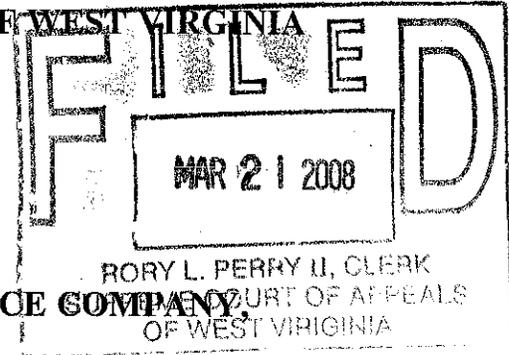


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33861



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 AMERICAN MODERN HOME INSURANCE COMPANY
IN SUPPORT OF A NEGATIVE ANSWER TO THE CERTIFIED QUESTION**

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I. INTRODUCTION

American Modern Home Insurance Company (hereinafter "AMHIC") 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-01015.¹

This case presents the issue of whether West Virginians who allow alcohol to be illegally consumed on their premises are going to be covered by their homeowners' policies when an automobile accident, covered by the automobile liability policies of the drivers, occupants, and pedestrians, later occurs off their premises allegedly due to the resulting intoxication.

In this case, the claim against AMHIC's insured is that he provided alcohol to an individual, under the age of twenty-one, who was later involved in an automobile accident. Of course, AMHIC's insured did not accidentally provide such alcohol, but did so intentionally. Indeed, its insured was convicted of multiple counts of "knowingly" furnishing alcohol to individuals under the age of twenty-one.² Accordingly, AMHIC has asserted that the claims against its insured are not covered under the insuring clause of the subject policy.

Presented with this issue of first impression, the United States District Court of the Southern District of West Virginia has certified to this Court the question of whether

¹Order of Certification, attached hereto as Exhibit A.

²Specifically, AMHIC's insured was convicted of violating W. Va. Code § 60-3-22(a), which provides, "Any person who shall knowingly buy for, give to or furnish to anyone under the age of twenty-one to whom they are not related by blood or marriage, any alcohol liquors from whatever source, is guilty of a misdemeanor"

“knowingly permitting an underage adult to consume alcoholic beverages on a homeowner’s property constitute an ‘occurrence’ within the meaning of . . . [a] homeowner’s policy. . .?”³

AMHIC submits that the proper answer is in the negative⁴ as this Court has stated:

[a]n ‘accident’ generally means an unusual, unexpected and unforeseen event. . . . An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage. . . . To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual.⁵

Again, AMHIC’s insured was convicted of multiple counts of “knowingly” furnishing alcohol to persons under the age of twenty-one in violation of a criminal statute. Therefore, as a matter of law, the insured’s conduct was not “unexpected and unforeseen.” Accordingly, AMHIC respectfully submits that this Court should determine that the insured’s actions do not constitute an “occurrence” triggering coverage under the subject homeowner’s policy.

Simply stated, West Virginians who allow alcohol to be illegally consumed on their premises should not be deemed to be covered by their homeowners’ policies when an automobile accident, covered by the automobile liability policies of the drivers, occupants, and pedestrians, later occurs off their premises allegedly due to the resulting intoxication.

³ Exhibit A at 1-2.

⁴ A negative answer to the certified question is dispositive of the case. However, an affirmative answer will not resolve the matter as AMHIC has asserted a number of policy exclusions, including the criminal acts exclusion.

⁵ *State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, 199 W. Va. 99, 105, 483 S.E.2d 228, 234 (1997) (citations omitted).

II. STATEMENT OF FACTS

On or about September 20, 2006, the Estate of Joshua Tucker and the Estate of Matthew Humphreys placed AMHIC's insured, Jeff Corra, on notice of a claim arising out of an August 6, 2006, motor vehicle accident, stating:

Prior to the crash, Mr. Tucker, Mr. Humphreys and Ms. McDonough, all of whom were under the age of twenty-one (21) years, were social guests on your premises where alcohol was purportedly consumed by persons under the age of twenty one (21) years.⁶

On or about September 6, 2006, Morgan Brown placed Jeff Corra on notice of a claim arising out of the August 6, 2006, motor vehicle accident, stating "[t]his is to advise you that we intend to proceed under your homeowner's policy of insurance for this accident."⁷

Mr. Jeff Corra had purchased a policy of insurance with AMHIC, policy number 0770005918740, with a policy period of February 16, 2006, through February 16, 2007.⁸ Consequently, Mr. Corra placed AMHIC on notice of the claims indicating that "Two minors [sic] were injured and two were killed in an automobile accident after leaving insured's home as guests of his daughter."⁹

AMHIC thereafter initiated a declaratory judgment action in the United States District Court for the Southern District of West Virginia asking the Court to declare whether or not

⁶Correspondence dated September 20, 2006, attached hereto as Exhibit B.

