

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 22861

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AMERICAN MODERN HOME INSURANCE COMPANY,

Plaintiff,

v.

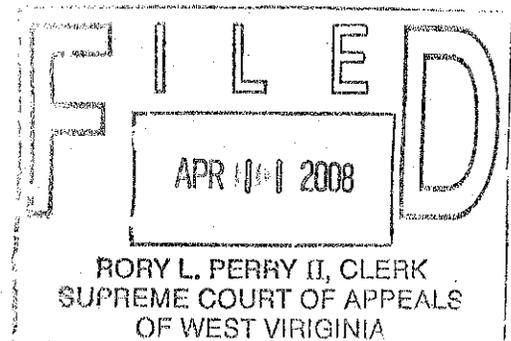
JEFF CORRA, COURTNEY D. MCDONOUGH, MORGAN BROWN,  
THE ESTATE OF MATTHEW HUMPHREYS, and THE ESTATE OF JOSHUA B.  
TUCKER,

Defendants.

BRIEF OF MORGAN BROWN IN SUPPORT OF AN AFFIRMATIVE  
ANSWER TO THE CERTIFIED QUESTION

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## I. INTRODUCTION

COMES NOW the Defendant, Morgan Brown, by and through her attorney, Steven M. Thorne, and respectfully submits this brief on the question of law certified by the United States District Court for the Southern District of West Virginia in American Modern Home Insurance Company v. Corra, et al, Civil Action No. 6:06-CV-01015.

This case presents the issue of whether a homeowners' policy should cover a homeowner that negligently permitted the use of his property for the consumption of alcohol by adults over the age of 18, which proximately caused a motor vehicle accident that occurred off their premises causing injuries.

The homeowner, Jeff Corra, was convicted of four (4) counts of providing alcohol to persons under the age of twenty-one (21) years during the course of the party, however, the facts surrounding the criminal convictions were not related to the motor vehicle accident. Those convictions are pending before this Court on appeal. As a matter of law, the policy terms and exclusions pertaining to occurrence, intentional acts, criminal acts and motor vehicles do not preclude Morgan Brown's insurance claims. The homeowner's policy should cover injuries resulting from the negligent use of the property.

## II. STATEMENT OF MATERIAL FACTS

On or about August 6, 2006 the Defendant, Morgan Brown, age 18, was invited to the home of Jeff Corra as a social guest by his daughter, Ashley Corra. Upon arrival at the home of Jeff Corra, Courtney McDonough was already at the party. (Exhibit 1 at p.56, trial transcript from State v. Jeff Corra) Morgan Brown testified that she arrived at the party around 11:30 p.m. (Id. at p. 49)

Courtney McDonough testified that she arrived at the party about ten (10) minutes prior to Morgan Brown, Joshua Tucker and Matthew Humphries. (Id. at p. 133) Courtney McDonough stated that when she arrived she went to Jeff Corra's refrigerator and opened one can of Coors' Light beer and sat down on the swing. (Id. at p. 146) At around 12:45 a.m. she left the party with Matthew Humphreys and Joshua Tucker to purchase more beer and pick up her friend Miranda Brock. (Id. at p137) They went to the 7- Eleven by City Park and purchased a case of Budweiser beer. (Id. at p. 143) Joshua Tucker purchased the beer with a fake identification. (Id. at p. 168) Significantly, she stated that she drank six or seven Budweiser beers that night from the case of beer that was purchased from the 7-Eleven. (Id. at p. 169) She further testified that she became intoxicated from the Budweiser purchased by Joshua Tucker, not the one Coors Light beer that she obtained from Jeff Corra's refrigerator. (Id. at p. 170)

Miranda Brock testified that Courtney McDonough, Matthew Humphreys and Joshua Tucker picked her up after work on August 6, 2006 at around 12:30 a.m. (Id. at p. 6) She stated that there was an unopened case of Budweiser beer in the car when they picked her up and that they drove directly to Jeff Corra's home. (Id. at p. 11) She stated that upon arrival at Jeff Corra's home that she saw Courtney McDonough drinking from the case of Budweiser that they brought to the party. (Id. at p. 18) She stated that she saw only Budweiser and Coors Light beer at the party. (Id. at p. 43) She further stated that for 90% of the evening Jeff Corra tended to the brush fire in the back yard. (Id. at p. 34)

Subsequently, Morgan Brown left the party in a 2000 model Jeep Wrangler operated by Courtney McDonough in Parkersburg, Wood County, West Virginia. The parties were involved in a motor vehicle accident that resulted in the deaths of Matthew Humphreys and Joshua Tucker, along with the severe injuries to Morgan Brown. (Exhibit 2)

That on April 17, 2007, Courtney McDonough entered a plea of guilty to counts one, three and five of the indictment charging DUI causing death and DUI causing injury relating to the accident in question. (Exhibit 3 at p. 3) Jeff Corra was convicted of four counts of providing alcohol to persons under the age of twenty-one (21) years.

