IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

SPEEDWAY, LLC,

Petitioner,

v. **Case No.: 21-0215**

DEBORAH L. JARRETT,
as the Executrix of the Estate of
Kevin M. Jarrett,

Respondent.

AMICUS CURIAE FROM THE WEST VIRGINIA ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT, DEBORAH L. JARRETT, AS THE EXECUTRIX OF THE ESTATE OF KEVIN M. JARRETT

Michelle Marinacci
W.Va. Bar No. 7482
Gold, Khourey & Turak, L.C.
510 Tomlinson Avenue
Moundsville, WV 26041
mlm@gkt.com
Phone: 304.845.9750
Facsimile 304.845.1286

David A. Sims
W.Va. Bar No. 5196
Law Offices of David A. Sims, PLLC
P.O. Box 5349
Vienna, West Virginia 26105
david.sims@mywvlawyer.com
Phone: 304-428-5291
Facsimile: 304-485-5293

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases

Federal and Foreign Jurisdiction Cases

Rules

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The West Virginia Association for Justice ("WVAJ")[1] is a private, non-profit organization consisting of over five-hundred (500) attorneys licensed to practice law in the State of West Virginia who represent, among others, citizens of West Virginia in the courts of our State. The membership of WVAJ is devoted to protecting the core values of our system of justice and to protecting the rights conferred upon all citizens of the State of West Virginia by our Constitution, the West Virginia Code and the long-standing decisions and precedent of this Court.

WVAJ has an interest in upholding the integrity of our judicial system against unfair attacks from special interest groups, protecting access to our courts and ensuring redress for injuries caused by the wrongful conduct of others. WVAJ recognizes the importance of the precedent established by this Court's earlier opinions and the ability for all lawyers, businesses and other citizens of the State to rely upon them.

WVAJ monitors trial court and appellate decisions and, where its members believe, an issue is presented to this Court which impacts the fundamental legal rights of West Virginians and/or seeks to derogate established principles of West Virginia law, WVAJ will, as it has on many prior occasions, seek leave to submit an *amicus curiae* brief to give voice to West Virginians and to assist this Court in upholding its established precedent.[2]

Since 1983, when this Court issued its decision in *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983), an employer could be held liable for its own conduct which creates an

---

[1] Pursuant to W.Va.R.A.P. 30(e)(5), WVAJ certifies that no counsel for a party authored this *amicus curiae* brief in whole or in part, nor did any counsel, party, or other person make a monetary contribution toward its preparation and submission. Additionally, notice of WVAJ's intent to submit its *amicus curiae* brief was provided to the parties.

[2] WVAJ's *amicus curiae* brief is limited to the issues of the circuit court's application of *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983), Speedway, LLC's duty, as well as addressing the arguments made by the *amici curiae* briefs filed in support of Speedway. As such, WVAJ will not be addressing the issues raised in Speedway, LLC's assignments of error II-IV.

unreasonable risk of harm to West Virginians and those utilizing our roadways even though the immediate injury causing event was that of an off-duty employee. Through selective omissions of fact and statements of "fact" not supported with citation to the Appendix, Petitioner and its *amici curiae* attempt to create the illusion that the circuit court deviated far from the dictates of *Robertson* and West Virginia law to create a new and untenable expanse of liability for West Virginia employers. The truth is the circuit court held true to *Robertson* and established West Virginia negligence law by recognizing that an employer had a duty, the breach of which may render it liable in negligence, where the employer had notice of an employee's impairment; knew or should have known that the impairment caused an unreasonable risk of harm to the public; and took affirmative action which contributed to the unreasonable risk of harm, all of which resulted in the death of Respondent's decedent. As the Appendix clearly establishes, the jury empaneled to try this issue was properly instructed under the principles of *Robertson* and rendered a fair and impartial liability verdict based upon all of the evidence, which this Court should not disturb.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT SPEEDWAY HAD A COGNIZABLE LEGAL DUTY UNDER *ROBERTSON*, A FINDING WHICH IS CONSISTENT WITH WEST VIRGINIA NEGLIGENCE LAW