⁷Correspondence dated September 6, 2006, attached hereto as Exhibit C.

⁸Policy, relevant portions of which are attached hereto as Exhibit D.

⁹Notice of Claim, attached hereto as Exhibit E.

it had a duty to defend and indemnify its insured under the relevant homeowner's insurance policy for said claims. During the declaratory judgment action, the Estate of Matthew Humphreys alleged that the basis for its claim was:

Jeff Corra was negligent in permitting and providing substantial assistance to the Defendants in allowing his property to be used as a location for a party. Thereafter, Jeff Corra failed to take reasonable steps to supervise and monitor activities on his property, i.e., he failed to prevent consumption of alcohol by persons under the age of 21 at the party taking place on his property. Subsequently, one of the Defendants became intoxicated and attempted to operate an automobile resulting in the death of this Defendant's decedent.¹⁰

Indeed, Jeff Corra was criminally convicted of four counts of providing alcohol to persons under the age of twenty-one years.¹¹

Notably, particularly as the parties involved were adults, the only viable cause of action that could be stated against Mr. Corra would be for his violation of the criminal statute because "in West Virginia there is no 'dram shop' or social host liability."¹² Thus this Court has held that, "absent a basis in either common law principles or negligence or statutory enactment, there is generally no liability on the part of the social host who gratuitously furnishes alcohol to a guest when an injury to an innocent third party occurs as a result of the guest's intoxication."¹³

¹⁰Humphreys' Answers to Interrogatories at No. 2, attached hereto as Exhibit F.

¹¹Newspaper Article, attached hereto as Exhibit G.

¹²*Overbaugh v. McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153, 155-156 (1990).

¹³*Id.* at 158.

Although a West Virginia social host, like Mr. Corra, cannot be held liable for an automobile accident involving a person whom allegedly became intoxicated at the social host's residence, a social host can be held liable if serving alcohol in violation of statute. For example, in *Bailey v. Black*,¹⁴ this Court relied upon a statute prohibiting the sale of alcohol to a physically incapacitated person, along with a statute allowing recovery for statutory violations¹⁵ to "conclude that there exists a civil cause of action against a licensee for personal injuries caused by the licensee's selling alcohol to anyone who is 'physically incapacitated' by drinking."¹⁶ Likewise, in this case, AMHIC's insured was convicted of violating such a statute.¹⁷ Accordingly, the issue, as framed by the District Court, is whether or not the knowing provision of alcohol to underage adults triggers coverage under the AMHIC policy.

Testimony adduced in the related criminal proceedings provides many details of the events leading up to the claims against AMHIC's insured. Courtney McDonough testified that Jeff Corra and his daughter Ashley told her that they were going to burn some brush the night

¹⁴183 W. Va. 74, 394 S.E.2d 58 (1990).

¹⁵W. Va. Code § 55-7-9 provides, "Any 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 of forfeiture for such violation be thereby imposed, unless the same be expressly mentioned in lieu of such damages."

¹⁶183 W. Va. at 75, 394 S.E.2d at 59.

¹⁷See W.Va. Code § 60-3-22(a) ("Any person who shall knowingly buy for, give to or furnish to anyone under the age of twenty-one to whom they are not related by blood or marriage, any alcohol liquors from whatever source, is guilty of a misdemeanor and shall, upon conviction thereof, be fined an amount not to exceed one hundred dollars or shall be imprisoned in the county jail for a period not to exceed ten days, or both such fine and imprisonment.").

before the automobile accident.¹⁸ Ashley Corra indicated at that time, in the presence of AMHIC's insured, that she was going to have a party that night.¹⁹ Ms. McDonough further testified that she initiated her drinking at Jeff Corra's house that night at around midnight.²⁰

