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.

REPLY BRIEF OF AMERICAN MODERN HOME INSURANCE COMPANY

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I. INTRODUCTION

The United States District Court for the Southern District of West Virginia has certified to this Court the question of whether "knowingly permitting an underage adult to consume alcoholic beverages on a homeowner's property constitutes an 'occurrence' within the meaning of . . . [a] homeowner's policy . . .?"[1] The question had to be framed in those terms because "in West Virginia[,] there is no 'dram shop' or social host liability."[2] 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."[3]

Simply stated, the defendant, Morgan Brown (Brown), could not bring a claim against the defendant, Jeff Corra (Corra), for "negligently permitting the use of his property for the consumption of alcohol by adults."4 Rather, Ms. Brown can only file suit against Mr. Corra, an insured of American Modern Home Insurance Company (AMHIC) for violating the statute for which he was criminally convicted, knowingly providing alcohol to underage persons, including the driver of the vehicle involved in the

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[1]Order at 1-2.

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

[3]*Id.* at 158.

4 Brief of Brown at 1.

subject motor vehicle accident. When the issue is addressed as properly formulated, AMHIC submits that the appropriate answer is in the negative.[5]

II. DISCUSSION OF LAW

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?[6]

What the defendants have done in their briefs, however, is seek to reformulate this question by focusing not on the actionable conduct, i.e., "knowingly permitting an underage adult to consume alcoholic beverages on a homeowner's property," as stated by the District Court, but on the "negligent use of property."[7] When formulated

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[5]A negative answer to the certified question is dispositive of the case. An affirmative answer will not resolve the matter, however, as AMHIC has asserted a number of policy exclusions, including the criminal acts exclusion. Inexplicably, Ms. Brown chose to address those exclusions in her brief. AMHIC, however, has not presented argument on those exclusions as they are "not part of the certified question." *Carney v. Erie Ins. Co., Inc.*, 189 W.Va. 702, 434 S.E.2d 374, n. 7 (1993); *see also* 5 Am. Jur. 2d *Appellate Review* § 915 ("Moreover, the court is limited to answering the question of law which is certified.") (footnote omitted).

[6]Order at 1-2.

[7]Brief of Brown at 3 ("This case presents the issue of whether a homeowners' policy should cover a homeowner that negligently permitted the use of his property . . . .").

appropriately, AMHIC respectfully submits that the Court should answer the question in the negative.[8]

It is undisputed that, 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, at which time he knowingly provided them with alcohol. Indeed, Mr. Corra was subsequently convicted of multiple counts of knowingly providing alcohol to underage persons arising out of that event.[9] Thus, contrary to Ms. Brown's position, the

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[8]Ms. Brown's statements regarding "proximate cause" are likewise without merit. For example, she seeks to cloud the issues by arguing the amount alcohol the driver consumed at various locales. *See, e.g.,* Brief of Brown at 8. Such arguments seek to impose social host liability on AMHIC's insured, a concept expressly rejected in *Overbaugh.* Moreover, even jurisdictions that, unlike this Court, would impose a form of social host liability on AMHIC's insured, reject the tenuous nature of the "cause of action" asserted by Brown. *See Guest v. Hansen*, 2007 WL 4561104 (N.D.N.Y. Dec. 18, 2007) ("while a landowner may be liable for injuries caused by an intoxicated guest, 'decisions have uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under the defendant's control, where defendant had the opportunity to supervise the intoxicated guest.' . . . *see also Wright v. Sunset Recreation, Inc.*, 457 N.Y.S.2d 606, 607 (N.Y. App. Div. 1982) (duty to control conduct of imbibing patrons did not extend to fatal automobile accident occurring off the premises); *Paul v. Hogan*, 392 N.Y.S.2d 766, 768 (N.Y. App. Div. 1977) (hosts of party had no duty to supervise or control guest who, after consuming alcohol at hosts' party, set off in his motorcycle and struck and killed plaintiff's decedent on a public highway).") (citations and footnote omitted).

Simply stated, the only means Ms. Brown has to recover against Mr. Corra is the violation of a criminal statute. Ms. Brown may believe that the vehicle driver only had "one beer from Jeff Corra's refrigerator" but Mr. Corra was convicted of providing the driver that beer. *See, e.g., Kelly v. Painter*, 202 W.Va. 344, 504 S.E.2d 171, 174 (1998) ("To later claim that drinking alcohol from an unknown source changes this from a liquor liability claim to a premises liability claim is absurd."). That criminal act, an act performed "knowingly," was not an accident and, therefore, not an "occurrence" triggering coverage under the subject policy.

[9]This Court recently granted an appeal of Mr. Corra's conviction, Brief of Corra at 3, but at the time of the filing of this brief, he still stands convicted. Most of Mr. Corra's brief addresses the validity of his conviction, but whether his conviction is sustained or reversed, because the allegations against him include those to knowingly permitting alcohol to be

only legally cognizable claim against AMHIC's insured is for the violation of that criminal statute.

