus point 12 of *Payne v. Kinder*, 147 W. Va. 352, 127 S.E.2d 726 (1962) we held that
>
> An owner who entrusts his motor vehicle to a person whom he knows, or from the circumstances is charged with knowing, to be incompetent or unfit to drive it is liable for injury inflicted which results from the use of the automobile by the driver if the injury was proximately caused by the disqualification, incompetency, inexperience, intoxication or recklessness of the driver.
>
> *See also* Syl. Pt. 11, *Payne*. The material issues of fact in dispute in this case are: (1) whether Roger was an inexperienced, incompetent or reckless driver and (2) if so, whether Quality knew or should have known Roger was an inexperienced, incompetent or reckless driver based upon the totality of the circumstances. The affidavits of Mr. Willard and Roger presented conflicting statements concerning the material factual issues in question. Summary judgment was prematurely granted by the circuit court. Therefore, the order granting summary judgment must be reversed.

Clark v. Shores, 201 W.Va. 636, 638-639, 499 S.E.2d 858 (1997)(footnotes omitted). As noted by the Supreme Court of Colorado, "negligent entrustment is a part of the general law governing liability for negligence. As the Michigan Supreme Court observed in *Moning v. Alfono*, the doctrine of negligent entrustment is 'one of the many specific rules concerning particular conduct that have evolved in the application of the general standard of care.' 254 N.W.2d 759, 767 (Mich. 1977)." *Casebolt v. Cowan*, 829 P.2d 352, 355 (Colo.1992).

Thus, if Westchester would be liable if Carrie Bragg were negligently operating the vehicle that night, then genuine issues of material fact exist as to whether Westchester is liable for Carrie Bragg negligently entrusting the vehicle to Cole Valentine and summary judgment was

improper.

Finally, the determination by the Circuit Court that the age of a person does not affect how that person may act in entrusting a vehicle to another is an invasion of the legislature's role in setting public policy.

> The prohibition against selling beer to persons under the age of twenty-one represents a **legislative determination** that because of their immaturity, such persons are less capable of handling the intoxicative and addictive effects of alcohol and, therefore, present a danger to themselves and to others.

Anderson, at 84(emphasis added). The Circuit Court invaded the province of the Legislature when it determined:

> The underage component of the Plaintiffs 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.

APP 00491-00492.

This Court has recently affirmed the distinct duties of the judiciary and the legislature: "Courts cannot dwell 'upon the political, social, economic or scientific merits of statutes[.]' The wisdom, desirability, and fairness of a law are political questions to be resolved in the Legislature." *Morrisey v. W. Virginia AFL-CIO*, 804 S.E.2d 883, 886 (W.Va.2017)(internal citation omitted). The Circuit Court, by concluding that age does not affect the judgment of a minor has altered the Legislature's policy decision and decided the bright line cutoff established by the Legislature should be ignored. As is frequently noted, a line has to be drawn somewhere. The Circuit Court is not free to ignore the line. The Circuit Court's determination that the line does not make a difference to Carrie Bragg's judgment requires a reversal of the grant of summary judgment.

In summary, the Circuit Court misapplied and misinterpreted West Virginia statutes and common law regarding negligence and the provisions of alcohol to underage and/or visibly intoxicated persons. Therefore, Petitioner respectfully requests that this Honorable Court reverse the Circuit Court of Marion County and reverse this matter for a trial on the merits before the trier of fact.

CONCLUSION

Wherefore, based upon the foregoing, Petitioner Heather Humphrey, individually, and as the next friend of Ozzmond Michael and the Administratrix of the Estate of Raymond Dale Michael, respectfully prays that the Supreme Court of Appeals of West Virginia reverse the grant of summary judgment and remand this case for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

COMES NOW Amanda J. Taylor, as counsel for petitioner, and hereby certifies that a true and accurate copy of the foregoing Petitioner's Brief, along with a copy of the Appendix Record, was served upon counsel for Respondent on this 2nd day of January, 2018 via U.S. Mail as follows:

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