Upon arriving at the home of AMHIC's insured, there was beer on the property.²¹ Ms. McDonough cannot recall exactly how she obtained her first beer, but does recall there being at least one case of Coors Light in Jeff Corra's refrigerator. [Exhibit J at 20].²² Morgan Brown, also in attendance at the party, testified that she had "two or three" beers from Jeff Corra's refrigerator and that Jeff Corra had told the minors "'something like, 'Go ahead and help yourself and drink. . .'" *Id.* at 77. According to Ms. McDonough, AMHIC's insured, Jeff Corra, witnessed persons under the age of twenty-one (21) drinking that night but did not try to stop them. [Exhibit H at 23].

At some point during the party, Ms. McDonough, Josh Tucker, Matthew Humphreys and Miranda Brock left to obtain more beer.²³ Again, McDonough testified that Jeff Corra

¹⁸July 2, 2007, Transcript at 9-10, attached hereto as Exhibit J.

¹⁹*Id.* at 22.

²⁰Exhibit H at 23.

²¹*Id.*

²²The District Court noted, framing the facts in the light most favorable to the Defendants, "Ms. McDonough consumed half a can of beer from Mr. Corra's refrigerator." Exhibit A at 3 (citations omitted).

²³*Id.* at 24.

knew that they were leaving to get more beer and that they had returned with more beer.²⁴

“After procuring their own beer, Ms. McDonough and the others returned to Mr. Corra’s home where Ms. McDonough consumed approximately six or seven beers.”²⁵ Subsequently, according to McDonough, she, Josh Tucker, Matthew Humphreys and Morgan Brown left to go to the BP Station.²⁶ Ms. McDonough testified that Miranda Brock called her cell phone asking them to return to AMHIC’s insured’s home to pick her up.²⁷ It was during that return to AMHIC’s insured’s premises that the accident occurred.²⁸

“Ms. McDonough pleaded guilty to two counts of driving while under the influence of alcohol causing death and one count of driving while under the influence of alcohol causing bodily injury. Mr. Corra was convicted of four counts of knowingly providing alcohol to underage persons, one count of which related to the half beer that Ms. McDonough had taken from Mr. Corra’s refrigerator.”²⁹

AMHIC respectfully submits that the knowing provision of alcohol to underage persons, as committed by its insured, is not an “occurrence” so as to trigger coverage under

²⁴*Id.*

²⁵Exhibit A at 3 (citation omitted).

²⁶Exhibit H at 25.

²⁷*Id.* at 26.

²⁸AMHIC believes that the Tucker Estate, the Humphreys Estate, and Morgan Brown obtained substantial settlements from the commercial automobile policy covering the McDonough vehicle. Additionally, AMHIC believes that the Tucker Estate and the Humphreys Estate settled UIM claims and that Morgan Brown’s UIM claim is pending.

²⁹Exhibit A at 3.

a homeowner's insurance policy. The actions of AMHIC's insured, Mr. Corra, cannot fairly be described as "accidental" and his multiple convictions speak for themselves. West Virginia homeowners should not expect insurance coverage when they serve alcohol to guests in violation of West Virginia. Accordingly, AMHIC respectfully submits that the certified question should be answered in the negative.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

With respect to the standard of review in certified question cases, 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 issues 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.").³⁰

Additionally, "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment,

³⁰*Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 559 S.E.2d 713, 717 (2001).

is reviewed *de novo* on appeal.”³¹ Finally, “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.”³²

B. THE KNOWING AND CRIMINAL ACT OF PERMITTING AN UNDERAGE ADULT TO CONSUME ALCOHOLIC BEVERAGES ON A HOMEOWNER’S PROPERTY DOES NOT CONSTITUTE AN “OCCURRENCE” TRIGGERING COVERAGE UNDER A HOMEOWNER’S POLICY.

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 Modern Home Insurance Company homeowner’s policy at issue in this case?³³

AMHIC respectfully submits that the Court should answer the question in the negative.

As set forth above, prior to the underlying motor vehicle accident, the claimants and/or their decedents, all adults under the age of twenty-one, were at the premises of AMHIC’s insured, Jeff Corra, at which time Mr. Corra knowingly provided them with alcohol. Indeed, Jeff Corra was subsequently convicted of multiple counts of knowingly providing alcohol to

³¹*Murray v. State Farm Fire and Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1 (1998) (quoting *Payne v. Weston*, 195 W. Va. 502, 506-7, 466 S.E.2d 161, 165-6 (1995)).