"[I]n West Virginia there is no 'dram shop' or social host liability."[10] 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."[11] This Court has, however, allowed such a claim to arise out of the violation of a statute.

In *Bailey v. Black*,[12] this Court relied upon a statute prohibiting the sale of alcohol to a physically incapacitated person, along with a statute allowing recovery for statutory violations[13], 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."[14] Mr. Corra was convicted of violating such a statute.[15]

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consumed on the insured premises in an illegal manner, there is no "occurrence" triggering coverage under the AMHIC policy.

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

[11]*Id.* at 158.

[12]183 W.Va. 74, 394 S.E.2d 58 (1990).

[13]W. Va. Code § 55-7-9 states, "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."

[14]*Bailey, supra* at 59.

[15]*See* W.Va. Code § 60-3-22a(b) ("Any person who shall knowingly buy for, give to or

Accordingly, the violation of this criminal statute is the only cognizable cause of action Brown and the other aggrieved parties could state against AMHIC's insured.[16]

Pursuant to the principles of insurance law long established by this Court, the knowing violation of a criminal statute is not accidental conduct constituting an "occurrence." 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**

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furnish to anyone under the age of twenty-one to whom they are not related by blood or marriage, any alcoholic 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.").

[16]*See Mateo v. Highland Plaza Trust, II*, 19 Mass. L. Rptr. 150, 2005 WL 1009768 (Feb. 17, 2005) (unpublished) ("In applying this rule, our courts have held to the view that it is the act of supplying or serving the alcoholic beverages that is the touchstone of the duty of care. Without this control of the alcohol, no duty of care is imposed even when the defendant knows of or allows the offending party to consume alcohol on its property."); *See also Hager v. Griesse*, 29 Ohio App.3d 329, 505 N.E.2d 982, 985 (1985) ("The record of this case reveals no act of negligence or failure to warn of concealable hidden dangers upon the premises. . . . First, appellant initiated the horseplay which resulted in his dive into the shallow end of the swimming pool. The fact that appellees furnished beer to their social guests does not alter our analysis on these facts. . . .") (citations omitted); 62 Am.Jur.2d *Premises Liability* § 411 ("The rule that a host has not duty to control the conduct of his or her guests, has been applied where social guests have been injured as a result of their own careless actions or the negligent behavior of third persons.") (footnote omitted).

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.[17]

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**.[18]

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

> [a]n "accident" generally means an unusual, unexpected and unforseen 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.[19]

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[17]Policy at 12 of 18.

[18]*Id.* at 2 of 18.

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

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 properly 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.

In *Illinois Farmers Ins. Co. v. Duffy*,[20] 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.[21]

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[20]618 N.W.2d 613 (Minn. Ct. App. 2001).

[21]*Id.* at 615; *see also Allstate Ins. Co. v. J.J.M.*,254 Mich. App. 418, 657 N.W.2d 181 (2002); *American Family Ins. Group v. Rodewald*, 1995 WL 711099 (Minn. Ct. App.); *Frymark v. Buckeye Union Cas. Co.*, 105 Ohio App. 161, 146 N.E.2d 632 (1957);

Contrary to Ms. Brown's contention, the instant matter is indistinguishable from *Duffy* as the legally cognizable tortious event in the referenced cases was the wrongful provision of alcohol.[22]

The "half beer" argument propounded by the defendant, Jeffrey Tucker, undercuts any liability, particularly for an occurrence-based claim: "It is undisputed Courtney McDonough drank one half (½) a Coors Light provided by Jeff Corra. . . . She then left to go to Seven-eleven (7-11) and Kokomo's. . . . And when she returned to Jeff Corra's house she began to drink the Budweiser obtained from Seven-Eleven (7-11)."[23] W.Va. Code § 60-3-22a(b) provides that, "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 alcoholic liquors **from whatever source**, is guilty of a misdemeanor . . . ." (emphasis supplied). The statute does not require that an individual "give" a person under the age of twenty-one intoxicating liquors that have been purchased by the individual; rather, even if an individual "furnishes" to someone under the age of twenty-one "alcoholic liquors from whatever source."[24]

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[22]In Mr. Corra's brief, he discusses a number of cases in which courts have held, under circumstances not involving allegations of the illegally furnishing alcohol, that shootings in self-defense, shootings in defense of others, and similar criminal acts under attenuating circumstances, were determined to trigger coverage under "occurrence" policies. Brief of Corra at 18-19. There was never any allegation in this case, however, that Mr. Corra illegally provided alcohol in "self-defense," "defense of others," or in any other manner that would be legally excused.

[23]Brief of Tucker at 9-10.