The entire premise of Petitioner's argument is that it owed no duty, the breach of which would permit liability to be imposed upon it for the death of Kevin Jarrett. Whether one looks to *Robertson* or this Court's other decisions governing the existence of a legal duty, the conclusion is the same: the circuit court correctly found that Speedway had a duty under the unique facts and circumstances of this case. Speedway's affirmative action in asking an obviously impaired (whether by exhaustion or illicit drug use) employee to work over so its manager could leave early caused or contributed to the death of Kevin Jarrett, to hold Speedway responsible, as the jury did,

for its own actions, does not create unending liability for West Virginia employers. Rather, upholding the circuit court's decision and the jury verdict simply upholds the integrity of this Court's precedent and continues to keep West Virginia courts open for West Virginians to seek redress for fatal injuries caused or contributed to by another's negligence.

Contrary to the premise of the arguments of the *amici curiae*, the floodgates of litigation against employers did not open when *Robertson* was decided nearly forty (40) years ago and they will not open now when *Robertson* is applied to the unique facts of this case. The circuit court properly instructed the jury on the law applicable to the case and the jury found that Petitioner had created a situation wherein its employee caused the death of Kevin Jarrett. There is nothing more for this Court to consider.

A. *Robertson* and Speedway's affirmative acts

Speedway and its *amici curiae* have attempted to frame the issue before this Court as one of control; that is, an employer's control over the acts of an off-duty employee. This "control" argument was addressed and dismissed by this Court in *Robertson*, the very case Speedway argues absolves it of liability. In *Robertson*, this Court framed the issue as:

> not the [employer's] failure to control [the employee] while driving on the highway; rather it is whether the [employer's] conduct prior to the accident created a foreseeable risk of harm.

Robertson, 171 W.Va. at 611, 301 S.E.2d at 567. After framing the issue, the Court undertook a discussion of how the *foreseeability* of injury impacts the determination of whether a legal duty exists before ultimately finding that where an "affirmative action is present, liability may be imposed regardless of the existence of a relationship between [the employer] and the party injured by the incapacitated [employee]." *Id.* at 613, 301 S.E.2d at 569. This holding was memorialized in syllabus point 2 which provides:

> 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.

Syl. pt. 2, *Robertson.*

In its briefing, Speedway glosses over several critical facts, facts which, when viewed in the light most favorable to Respondent, demonstrate that the circuit court correctly found a legal duty under *Robertson* existed, a duty which the jury found Speedway violated when holding it partially responsible for Kevin Jarrett's death. *See*, syl. pt. 2, *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W.Va. 437, 854 S.E.2d 257 (2020), quoting syllabus point 2, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009) (when reviewing a decision on a renewed judgment as a matter of law, evidence must be viewed in the light most favorable to the non-moving party). The testimony of both Speedway's manager and its shift leader[3] on duty on the date in question unequivocally demonstrates that Brandy Liggett was observed falling asleep multiple times throughout the shift, including *while standing up in the parking lot.* J.A. 2652, 2691-2692. Despite witnessing Brandy Liggett falling asleep multiple times throughout her shift, including while standing up, and witnessing Brandy Liggett staggering while attempting to walk, Bobbi Jo Maguire *the Speedway manager on duty*, affirmatively asked Brandy Liggett to continue working after her shift was over *so that Speedway manager Bobbi Jo Maguire could leave early.* J.A. 2523-2534, 2540-2543, 2545-2546, 2624, 2652. In other words, Bobbi Jo Maguire engaged in affirmative conduct – working Brandy Liggett overtime – after she realized that her own employee was impaired to the

[3] Speedway and its *amici curiae* omit any reference to the testimony of shift leader Jennifer Wells from their submissions to this Court. Jennifer Wells consistently testified: that Brandy Liggett's behavior during her shift on September 15, 2015, demonstrated that something was wrong with Brandy Liggett; that Brandy Liggett had fallen asleep multiple times when she was supposed to be working, including while standing in the parking lot; that the Speedway manager on duty, Bobbi Jo Maguire, was aware of Brandy Liggett's behavior and had expressed her own concern; that Maguire admitted Brandy Liggett shouldn't drive; and that Jennifer Wells thought action should be taken to prevent Brandy Liggett from driving after her shift. J.A. 2685-2686, 2690-2699, 2701-2702, 2710-2713, 2715, 2728.

point she was falling asleep on the job and while in a standing position. A reasonably prudent manager would have made certain that Brandy Liggett could make it home safely by calling someone to arrange a ride for her, not ask her to work over so that she could leave early, and thus endanger the public on her way home.