³²*Id.* (quoting *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 760 (3d Cir. 1985)); see also Syl. pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002).

³³Exhibit A at 1-2.

underage persons arising out of that event, thus, the only legally cognizable claim against AMHIC's insured is for the violation of that criminal statute.³⁴

In light of the criminal nature of the act, and the fact that the act had to have been performed *knowingly* in order for AMHIC's insured to be convicted, the act cannot constitute an "occurrence," thus necessitating a negative answer to the certified question.

The insuring clause for the "personal liability" coverage of the subject homeowner's 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

³⁴See *Overbaugh v. McCutcheon*, *supra* at 388-89, 396 S.E.2d at 155-156; *Bailey v. Black*, *supra*.

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.³⁵

Thus, coverage is 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.**³⁶

In the context of “occurrence” policies, this Court has held:

[a]n “accident” generally means an unusual, unexpected and unforeseen event. . . . An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage. . . . To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual.³⁷

In the instant matter, it is abundantly clear that the underlying misconduct pertains to the foregoing criminal statute, which requires the misconduct to be committed *knowingly*, and the District Court phrased the issue in that manner. Thus, this Court has been asked if “knowingly permitting an underage adult to consume alcoholic beverages” is an “occurrence.”

Other courts have answered the question in the negative.

³⁵Exhibit D at 12 of 18.

³⁶*Id.* at 2 of 18.

³⁷*State Bancorp, supra* at 105, 483 S.E.2d at 234 (citations omitted).

In *Illinois Farmers Ins. Co. v. Duffy*,³⁸ for example, the insured allowed his underage daughter to hold a New Year's Eve party at their house. Both the insured and his 21-year-old son purchased beer for the party. Following the party, two of the underage guests were in an automobile accident which killed the driver and severely injured the passenger. In analyzing the coverage issues, the court stated:

In this case, the wrongful or tortious events for which the insureds sought coverage were their actions of supplying alcohol to minors. It is undisputed that giving alcohol to minors was wrongful; the Duffys later pleaded guilty to criminal charges for their conduct. Because the wrongful or tortious acts were not accidental, they do not constitute an occurrence within the meaning of the policy. Consequently, the unintended harm that resulted is not covered under the policy.³⁹

In *Frymark v. Buckeye Union Cas. Co.*,⁴⁰ the policy trigger was an "accident" and the claim alleged that the insured "continued to serve [the customer] additional intoxicating liquors, as a direct result of which he became completely incapacitated and lost all control over his faculties" and fell "from the stool upon which he was sitting . . . breaking his right leg and rendering him unconscious."⁴¹ Among the allegations made was the violation of a statute prohibiting the sale of liquor to intoxicated persons.⁴² The court stated:

³⁸618 N.W.2d 613 (Minn. Ct. App. 2001).

³⁹*Id.* at 615.

⁴⁰105 Ohio App. 161, 146 N.E.2d 632 (1957).

⁴¹*Id.* at 633.

⁴²*Id.* at 634.

An accident is not even suggested by the evidence. The proof is that because of his complete stupefaction from drinking alcoholic beverages furnished by the plaintiff, Unger did not have the physical ability to stay on the stool. In fact, it would have been an accident, that is, an unexpected occurrence, if he had not fallen. In order to be entitled to legal services under the terms of the policy, the claim made against the insured must come within the protection of the policy, that is, within the definition of the hazards insured.⁴³

Likewise, in *Allstate Ins. Co. v. J.J.M.*,⁴⁴ where a homeowner was sued after a guest was sexually assaulted while at a party hosted by the homeowner in which alcohol was illegally served to minors, the court found that the knowing provision of such alcohol to minors was not an “occurrence” under a homeowners’ policy, stating as follows:

