

MYERS AND PERFATER

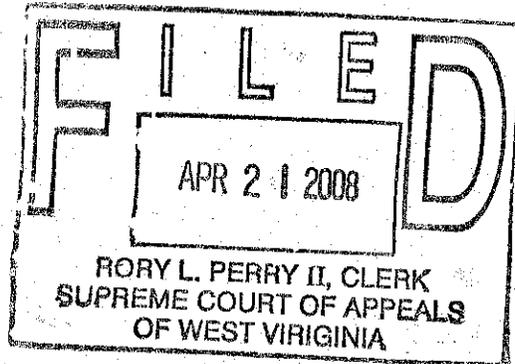
ATTORNEYS AT LAW

1311 VIRGINIA STREET, EAST
P.O. BOX 2631
CHARLESTON, WEST VIRGINIA 25329-2631

TELEPHONE (304) 345-2202
FAX (304) 344-8784

PAUL S. PERFATER
MICHAEL L. MYERS*
ERIC M. WILSON
* Also licensed in Kentucky

April 21, 2008



VIA HAND DELIVERY

The Honorable Rory L. Perry, II, Clerk
West Virginia Supreme Court of Appeals
Room 317, East
State Capitol Building
Charleston, WV 25305

Re: American Modern Home Insurance Company v. Corra, et al.
No. 33861

Dear Mr. Perry,

Enclosed please find the original and nine (9) copies of *Brief of the Estate of Matthew Humphreys in Support of an Affirmative Answer to the Certified Question* for filing in the above matter.

Should you have any questions, please do not hesitate to contact me.

Very Truly Yours,

A handwritten signature in cursive script, appearing to read "Paul S. Perfater".

Paul S. Perfater

PSP/

Enc.: As Stated

cc: Sara Humphreys
Hon. Joseph R. Goodwin
Scott Bellomy, Esq.
Steve Thorne, Esq.
Michelle Piziak, Esq.
James M. Cagle, Esq.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	2
III.	DISCUSSION OF LAW	3
A.	STANDARD OF REVIEW	3
B.	THE CLAIM AGAINST JEFF CORRA IS AN “OCCURRENCE” THAT TRIGGERS COVERAGE.....	3
C.	THE ALLEGATIONS ARISE FROM JEFF CORRA PROVIDING A PLACE FOR UNDERAGE DRINKERS TO CONSUME ALCOHOL NOT FOR PROVIDING COURTNEY MCDONOUGH WITH ONE HALF (½) A BEER. .	7
D.	INTENTIONAL ACTS EXCLUSION IS INAPPLICABLE TO THIS CLAIM. .	8
E.	THE CRIMINAL ACTS EXCLUSION IS INAPPLICABLE TO THIS CLAIM. .	9
F.	THE MOTOR VEHICLE EXCLUSION IS NOT APPLICABLE TO THIS CLAIM.....	10
IV.	CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<i>Aikens v. DeBow</i> , 208 W.Va. 486, 541 S.E.2d 576 (2000)	3
<i>Barr v. Curry</i> , 137 W.Va. 364, 71 S.E.2d 313	12
<i>Bower v. Westinghouse Elec. Corp.</i> , 206 W.Va. 133, 522 S.E.2d 424 (1999)	3
<i>Brace v. Salem Cold Storage, Inc.</i> , 146 W.Va. 180, 118 S.E.2d 799	12
<i>Butler v. Smith's Transfer Corp.</i> , 147 W.Va. 402, 128 S.E.2d 32	12
<i>Clay v. Walkup</i> , 144 W.Va. 249, 107 S.E.2d 498	12
<i>Evans v. Farmer</i> , 148 W.Va. 142, 133 S.E.2d 710	12
<i>Huggins v. Tri-County Bonding</i> , 175 W.Va. 643, 337 S.E.2d 12 (1985)	11
<i>Illinois Farmers Ins. Co. v. Duffy</i> , 618 N.W.2d 613 (Minn. 2001)	6
<i>Lawrence v. Nelson</i> , 145 W.Va. 134, 113 S.E.2d 241	12
<i>Leftwich v. Wesco Corp.</i> , 146 W.Va. 196, 199 S.E.2d 401	12
<i>Lester v. Rose</i> , 147 W.Va. 575, 130 S.E.2d 80	12
<i>Light v. Allstate Ins. Co.</i> , 203 W.Va. 27, 506 S.E.2d 64 (1998)	3
<i>Polan v. Traveler Ins. Co.</i> , 156 W.Va. 250 (1972)	13
<i>Price v. Halstead</i> , 177 W.Va. 592, 355 S.E.2d 380 (1987)	9
<i>Robertson v. LeMaster</i> , 171 W.Va. 607, 301 S.E.2d 563 (1983)	6
<i>Spurlin v. Nardo</i> , 145 W.Va. 408, 114 S.E.2d 913	12
<i>State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.</i> , 199 W.Va. 99, 483 S.E.2d 228 (1997)	5, 6
<i>Wilson v. Edwards</i> , 138 W.Va. 613, 77 S.E.2d 164	12