Thus, despite Speedway's and its *amici curiae*'s attempt to characterize the issue as one involving Speedway's failure to act when arguing the *Robertson* affirmative act requirement was not met, the evidence reveals Speedway affirmatively acted to keep Brandy Liggett on the job, after her shift ended when Speedway knew, or should have known, that Brandy Liggett was already impaired to the state that she fell asleep standing and stumbled while walking. Surely, Speedway knew or should have known that Brandy Liggett posed an unreasonable risk to the public if she were to drive a car in her condition and that continuing to work Brandy Liggett in this condition, after her scheduled shift had ended, served only to add to the state of impairment, particularly where Speedway was contemporaneously taking Brandy Liggett at her word that she was just tired.

Speedway's reliance upon *Overbaugh v. McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990), is curious because in *Overbaugh*, the purported employer did exactly what Speedway failed to do here – take steps to prevent an obviously impaired employee from driving and placing the safety of others in jeopardy. *Overbaugh* is, at its essence, a social host liability case, not an employer/employee relationship case as the parties disputed the existence of an employer/employee relationship. *Overbaugh*, 183 W.Va. at 387, 396 S.E.2d at 154. The underlying event was an off-duty Christmas party where alcohol was available to attendees on a self-serve basis. *Id.* The purported employee served himself and was one of a number of guests. *Id.* at 391, 396 S.E.2d at 158. In *Overbaugh*, the purported employer repeatedly instructed the impaired person not to drive and to wait until someone could drive him home. *Id.* at 388, 391-92,

396 S.E.2d at 155, 158-59. Contrary to the facts in this case, the impaired person left before the purported employer could get to him to give him a ride home. *Id.* In this instance, the employer—Speedway—through its manager, affirmatively asked its impaired employee to work an extended shift, despite her known impairment, and never suggested that she get help getting home from work to protect the public.

It is clear that the *Overbaugh* syllabus focused on the gratuitous furnishing of alcohol, not on other conduct contributing to the impairment of an individual who causes harm to a third party. *See*, syl. pts 2 and 3, *Overbaugh.* As noted by this Court, the employer tried to protect the public from the danger and instruct the impaired person to stay "put until either he (Cline) or his son could give him a ride home." *Overbaugh*, 183 W.Va. at 392, 396 S.E.2d at 159. As the Court noted, the only evidence of affirmative action in *Overbaugh* was "in the nature of an attempt to minimize the risk of harm to third persons." *Id.* Of course, under such facts, liability should not be imposed upon the purported employer who took steps, although unsuccessful, to prevent an impaired person from driving and harming others. Quite simply, those facts are lacking in this case. There was affirmative conduct that increased the risk of harm to the public by asking an already impaired employee to stay and continue working after her scheduled shift ended. *Overbaugh* is limited to social host liability, including when the "host" may also be an employer and, as such, has no relevance to determining whether Speedway breached a duty in this case.

The circuit court's adherence to the established dictates of *Robertson* in its duty finding is also demonstrated when the Texas Supreme Court in *Otis Engineering Corporation v. Clark*, 668 S.W.2d 307, 309-310 (Tex. 1984), is considered. This Court relied upon and discussed *Otis Engineering* in *Overbaugh*. *Overbaugh*, 183 W.Va. at 392, 396 S.E.2d at 159. *Otis Engineering* is instructive because, like here, a co-employee advised supervisors that something was wrong

with a co-worker and the supervisor observed the impaired condition. *Otis Engineering Corp.*, 668 S.W.2d at 307. Instead of arranging for transportation home for the impaired worker, the supervisor asked if he was all right and accepted his word that he was - just as Speedway manager Bobbi Jo Maguire did here. *Id.* Thirty minutes after leaving the job site in his own vehicle, the employee caused a fatal accident. *Id.* Although the employer did not cause the impairment at issue in *Otis Engineering Corp.*, the Texas Supreme Court held that the employer had a:

> duty to take such action as a reasonably prudent employer would take under the same or similar circumstances to prevent the employee from causing an unreasonable risk of harm to others.