The Defendant, Morgan Brown, filed a notice of intent to proceed against Jeff Corra's homeowner policy on the basis that Jeff Corra negligently permitted the use of his home for the consumption of alcohol and failure to take reasonable steps to supervise and monitor the activities on his premises which resulted in her injuries. (Exhibit 4)

### III. DISCUSSION

A. The District Court has certified the following question of law to this Court:

The homeowner's policy in effect at the time of the underlying Events provides coverage for an "occurrence," which is defined As "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . bodily injury or property damage." Under West Virginia law, does knowingly permitting an underage adult to consume alcoholic beverages on a homeowner's property constitute an "occurrence" within the meaning of the American Home Insurance Company homeowner's policy at issue in this case?

The Plaintiff's primary argument denying coverage under the terms of the policy is that Jeff Corra was convicted of providing alcohol to persons under the age of 21. The statute states as follows:

Any person who knowingly buys for, gives to or furnishes to anyone under the age of twenty-one, any non-intoxicating beer, wine or alcoholic liquors purchased from a licensee, if guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than five hundred dollars, or

imprisoned in the county jail not more than ten days, or both fined and imprisoned.

W.Va. Code Section 60-7-12a

The question is whether or not providing a place to consume alcohol to adults under the age of 21, which ultimately lead to an automobile accident causing injuries, constituted an occurrence triggering coverage. The fact that Jeff Corra was convicted of providing alcohol to persons under age 21 is not relevant. It is undisputed that Courtney McDonough became intoxicated from drinking her own beer and not that of Jeff Corra. Thus, there was no proximate causation between the criminal conviction and the automobile accident. The triggering event or "occurrence" was Jeff Corra's negligent act providing a place for Courtney McDonough to become intoxicated.

Courtney McDonough is the most relevant person to this case because she was the driver of the vehicle that wrecked subsequent to the party. There is no issue with the fact that Courtney McDonough admitted that she was intoxicated at the time of the accident and entered a plea of guilty to two counts of DUI causing death and DUI causing injuries. The issue before the Court is whether her intoxication was a result of Jeff Corra providing her with alcohol during the party, which proximately caused the motor vehicle accident. The answer to that

question is no, therefore, the exclusionary language in the policy regarding an "occurrence", intentional acts, and criminal acts do not apply to this case. The fact that Jeff Corra was convicted of providing alcohol to three other people at the party is irrelevant to the issues before this Court.

Courtney McDonough testified at the trial of Jeff Corra that she arrived at the party around 11:30 p.m. and drank one beer from Jeff Corra's refrigerator. She testified that she left the party about 11:45 with Matthew Humphreys and Joshua Tucker and purchased a case of Budweiser beer, which she drank the rest of the night. She testified that she drank six or seven Budweiser beers from the case that Joshua Tucker purchased. She stated that she only drank one beer at the party prior to leaving to purchase the Budweiser beer.

West Virginia Code Section 60-6-24 requires each vendor that sells alcoholic beverages to post a Blood Alcohol Chart. The legal intoxication limit in West Virginia is .02% for persons under the age of 21 and .08% for persons over age 21. Pursuant to the chart listed in Section 60-6-24, a person weighing 120 lbs. that consume one 12 ounce bottle of beer could have a base blood alcohol content of .31%. Courtney McDonough testified that she arrived at the party around 11:30 p.m. and drank one beer prior to leaving at 11:45 p.m. According to the police report the accident occurred at 3:09 a.m. The Blood Alcohol Chart outlined in 60-

6-24 allows for a reduction of 0.15% for each hour after consumption. Pursuant to the calculations from the Blood Alcohol Chart, the one beer that she obtained at 11:30 p.m. from Jeff Corra's refrigerator would have "burned up" by the time of the accident three hours later. Her intoxication level at the time of the accident was a result of her drinking her own beer at Jeff Corra's residence. It is not illegal in the State of West Virginia to allow adults under the age of 21 years of age to consume alcohol on your premises.