STATUTES AND RULES

W.Va. Code § 17C-5-8(a)(1)

8

W.Va. Code § 60-6-24

7

W.Va. Code 60-7-12a

8

I. INTRODUCTION

Defendant Estate of Matthew Humphreys 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 homeowner permitting an underage adult to consume alcoholic beverages on the homeowner's property constitutes an "occurrence" within the meaning of the American Modern Home Insurance Company (hereinafter "Plaintiff") homeowner's insurance policy at issue in this case.

Contrary to Plaintiff's assertion, this Defendant's claim does not concern whether AMHIC's insured, Jeff Corra, provided alcohol to underage adults. Rather, Defendant's claim arises out of Corra negligently permitting and providing substantial assistance to the Defendants in allowing his property to be used as a location for a party and failing to take reasonable steps to supervise the property, i.e., failing to prevent underage adults from consuming alcohol at his residence and then operate an automobile. Defendant calls attention to fact that the relevant charge of which Corra was convicted, knowingly giving or furnishing one-half ($\frac{1}{2}$) of one (1) Coor's Light to the driver of the automobile, Courtney McDonough, some three (3) hours prior to the accident, is among those charges this Court has decided in a 5-0 decision, to hear on appeal.¹ Defendant notes that the only issue before this Court is that of whether or not an "occurrence" as defined by the subject policy took place, but, as Plaintiff has raised other issues not before this Court, Defendant is compelled to address those issues as well.

¹ A copy of Jeff Corra's *Petition for Appeal* to this Court is attached hereto as Exhibit 1.

II. STATEMENT OF FACTS

On or about the 6th day of August, 2006, the insured, Jeff Corra permitted his daughter to have a party at their residence on Rector Road near Rosemar Road, Parkersburg, West Virginia. At the party alcohol was consumed by underage drinkers. Arguably, Jeff Corra did provide Courtney McDonough with a Coors Light of which she consumed half the can. (Exhibit 1 at 133²) Courtney McDonough then left Jeff Corra's residence to get more beer. (Exhibit 1 at 136) During that time Courtney McDonough was gone for at least half an hour. (Exhibit 1 at 141) She went to a Seven-Eleven ("7-11") convenience store where Budweiser Beer was purchased by Josh Tucker, who used a false I.D., and then drove to a local establishment known as Kokomo's. (Exhibit 1 at 143) After leaving Kokomo's she returned to the party at Jeff Corra's and consumed the additional beer. (Exhibit 1 at 144)

Later, after Ms. McDonough consumed six to seven Budweisers (Exhibit 1 at 146, 169) purchased by Josh Tucker, she became intoxicated (Exhibit 1 at 169-170). She, Josh Tucker, Matthew Humphreys and Morgan Brown left to go to the British Petroleum (BP) station. After leaving the nearby British Petroleum (BP) station to return to Jeff Corra's house Ms. McDonough's Jeep left the roadway, killing Matthew Humphreys and Joshua Tucker, also severely injuring Morgan Brown. Ms. McDonough pleaded guilty to DUI causing death.