Otis Engineering Corp., 668 S.W.2d at 311. Whether that duty was breached is a jury question. *Id.* In the instant matter, the circuit court found, under the unique circumstances of this case, that a duty existed under West Virginia law. Speedway now seeks to avoid the jury's finding that the duty was breached, but this Court should not do so. The jury's verdict should be permitted to stand.

B. The circuit court's finding that Speedway had a legal duty is consistent with West Virginia law

The standard by which a circuit court is to determine whether a duty exists in West Virginia, the breach of which will subject an actor to liability in negligence, is well established. Indeed, this Court recently rejected an argument that a national retailer did not have a duty to an injured party against similar cries that "the sky will fall" and "businesses will flee this state" if a jury verdict was upheld in *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W.Va. 437, 854 S.E.2d 257 (2020).

In *Wal-Mart Stores East*, Wal-Mart argued that it did not owe a duty to protect a patron from the acts of a shoplifter. *Wal-Mart Stores East, L.P.*, 244 W.Va. at __, 854 S.E.2d at 267. Therein, this Court noted:

> Fundamentally, "[n]egligence is the violation of the duty of taking care under the

> given circumstances. It is not absolute, but is always relative to some circumstance of time, place, manner, or person."

Id., *quoting* syl. pt. 1, *Dicken v. Liverpool Salt & Coal Co.*, 41 W.Va. 511, 23 S.E. 582 (1895). In *Wal-Mart Stores East, L.P.*, this Court further explained that:

> foreseeability is key when determining whether a particular actor operates under a duty of care:
>
> > The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Wal-Mart Stores East, L.P., 244 W.Va. at __, 854 S.E.2d at 268, *quoting* syl. pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988); *see also*, syl. pt. 7 *Gable v. Gable*, -- W.Va. --, 858 S.E.2d 838 (2021) (same). Just as this Court found it was foreseeable that a Wal-Mart patron could be injured by a shoplifter fleeing from loss prevention personnel, it is foreseeable that a risk of harm was created by Speedway when it extended the shift of an obviously impaired worker, an act which added to the impairment, and then released her to get behind the wheel of a car in her impaired state only to have her be involved in a traffic accident causing the death of Kevin Jarrett.

Foreseeability, as it relates to the question of the existence of a duty, is so important that this Court recently characterized it as "dispositive." *Gable*, -- W.Va. --. 858 S.E.2d at 851. Where the question of foreseeability is premised upon disputed facts and reasonable persons may draw different conclusions, the circuit court must determine whether facts exist which, when viewed in the light most favorable to the plaintiff, are "sufficient to support foreseeability." Syl. pts. 8 and 9, *Marcus v. Staubs*, 230 W.Va. 127, 736 S.E.2d 360 (2012) (*per curium*), *quoting*, syl. pts. 11 and 12, in part, *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197 (2004). The United States District Court for the Northern District of West Virginia explained this fundamental principle of

West Virginia law in *Figaniak v. Fraternal Order of Owl's Home Nest*, Civil Action No. 5:15CV111, 2017 WL 2637397, *4 (N.D.W.Va. June 19, 2017), stating:

> While the issue of duty is one of law for the court, *Aikens v. Debow*, 541 S.E.2d 576, 580 (W. Va. 2000), "the court must leave room for the fact-finder to determine the issue of foreseeability." *Marcus*, 736 S.E.2d at 370. The court must determine "in general terms whether the type of conduct at issue is sufficiently likely to result in the kind of harm experienced based on the evidence presented," while the jury "has the more specific job of considering the likelihood or foreseeability of the injury sustained under the particular facts of the case in order to decide whether the defendant was negligent in that his or her conduct fell within the scope of the duty defined by the court." Id. at 370-71. Thus, "[w]hen the facts are in dispute, the court identifies the existence of the duty conditioned upon the jury's possible evidentiary finding." Id. at 371 (internal quotation marks omitted) (alteration in original).