[24]Similarly, in *Davis v. Malcolm*, 2000 WL 33534068 at *2 (Mich. Ct. App.) the court held, "Plaintiff contends that <u>it was not defendant who furnished alcohol to minors on her</u>

It is telling that a total of four briefs have been filed in opposition to AMHIC's brief addressing whether the circumstances of this case constitute an "occurrence" under a homeowners' policy and not a single case has been cited in any of those briefs in which any court has so held. Obviously, it is not uncommon for alcohol to be illegally consumed in homes for which homeowners' coverage is available. It would also be expected that, in some of those situations, automobile accidents have occurred involving those who illegally consumed alcohol on insured premises. Yet, the only cases cited to this Court reject the argument that providing a place for the illegal consumption of alcohol to take place constitutes an "occurrence" under a homeowners' policy.

Thus, 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."[25]

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premises, but that she was merely negligent in allowing this activity to occur. However, whether defendant or Elvis Malcolm, another insured under the homeowner's policy, actually furnished or supplied the alcohol at issue is not dispositive; alcohol was provided to minors on defendant's premises.")(emphasis supplied).

[25]Thus, Ms. Brown's argument that, "The triggering event or 'occurrence' was Jeff Corra's negligent act providing a place for Courtney McDonough to become intoxicated," Brief of Brown at 7, has no merit. Once cannot "accidently" allow someone to illegally consume intoxicating beverages on one's insured premises.

III. CONCLUSION

This Court has consistently rejected efforts to expand occurrence-based policies with intentional acts exclusions beyond their intended scope. [26] With respect to the circumstances of this case, "Courts recognize that homeowners policies are designed to protect the insured for damage to the dwelling and liability arising out of use of the dwelling -- not for liability arising out of an automobile, which is usually expected to be covered by automobile insurance."[27] Ms. Brown and the other parties subject to this tragedy have been compensated through these types of policies. Regardless, however, risks that are undertaken by homeowner's insurers, such as AMHIC, do not include knowing, criminal acts. Thus, the trigger of coverage under such policies is an "occurrence" defined as an "accident."

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[26] *See* Syl. Pt. 2, *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000)("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."); Syl., *Horace Mann Insurance Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988)("There is neither a duty to defend an insured in an action for, nor a duty to pay for, damages allegedly caused by the sexual misconduct of an insured, when the liability insurance policy contains a so-called 'intentional injury' exclusion. In such a case the intent of an insured to cause some injury will be inferred as a matter of law."); *Municipal Mutual Ins. Co. v. Mangus*, 191 W. Va. 113, 117, 443 S.E.2d 455, 459 (1994)("For this court to allow a blanket legal excuse for a mentally ill person's actions which society has deemed unacceptable, as Mr. Mangus urges, would seriously interfere with the ability of an insurance company to rate risks based upon the policy language and consequently achieve an equitable insurance premium. 'If a single insured is allowed, through intentional acts, to consciously control risks covered by the policy, the central concept of insurance is violated.' 7A Appleman Insurance Law and Practice (Berdal ed.) § 4492.01."); Syl. pt. 1, *Baber v. Forter*, 186 W. Va. 413, 412 S.E.2d 814 (1991)("An intentional shooting which occurs from within the cab of a stationary pickup truck is not an act arising out of the ownership, maintenance, operation, or use of the vehicle.").

[27] 4 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 50:8 (footnote omitted).

As this Court stated in *Corder v. William W. Smith Excavating Co.*,[28] "[b]efore any coverage can be found to exist under the . . . policy, an 'occurrence' within the policy definition of that term, must be determined to have occurred." West Virginia law is well-settled, "[a]n 'accident' generally means an unsusal, unexpected and unforeseen event . . . . An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happen occurs which produces the damage. . . . To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual."[29] The "knowing" violation of a criminal statute does not, as a matter of law, constitute an "unusual, unexpected and unforeseen event."[30]

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

AMERICAN MODERN HOME INSURANCE COMPANY

By Counsel

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[28]210 W.Va. 110, 556 S.E.2d 77, 82 (2001).

[29]*State Bancorp, Inc., supra* at 234 (citations omitted).

[30]*See Cretens v. State Farm Fire & Cas. Co.*, 60 F. Supp. 2d 987 (D. Ariz. 1999) ("In order to find Poer guilty of voluntary manslaughter, the jury had to conclude that Poer 'intentionally killed another or . . . caused the death of another . . . by conduct which he knew would cause death or physical injury' and that that act was 'performed consciously.' Thus, there is a conclusive finding *by a jury*, that Power acted intentionally or knowingly when he killed Kim Poer. Poer, or as in this case his assignees standing in this shoes, are precluded. . . from re-litigating whether Poer had the capacity to expect or intend physical injury to Mrs. Poer. State Farm is entitled to a finding as a matter of law that Plaintiffs' breach of contract claims are barred by the intentional act exclusion.") (emphasis in original).

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on May 8, 2008, I served the foregoing "***REPLY BRIEF OF AMERICAN MODERN HOME INSURANCE COMPANY***" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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