A party was ongoing during this evening at the Corra house. Emily Bostic, Katyln Smith, Harold Hendrix, and Beverly Yeager all testified that under-aged adults were consuming beer at the Corra residence.

² With the exception of Exhibit 1, all other exhibits are part of the underlying record and attached to *Defendant the Estate of Matthew Humphreys' Memorandum of Law in Opposition to Motion for Summary Judgment*.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

With respect to the review of a certified question matter, this Court has held:

When considering a certified question, we generally accord the original court's determination thereof plenary review. 'A *de novo* standard is applied by this [C]ourt in addressing the legal issue presented by a certified question from a district court or appellate court.' Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E. 2d 64 (1998)." Syl. Pt. 2, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E. 2d 576, (2000). *Accord* Syl. Pt. 1, *Bower v. Westinghouse Elec. Corp.* 206 W.Va. 133, 522 S.E.2d 424 (1999) ("This Court undertakes plenary review of legal issues presented by certified questions from a federal district court or appellate court.")

B. THE CLAIM AGAINST JEFF CORRA IS AN "OCCURRENCE" THAT TRIGGERS COVERAGE.

The claim that the Estate of Matthew Humphreys brings to the court is relatively straight forward. Law school teaches that to prove negligence, the plaintiff must prove four elements: duty, breach, causation, and damages.

1. Duty

Jeff Corra had a duty not to provide underage drinkers with a place to party and consume alcohol. Further, Jeff Corra had a duty once he recognized he had created a dangerous situation to use reasonable care to remedy the dangerous situation.

2. Breach of Duty

Jeff Corra breached the duty he owed to Matthew Humphreys and others when he permitted his daughter Ashley Corra to have friends over for a party. He further breached his duty when he saw underage drinkers, particularly Courtney McDonough and Josh Tucker, and didn't cease the

activities on his property. Further, he did not use reasonable care to prevent the threatened harm.

3. Causation

Jeff Corra's breach of his duty caused Matthew Humphreys damages. If not for Jeff Corra providing Courtney McDonough with a place to become intoxicated, she would not have become intoxicated. If she had not become intoxicated, she would not have wrecked and, if she would not have wrecked, Matthew Humphreys would not have been killed upon leaving Corra's residence.

4. Damages

Matthew Humphreys was killed in the accident resulting from Jeff Corra's negligence. Plaintiff attempts to paint its insured with a broad brush. Plaintiff argues its insured "Jeff Corra was convicted of multiple counts of providing alcohol to underage persons arising out of the event."³ The Estate of Matthew Humphreys agrees Mr. Corra was so convicted; however, let us narrow our focus to the important person in this situation, Courtney McDonough. Courtney McDonough was the driver when the vehicle left the roadway and Matthew Humphreys and Joshua Tucker were killed, and Morgan Brown was injured. Thus, let us not chase red herrings as to who else was intoxicated, or for what other crimes Jeff Corra was questionably convicted, but instead focus on the important aspects of the case. The question is whether Matthew Humphreys' death arose from an "occurrence" as defined by the insurance policy at issue. Courtney McDonough did not become intoxicated on Jeff Corra's alcohol. Corra allegedly provided McDonough with one-half (½) of a Coors Light.

³ Defendant notes that this issue is not presently before this Court. However, in addressing this issue, this Defendant concurs with the obvious as stated by Morgan Brown: "Each case cited by the Plaintiff involved by 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." *Brief of Morgan Brown in Support of an Affirmative Answer to the Certified Question* at p. 9.

Instead she became intoxicated on the Budweiser she and others went to get after the party started.

The insuring clause for the "personal liability" coverage of the subject policy states:

If a claim is made or a suit is brought against any **insured person** for damages because of **bodily injury or property damage**, caused by an **occurrence**, to which this coverage applies, we will:

1. pay up to our liability limit for the damages for which the **insured person** is legally liable, except for punitive or exemplary damages.

However, we will pay no more than \$10,000 for any claim made or suit brought against any **insured person** for **bodily injury or property damage** caused by any animal owned by, or in the care, custody or control of, any **insured person**. This limit is the maximum we will pay for any one **occurrence**.