Each case cited by the Plaintiff involved homeowners that provided alcohol to persons under the age of 21 to the point of intoxication, which resulted in injuries. Those were not the facts of this case. The Plaintiff is precluded from denying coverage on the basis of the criminal convictions because there was no proximate causation between the criminal acts and the injuries to Morgan Brown. An "occurrence" was triggered when Jeff Corra negligently allowed adults under the age of 21 years to consume alcohol on his premises.

B. The Plaintiff next argues that coverage should be denied on the basis of the policy's intentional acts exclusion. Again, the Plaintiff relies upon the Jeff Corra's convictions that have been discussed above. Again, there was no causation between the criminal acts and the resulting injuries.

The Supreme Court of Appeals of West Virginia has refined the standards governing intentional acts exclusions, holding that "when an intentional acts exclusion uses language to the effect that insurance coverage is voided when the loss 'expected or intended by the insured,' courts must use a subjective rather than objective standard for determining the policyholder's intent."

Farmers and Mechanics Mut. Ins. Co. of West Virginia v. Cook, 210 W.Va. 394, 557 S.E. 2d 801, Syl. Pt. 8 (2001).

According to the Farmers case the insured must have intended for the injuries to have occurred before it can be excluded. If the event was intended it can be properly excluded, however, if it was not intended then it was an accident. According to the testimony at Jeff Corra's trial, he offered to allow people to stay overnight if they were too intoxicated to drive. Obviously, it was not his intention to cause an automobile accident or injure the Defendants. The Plaintiff cited several cases from other jurisdictions that apply an objective standard in support of its argument. The West Virginia Supreme Court of Appeals has rejected the objective standard, therefore, those cases are not applicable. (See Huggins) The policy language regarding "...whether or not the resulting bodily or property damage was expected or intended" is ambiguous, overly broad and against public policy. Clearly, this was a negligent act that would trigger an "occurrence"

pursuant to the terms of the policy. The intentional act exclusion does not apply because Jeff Corra did not intend to cause the auto accident after the party. A declaratory judgment is not appropriate.

C. Next, the Plaintiff asserts that coverage should be denied on the grounds that it is excluded by the policy's motor vehicle exclusion, which states as follows:

- (4) failure to supervise, or negligent supervision of, any person involving a motor vehicle or other motorized land Conveyance by an insured person.

The Plaintiff cited the Huggins case in support of her argument. However, that case is more persuasive to the defendants' position that the exclusion does not apply. The Huggins case involved similar facts involving a homeowner providing alcohol to underage persons to the point of intoxication, which resulted in an automobile accident away from the insured's premises. This is an important distinction from the case at bar. Jeff Corra did not provide Courtney McDonough alcohol to the point of intoxication. The testimony established that she used his premises to become intoxicated on beer that she brought to the party, which is not a crime in the State of West Virginia. Jeff Corra's negligence arose out of the use of his property for the consumption of alcohol by adults under the age of 21 and failure to properly supervise their activities while on his premises. The Court

in the Huggins case ruled that the use of the motor vehicle exclusion did not apply to the claim of negligent entrustment. The Court stated that where a policy owner negligently entrusts a non-owned vehicle to his son who injures a third party resulting from his negligent act of providing alcohol to him to the point of intoxication, the motor vehicle exclusion would not preclude coverage under the policy.

The Huggins case stated in part:

[3] Simply because a person can purchase automobile liability insurance that will provide protection against losses due to the use of automobiles does not necessarily negate coverage under a comprehensive homeowners policy. A policy must be interpreted on its own terms without reference to what other insurance is owned or available to the insured. Not all home owners are car owners. Hence, it would be unreasonable to deny liability protection to a home owner when the liability, in some way, involved someone else's car that the home owner had no reason or interest to insure. *Accord Aetna Cas. & Sur. Co. v. Drake, 343 PA. Super, 114, 494 A. 2d 381 (1985)* Nationwide's liability coverage in this case is quite broad. It does not limit liability to occurrences on the insured's premises. For example, it extends coverage to teachers acting in their professional capacity and also covers business activities that are ordinarily incident to nonbusiness pursuits. Furthermore, it covers business activities on the insured's premises provided \*\*17 such businesses are indicated in the policy. It also applies to the use of some watercraft and farm equipment. [FN11] In other words, the policyholder could reasonably expect that the liability coverage in this policy is much more comprehensive than a policy that only covers liability arising from accidents on the home owner's premises.