The policy defines “occurrence” as “an accident.” No “accident” occurred in this case, either as a result of Morton’s conduct or Stringer’s. J.J.M.’s injuries were the result of the intentional act of a third party, Stringer, not some “undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.” *Frankenmuth Mut. Ins. Co. v. Masters*, 460 Mich. 105, 114, 595 N.W.2d 832 (1999), quoting *Arco Industries v. American Motorists Ins. Co.*, 448 Mich. 395, 404-405, 531 N.W.2d 168 (1995), overruled by *Masters*, supra at 116, 595 N.W.2d 832. In *Nabozny v. Burkhardt*, 461 Mich. 471, 606 N.W.2d 639 (2000), our Supreme Court addressed unintended or “accidental” injuries that occur as the result of intentional acts. The Court held that such acts are not “accidents” triggering coverage under an insurance policy. . . . Under *Nabozny*, no accident giving rise to coverage occurred in this case because Morton reasonably should have expected that giving minors enough alcohol to allow them to pass out would result in harm. The fact that the specific harm that occurred was

⁴³*Id.*

⁴⁴254 Mich. App. 418, 657 N.W.2d 181 (2002).

Stringer's intentional act of rape rather than alcohol poisoning is irrelevant to the determination whether the occurrence was an accident.⁴⁵

Indeed, one leading authority on the law of insurance has noted, "Many jurisdictions have enacted statutes that impose liability on those who knowingly sell alcohol to a minor or intoxicated person. However, there is no public policy that requires insurance coverage for such a liability and most liability policies exclude this type of risk."⁴⁶ And, whether alcohol is illegally sold by a merchant or merely furnished by a policyholder, there should be no coverage.

AMHIC acknowledges that in the single Syllabus Point of *Columbia Cas. Co. v. Westfield Ins. Co.*,⁴⁷ this Court held that, "In determining whether under a liability insurance policy an occurrence was or was not an 'accident' – or was or was not deliberate, intentional, expected, desired, or foreseen – primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue." Here, however, the statutory provision which AMHIC's insured was convicted of violating states, "Any person who shall knowingly buy for, give to or furnish to anyone under the age of twenty-one to whom they are not related by blood or marriage, any alcohol liquors . . . ,"⁴⁸ and its insured is barred by collaterally estoppel from asserting that

⁴⁵*Id.* at 422, 657 N.W.2d at 183-84.

⁴⁶7 COUCH ON INSURANCE 3D § 101:37 (2007)(footnotes omitted).

⁴⁷217 W. Va. 250, 617 S.E.2d 797 (2005).

⁴⁸W. Va. Code § 60-3-22(a) (emphasis added).

he did not act “knowingly,” or, in “occurrence” terms, that the act was not deliberate, intentional, expected, desired, or foreseen.⁴⁹

In other contexts, this Court has frequently held that knowing and voluntary acts made with disregard to their probable consequences are not “occurrences” within the meaning of liability policies.

In Syllabus Point 3 of *Aluise v. Nationwide Mut. Ins. Co.*,⁵⁰ this Court held, “Absent policy language to the contrary, a homeowner’s policy defining ‘occurrence’ as ‘bodily injury or property damage resulting from an accident’ does not provide coverage for an insured homeowner who is sued by a home buyer for economic losses caused because the insured negligently or intentionally failed to disclose defects in the home.”

⁴⁹In Syllabus Point 4 of *Baber v. Fortner*, 186 W. Va. 413, 412 S.E.2d 814 (1991), this Court held that “[t]he adjudication of a killing which results in a voluntary manslaughter conviction conclusively establishes the intentional nature of that same act for the purposes of any subsequent civil proceeding.” The *Baber* Court stated “no suggestion is made here that the appellant did not avail himself of all possible defenses at his criminal trial. Under the higher standard of proof utilized in criminal proceedings, a jury found Nicholas Fortner guilty of voluntary manslaughter and, by implication, thereby found that he acted with an intent to kill. A relitigation of the issue under a lesser civil standard would be pointless.” *Id.* at 420, 412 S.E.2d at 821.

⁵⁰218 W. Va. 498, 625 S.E.2d 260 (2005).

In Syllabus Point 2 of *Corder v. William W. Smith Excavating Co.*,⁵¹ this Court held, “Commercial general liability policies are not designed to cover poor workmanship. Poor workmanship, standing alone, does not constitute an ‘occurrence’ under the standard policy definition of this term as an ‘accident including continuous or repeated exposure to substantially the same general harmful conditions.’”