2. provide a defense at our expense by counsel of our choice. We may investigate and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the **occurrence** in settlement of a claim(s) or in satisfaction of a judgment(s) equals our liability limit. We have no duty to defend any suit or settle any claims for **bodily injury or property damage** not covered under this policy.

[Insurance Policy at 12 of 18]. Coverage is, therefore, triggered by 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:

a. **bodily injury; or**

b. **property damage.**

Counsel for Plaintiff argues coverage is triggered by an occurrence, which is defined as an accident. Plaintiff then cites *State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, 199 W.Va. 99, 483 S.E.2d 228 (1997) and then determines Jeff Corra's conduct was not an accident. Obviously,

the Estate of Matthew Humphreys agrees Jeff Corra intentionally provided a place for Courtney McDonough to consume alcohol - which is not illegal. Nevertheless, the triggering event or occurrence is the automobile accident which occurred one half (½) a mile from Jeff Corra's house. That is the occurrence that is "independent and unforeseen happening which produces the damages". *State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, not the allegedly deliberate act of providing them with a place to party and consume alcohol.

Plaintiff then cites *Illinois Farmers Ins. Co. v. Duffy*, 618 N.W.2d 613 (Minn. 2001) as authority for its proposition that no occurrence happened to engage coverage. That case is easily distinguished from the case at bar in that the insured in the Minnesota case supposedly provided the alcohol. In this case it is undisputed that Jeff Corra provided Courtney McDonough with only one-half (½) of a Coors Light three hours prior to the accident. Thus, the occurrence is not the providing of beer, but is instead the providing a place (his insured home) to become intoxicated.

If Plaintiff is correct in its reasoning, then negligence never occurs because it always starts from an intentional act. Obviously, using the Plaintiff's reasoning, coverage would be denied if a smoker fell asleep while smoking and accidentally dropped his cigarette into the couch, and a fire burned the trailer to the ground. Because, in Plaintiff's analysis, the smoker's first act in the chain (lighting a cigarette) was a deliberate act, no coverage or negligence ensues. Obviously, that is not the case as the Supreme Court of Appeals of West Virginia used the word "unless" when defining accident. "Unless some additional ...happening occurs which produces the damage". *Syl. Pt. 2, Robertson, Supra.* An accident did occur and it occurred approximately one half (½) a mile from Jeff Corra's residence - that is apparent in the case at bar, obviously.

Plaintiff continues to paint with a broad brush alleging Jeff Corra provided alcohol to minors. Although this is a disputed matter, Corra was so convicted. But even assuming *arguendo*, the driver of the vehicle in the wreck, Courtney McDonough, only received from Jeff Corra one half (1/2) a Coors Light three hours prior to the accident. (Exhibit 1 at 141) Corra's alleged furnishing of one-half (1/2) of a Coor's Light is not the proximate cause of the accident at bar.

C. THE ALLEGATIONS ARISE FROM JEFF CORRA PROVIDING A PLACE FOR UNDERAGE DRINKERS TO CONSUME ALCOHOL NOT FOR PROVIDING COURTNEY MCDONOUGH WITH ONE HALF (1/2) A BEER

Courtney McDonough drank one half (1/2) a Coors Light allegedly provided by Jeff Corra three hours before the accident. (Exhibit 1 at 141) She then left to go to Seven-Eleven (7-11) and Kokomo's. (Exhibit 1 at 143). When she returned to Jeff Corra's house, she began drinking the Budweiser Josh Tucker obtained from Seven-Eleven (7-11).

Pursuant to *W.Va. Code § 60-6-24*, signs must be posted in establishments that sell alcoholic beverages. The signs show Blood Alcohol levels in order that consumers can estimate their Blood Alcohol Content (BAC). Pursuant to those findings a one hundred twenty (120) pound person (See attached DMV records evincing Courtney McDonough's weight as 120 pounds, "Exhibit 2") who drank one-half (1/2) of a Coors Light would have a Blood Alcohol Content (BAC) of .0155 (which is below the .02 required to charge an underaged drinker with DUI). Further, that amount would have been sufficiently "burned up" in the half- hour drive to Kokomo's and back to Jeff Corra's residence. Mathematically, we can compute her Blood Alcohol Content (BAC) at .007. Of course, the legal limit in West Virginia is .08 prima facie evidence of intoxication.