Huggins v. Tri-County Bonding Co., 175 W.Va. 643, 337 S.E. 2d 12 (1985)

The Huggins case further made a distinction between policies that limited liability to injuries that occur on the premises. It stated in part:

There is no language in the liability coverage section which confines liability to acts arising on the premises covered by the policy. [FN4] We think it is clear that the liability policy coverage is sufficiently comprehensive to cover negligent personal acts occurring on or off the insured's premises committed by an insured. This would include a negligent entrustment claim such as asserted in the present case. [FN5]

In the present case the policy specifically covers bodily injuries off of the insured's premises. The medical payments section of the policy states as follows:

... As to others, this coverage applies only:

(a) To a person on the insured premises with the permission of any insured person; or

(b) To a person off the insured premises if the bodily injury:

(1) Arises out of a condition on the insured premises;

(2) Is caused by the activities of any insured person;

(3) Is caused by a resident in the course of the residence employee's employment by an insured person; or

(4) Is caused by an animal owned by or in the care of any insured person...

There is no limiting language under the liability section of this policy limiting coverage to the insured's premises. The Huggins court went on to say that the insured could reasonably expect that the liability coverage is much more comprehensive than a policy that only covers liability arising from accidents on the homeowner's premises. (Id. at p.7) The Court further stated that they did not disagree that a homeowner's policy is not meant to be coextensive with the ordinary automobile liability policy. However, this does not mean that in certain situations there may not be an occasional overlap. (Id.) Whenever language of

insurance policy is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous. (Id. at p. 2) Insurance policies that require construction must be construed liberally in favor of insured. (Id.) The policy is inconsistent in that it under the medical payments section a person injured off of the premises caused by the actions of an insured is covered by the policy. There is no language under the liability portion that precludes coverage off of the premises. The Huggins case requires that ambiguous language in a policy be construed liberally in favor of the insured.

The Plaintiff further asserts that the mere use of the motor vehicle precludes coverage under the policy. That argument is inconsistent with West Virginia case law. All of the cases identified in the Plaintiff's Memorandum of Law regarding this issue are from other jurisdictions and involve homeowners providing alcohol to minors to the point of intoxication. The West Virginia Supreme Court of Appeals in the Huggins case stated, "Thus, the driver's negligent operation is not the critical factor in a negligent entrustment action, although it is necessary to complete the causal connection between the original negligent act and the ultimate injury. (Id. at p. 8) Although the death and injuries occurred

during a motor vehicle accident, the critical component to their claims was that Jeff Corra negligently allowed underage drinking on his premises.

In Price v. Halstead, the West Virginia Supreme Court of Appeals stated:

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.

Price v. Halstead, 177 W. Va. 592, 355 S.E. 2d 380 (1987) Syl. Pt. 10.

The Plaintiff points to the overly broad and ambiguous language in the policy involving failure to supervise any person involving a motor vehicle. The exclusion does not apply because the negligent act was the failure to supervise the drinking at the party that caused the accident, not the failure to supervise a person involving an automobile. First of all, the vehicle in question was not owned by Jeff Corra. He had no right to supervise or inspect that vehicle. Further, the language in the policy does not make the distinction between owned and non-owned vehicles. Also, as discussed above, there is conflicting language in the policy that allows coverage for bodily injury outside the premises due to the actions of the insured or a condition on the premises. Reasonable minds could differ as to whether the policy language included coverage beyond the homeowner's premises based on a negligence standard.

#### IV. CONCLUSION

The facts and the case law cited above make it abundantly clear that there are genuine issues regarding the interpretation of the policy that reasonable minds could differ regarding the interpretation of the policy, along with the facts. The West Virginia Supreme Court in Huggins stated that they did not disagree that a homeowner's policy is not meant to be coextensive with the ordinary automobile liability policy. However, this does not mean that in certain situations there may not be an occasional overlap. For all of these reasons the certified question should be answered in the affirmative. The Defendant, Morgan Brown, joins in the other Defendants' responses to the certified question.

WHEREFORE, the Defendant, Morgan Brown, respectfully requests this Court to enter an Order answering the certified question in the affirmative.

Morgan Brown  
By counsel,



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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
At Parkersburg

AMERICAN MODERN HOME  
INSURANCE COMPANY,

Plaintiff,

v.

CIVIL ACTION NO.: 6:06-CV-1015  
(Honorable Joseph R. Goodwin)

JEFF CORRA,  
COURTNEY D. MCDONOUGH,  
MORGAN BROWN,  
THE ESTATE OF MATTHEW HUMPHREYS,  
and THE ESTATE OF JOSHUA B. TUCKER,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2007, I served a copy of the foregoing "Defendant, Morgan Brown's, Memorandum of Law in opposition to American Home Insurance Company's Motion for Summary Judgment and Motion for Leave to Exceed Page Limitation" with the Clerk of the Court using the CM/ECF system, and served the foregoing upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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