In *West Virginia Fire & Cas. Co. v. Stanley*,⁵² where coverage was sought under a homeowners’ policy arising from alleged sexual abuse on the insured premises, this Court stated:

The common and everyday meaning of “accident” is a chance event or event arising from unknown causes. This meaning does not include the kinds of deliberate acts alleged in the complaint. The crux of the complaint is that Jesse Stanley deliberately sexually assaulted Cass-Sandra Stanley. Such a deliberate act is not covered by the subject policy because it does not constitute an “accident.” Cass-Sandra and Sandra Stanley also allege the intentional torts of outrage, civil conspiracy, and civil assault. These too are deliberate acts which do not fall within the meaning of the term “accident.” We conclude, therefore, that

⁵¹210 W. Va. 110, 556 S.E.2d 77 (2001); see also Syl. pt. 2, *Webster Co. Solid Waste Authority v. Brackenrich & Associates, Inc.*, 217 W. Va. 304, 617 S.E.2d 951 (2005)(same); *Erie Ins. Property and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W. Va. 506, 526 S.E.2d 28 (1999)(CGL policy does not cover the “accident” of faulty workmanship, but covers faulty workmanship which causes an “accident”); Syl. pt. 3, in part, *Bruceton Bank v. United States Fidelity and Guaranty Ins. Co.*, 199 W. Va. 548, 486 S.E.2d 19 (1997)(“Where, under a commercial general liability policy and a related commercial umbrella liability policy issued to a bank, insurance coverage is provided for certain injuries and damages caused by an ‘occurrence’ or an ‘incident,’ and the policies expressly equate the terms ‘occurrence’ and ‘incident’ with an ‘accident,’ no such insurance coverage, or duty to defend or investigate by the insurer, arises, where the underlying case against the bank, concerning the denial of a loan, is grounded upon breach of contract and is in the nature of a lender liability action. . . .”).

⁵²216 W. Va. 40, 602 S.E.2d 483 (2004).

the allegations of deliberate acts committed by Glen, Helen, and Jesse Stanley are not covered by the subject insurance policy. Further, although Cass-Sandra and Sandra Stanley also assert allegations of negligence in their complaint, for the reasons to be discussed *infra*, we do not believe that these allegations bring the claims of Cass-Sandra and Sandra Stanley under the policy's coverage provision.⁵³

In Syllabus Point 2 of *Smith v. Animal Urgent Care, Inc.*,⁵⁴ this Court held, "In an insurance liability policy, a claim based on sexual harassment does not come within the definition of 'occurrence,' which is defined as an 'accident, including continuous or repeated exposure to substantially the same general harmful conditions.'"

Likewise, in the instant case, AMHIC submits that this Court should hold that, "Absent policy language to the contrary, a homeowner's policy defining 'occurrence' as 'an accident . . . which results . . . in bodily injury . . . or . . . property damage,' does not provide coverage for an insured homeowner who is sued arising from a motor vehicle accident involving an allegedly intoxicated person to whom the homeowner knowingly furnished alcohol in violation of a criminal statute." Knowingly furnishing alcohol to a person in violation of a criminal statute is simply no "accident."

IV. CONCLUSION

The underlying motor vehicle accident is undeniably a tragedy, but not all tragedies are covered by all types of insurance. Motorists purchase automobile liability insurance to provide coverage arising from the negligent operation of motor vehicles, including operating

⁵³*Id.* at 49-50, 602 S.E.2d at 492-93.

⁵⁴208 W. Va. 664, 542 S.E.2d 827 (2000).

a motor vehicle under the influence. Persons also purchase uninsured and underinsured motorists insurance to protect themselves against negligent motorists, including those under the influence, who have purchased insufficient limits of liability. Those adversely affected by this tragedy have been and will presumably be compensated through these types of policies.

The liability provisions of a homeowners' policy, however, were never meant to provide coverage for a homeowner who knowingly and illegally provides alcohol to under-aged guests who are later involved in automobile accidents. Homeowners' policies provide coverage for "occurrences," which are

WHEREFORE, the plaintiff, American Modern Home Insurance Company, respectfully requests this Court answer the certified question in the negative.

**AMERICAN MODERN HOME
INSURANCE COMPANY**

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on March 21st, 2008, I served the foregoing "**BRIEF OF AMERICAN MODERN HOME INSURANCE COMPANY IN SUPPORT OF A NEGATIVE ANSWER TO THE CERTIFIED QUESTION**" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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