In fact, for underage DUI, McDonough must have a minimum Blood Alcohol Content (BAC) of .02. Further, if she were over twenty-one (21) this Blood Alcohol Content (BAC) level is prima facie evidence she was not intoxicated. (See, 17C-5-8(a)(1)). For Plaintiff to argue that it is undisputed that the one half (1/2) a beer Jeff Corra allegedly "provided" to Courtney McDonough is the undisputed underlying allegation and cause of this accident and the accident "arises" out of that criminal conduct is erroneous.

W.Va. Code § 60-7-12a. Any person who knowingly buys for, gives to or furnishes to anyone under the age of twenty-one, any nonintoxicating beer, wine or **alcoholic liquors** purchased from a licensee, is 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. (Emphasis added.)

Thus, although Jeff Corra was convicted under this code section he only allegedly gave, furnished, or bought one-half (1/2) of a Coors Light - a beer, not alcoholic liquor - to Courtney McDonough. To claim that this car wreck "arises" out of providing one-half (1/2) of a Coors Light - three hours before the accident - to Courtney McDonough is misguided. The injuries arose out of Jeff Corra providing a place for her to consume alcohol and then not using reasonable care to remedy the dangerous situation he created.

D. INTENTIONAL ACTS EXCLUSION IS INAPPLICABLE TO THIS CLAIM

Once again Plaintiff loses sight of the actual facts. Jeff Corra only provided to Courtney McDonough one half (1/2) of a Coors Light. All the other alcohol she and the others consumed was brought back to the Corra residence after their beer run. Thus, Mr. Corra's negligence in permitting the party is the causative factor, not that he intended to provide one-half (1/2) of a Coor's Light to Ms.

McDonough. The testimony is undisputed that she helped herself to the Coors Light. Jeff Corra did not offer her a beer (Exhibit 1 at 160), did not hand her a beer (Exhibit 1 at 160), and did not give her permission to take a beer. (Exhibit 1 at 164) Thus, the question becomes what is the intentional act Jeff Corra did that resulted in bodily injury? The exclusion must go to causation, and in this case it does not.

Jeff Corra's negligence is easily found pursuant to Syl. Pt 10, *Price v. Halstead*, 177 W.Va. 592, 355 S.E. 2d 380 (1987), in which the Supreme Court of Appeals of West Virginia held:

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).

Jeff Corra did engage in affirmative conduct, that conduct was he permitted a party at his residence. Further, he should have realized providing underage drinkers with the place and opportunity to consume alcohol away from the eyes of law enforcement and the public would create a reasonable risk of harm to Matthew Humphreys and others. In fact, he did realize the danger. This is evidenced in the proffer Corra's attorney, George Cosenza, made at Corra's trial. Mr. Cosenza vouched the record that Jeff Corra offered to call a cab or permit the youths to stay at his place to become sober. (Exhibit 1 at 243) Finally, he breached his duty to exercise reasonable care to prevent the threatened harm.

Thus, the intentional acts exclusion is inapplicable to the case at bar.

E. THE CRIMINAL ACTS EXCLUSION IS INAPPLICABLE TO THIS CLAIM

As previously stated, the criminal acts exclusion is found in Section III § 1b. The language in that exclusion is bodily injury "arising out of any criminal conduct". Matthew Humphreys, through his personal representative, disputes that the claim "arises" out Jeff Corra's criminal conduct.

It is undisputed Courtney McDonough only drank one-half (1/2) of a can of Coors Light and left the party. She then returned and used Jeff Corra's residence to consume six (6) to seven (7) beers from other sources. (Exhibit 1 at 169) Thus, it is not a matter of law that the criminal exclusion in this policy bars recovery. No one can assert that this accident arose out of providing one-half (1/2) of a beer to Courtney McDonough three hours prior to the accident. But it is undisputed that Jeff Corra permitted Courtney McDonough to consume her own alcohol and the alcohol of others on his premises. Thus, he substantially contributed to the motor vehicle accident. The accident did not "arise", however, from Jeff Corra's alleged criminal conduct.

F. THE MOTOR VEHICLE EXCLUSION IS NOT APPLICABLE TO THIS CLAIM

Among the myriad exclusions listed in Corra's policy is the following relied upon by Plaintiff:

1. Under **PERSONAL LIABILITY** and **MEDICAL PAYMENTS TO OTHERS**, we do not cover **bodily injury** or **property damage**:

f. arising out of the:

- (1) the ownership, maintenance, occupancy, operation, use, loading or unloading of **motor vehicles** or all other motorized land conveyances, including trailers, owned or occupied by or rented or loaned to an **insured person**;
- (2) the entrustment by an **insured person** of a **motor vehicle** or any other motorized land conveyance to any person;
- (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor involving a **motor vehicle** or other motorized land conveyance; or
- (4) failure to supervise, or negligent supervision of, any person involving a **motor vehicle** or other motorized land conveyance by an **insured person**.

Plaintiff asserts in its argument that “[e]xclusion f(4) clearly and unambiguously applies to any claim of negligent supervision of the driver of the vehicle in question, thereby precluding coverage for the claims presented against American Modern Home Insurance Company’s insured” (*Plaintiff’s Memorandum in Support of Summary Judgment* at 17). Plaintiff’s counsel cites as authority *Huggins v. Tri-county Bonding*, 175 W.Va. 643, 337 S.E.2d 12 (1985). The Estate of Matthew Humphreys does not argue, however, that Jeff Corra failed to supervise of a person involving a motor vehicle. In fact, Jeff Corra had no right to supervise a vehicle owned and maintained by Joseph McCoy and driven by Courtney McDonough. Nevertheless, he had an affirmative duty to “exercise reasonable care to prevent the threatened harm”. Syl. Pt. 2, Robertson, Supra. In the trial transcript Mr. Cosenza vouches the record as follows:

Just so I’m clear on the Court’s earlier ruling, this witness does have the knowledge that Mr. Corra asked these people who were out there to stay at his home, that he would provide a cab if they were drinking, and the Judge has ruled that I’m not allowed to raise that issue, is that correct? (Exhibit 1 at 243)

Perhaps Jeff Corra offered a ride to Courtney McDonough. Perhaps Jeff Corra offered to let Courtney McDonough stay at his home and sleep off her intoxication. Nothing proves or disproves those assertions. Thus, the question is one of fact. Therefore, a jury should determine that fact.

If Jeff Corra did make such an offer to Courtney McDonough, perhaps that offer was sufficient to meet his obligation of reasonable care as found in *Robertson*, Supra. However, questions of negligence, due care, proximate cause, and concurrent negligence present issues of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them. *Evans v. Farmer*, 148 W.Va. 142, pt. 2 syl., 133 S.E.2d 710; *Butler v. Smith's Transfer Corporation*, 147 W.Va. 402, pt. 8 syl., 128 S.E.2d 32; *Lester v. Rose*, 147 W.Va. 575, pt. 14 syl., 130 S.E.2d 80; *Leftwich v. Wesco Corporation*, 146 W.Va. 196, pt. 7 syl., 119 S.E.2d 401; *Brace v. Salem Cold Storage, Inc.*, 146 W.Va. 180, pt. 5 syl., 118 S.E.2d 799; *Spurlin v. Nardo*, 145 W.Va. 408, pt. 3 syl., 114 S.E.2d 913; *Lawrence v. Nelson*, 145 W.Va. 134, pt.1 syl., 113 S.E.2d 241; *Clay v. Walkup*, 144 W.Va. 249, pt. 2 syl., 107 S.E.2d 498; *Wilson v. Edwards*, 138 W.Va. 613, pt. 4 syl., 77 S.E.2d 164; *Barr v. Curry*, 137 W.Va. 364, 371-72, 71 S.E.2d 313, 317.

Matthew Humphreys' Estate is not asserting Jeff Corra failed to supervise a vehicle, but the question is whether he used reasonable care once he created - and realized he had created - a dangerous situation. That is always a question of fact for a jury to decide.

CONCLUSION

Plaintiff is trying to hide behind facts that are irrelevant and/or immaterial to the discussion. Everyone agrees Jeff Corra was convicted for providing alcohol to underage drinkers, including Courtney McDonough. However, the evidence is undisputed that he allegedly provided her with one half (1/2) of a Coors Light prior to the accident. Pursuant to the burn rate and Blood Alcohol Charts that must be posted in W.Va. bars, she was not intoxicated by consuming that one half (1/2) a beer. In fact, her Blood Alcohol Content (BAC) level from that one half (1/2) a beer was prima facie evidence she was not intoxicated. Thus, for Plaintiff to argue that his accident "arises" from that one half (1/2) a beer is disingenuous. This is true whether Plaintiff tries to exclude coverage under an intentional acts exclusion, a criminal acts exclusion, or a medical payments exclusion.

Once Jeff Corra permitted these underage drinkers to use his residence to hide their conduct from the public, he engaged in affirmative conduct which created a duty to exercise reasonable care to prevent the harm. Syl. 2, Robertson v. LeMaster, Supra. Defendant submits to this Court that the creation of the situation giving rise to the ultimate injury constitutes an "occurrence" as defined by Plaintiff's policy of insurance. Jeff Corra offered to some of the underage drinkers an opportunity to stay or he would telephone a cab for them. Obviously, he realized he had created risk of harm. No one is certain whether he made that offer to Courtney McDonough or not. Assuming, *arguendo*, Mr. Corra did make that offer to Courtney McDonough, whether that offer would be reasonable care is an issue for a jury to determine.

Matthew Humphreys' Estate recognizes an automobile exclusion exists in this home owner's policy. Nevertheless, it is inapplicable to the case at bar. Mr. Corra's failure was not one to

supervise an automobile. As explained earlier he had no right to supervise Courtney McDonough or her automobile. He did have a duty to use due care. Insurance policies that require construction must be construed liberally in favor of the insured. Syl. pt.3, *Polan v. Traveler Ins. Co.*, 156 W.Va. 250 (1972). Mr. Corra's coverage should not be excluded because he had no right to supervise a vehicle that he did not own or have control over. This Defendant, the Estate of Matthew Humphreys, joins in the other Defendants' responses to the Certified Question.

WHEREFORE, the Estate of Matthew Humphreys respectfully requests this Court enter an order answering the Certified Question in the affirmative.

THE ESTATE OF MATTHEW HUMPHREYS

By Counsel



Paul S. Perfater, Esq WVSB 2860

MYERS AND PERFATER

1311 Virginia Street, East

Charleston, WV 25301

(304) 345-2202

Counsel for the Estate of Matthew Humphreys

CERTIFICATE OF SERVICE

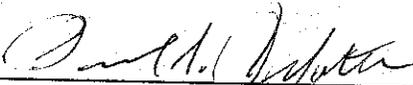
I, Paul S. Perfater, Esq., counsel for defendant, the Estate of Matthew Humphreys, do hereby certify that a true and correct copy of the foregoing "**Brief of the Estate of Matthew Humphreys in Support of an Affirmative Answer to the Certified**" was served upon counsel of record by sending, via United States Postal Service, postage pre-paid, to the following:

D. Scott Bellomy, Esq.
David J. Lockwood, Esq.
741 Fifth Avenue
Huntington, West Virginia 25701
*Counsel for Defendant, the Estate
of Joshua B. Tucker*

Steven M. Thorne, Esq.
Cook & Cook
P.O. Box 190
Madison, West Virginia 25130
Counsel for Defendant, Morgan Brown

Michelle E. Piziak, Esq.
Ancil G. Ramey, Esq.
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, West Virginia 25326-1588
Counsel for Plaintiff

James M. Cagle, Esq.
1018 Kanawha Boulevard, East
Suite 1200
Charleston, WV 25301
Counsel for Defendant, Jeff Corra



PAUL S. PERFATER, ESQ. (WVSB #2860)