Figaniak, 2017 WL 2637397 at *4.

The circuit court held true to West Virginia law when it found disputed facts existed upon which the jury could conclude that it was foreseeable that Speedway's actions as they pertained to Brandy Liggett on September 15, 2015, were likely to cause a risk of harm. Under established precedent, that is all that was required to submit the issue of Speedway's negligence to the jury in this case. Through its verdict, the jury found that Speedway knew or should have known that its actions placed Brandy Liggett on the road in an impaired state and created a risk of harm to the public. The circuit court's initial duty determination and the jury's subsequent liability finding are consistent with the established law of our State and should be upheld.

C. Public policy considerations support a duty finding

The question of duty is not limited solely to foreseeability but also includes an element of policy. As stated by this Court in *Harris v. R.A. Martin, Inc.*, 204 W.Va. 397, 401, 513 S.E.2d 170, 174 (1998) (*per curiam*):

> " '[Duty]' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk." [*Robertson v. Lemaster*,] 171 W.Va. [607] at 611, 301 S.E.2d [563] at 567

> [1983], quoting W. Prosser, *The Law of Torts*, § 53 (4th ed. 1971). While the existence of a duty is defined in terms of foreseeability, it also involves policy considerations including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Id.*

See also, *Aikens v. Debow* 208 W.Va. 486, 491, 541 S.E.2d 576, 581 (2000), (quoting *Robertson* for the proposition that "the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection[.]"). In *Robertson* itself, this Court recognized that the concept of liability "is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injur [sic] another." *Robertson*, 171 W.Va. at 611, 301 S.E.2d at 567, *quoting Blaine v. Chesapeake & O.R.R. Co.*, 9 W.Va. 252 (1876). As eloquently stated by the Texas Supreme Court nearly four (4) decades ago in *Otis Engineering*:

> "[c]hanging social conditions lead constantly to the recognition of new duties. No better general statement can be made, than the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists." W. Prosser, *supra*, at 327. If, as Prosser asserts should be done, we change concepts of duty as changing social conditions occur, then this case presents the Court with the opportunity to conform on conception of duty to what society demands.

Otis Engineering, 668 S.W.2d at 310.

There is an epidemic of impaired drivers on West Virginia roadways. Whether the impairment is caused by alcohol, prescription drugs, illegal drugs or pure exhaustion from the demands of working and living in today's society, impaired drivers pose a risk to the pedestrians, persons in other vehicles or even those sitting or standing near roadways. West Virginians spend a large part of their waking hours at work. Employers, supervisors and co-employees often see and interact with West Virginia workers more than workers' own families. Human decency often compels West Virginians to seek to intervene when they see an impaired person attempting to get behind the wheel of a car where the impaired person could harm his or herself or others, even when

the impaired person is a complete stranger. Justifiably or not, West Virginians believe their employers care about them and their safety. It is not a stretch to expect, in today's society, that when an employer has actual notice that an employee is impaired that the employer will not add to the impairment and then release the impaired employee to get behind the wheel of a vehicle on West Virginia roads and endangering the lives of the employee and the public at large.

No one is asking employers to become drug enforcement agents or to search and physically restrain employees as suggested by Speedway and its *amici curiae*. No one is asking employers to interrogate employees or to delve into their personal lives or to physically restrain them when they claim to simply be tired. No one is even suggesting that an employer had the absolute duty to do what the purported employer in *Overbaugh*, a social host liability case, did and attempt to arrange a ride home for an impaired employee, although doing so would be common courtesy. What is being suggested is that where an employer has actual notice that an employee is in an obviously and objectively impaired state throughout the workday, that public policy demands that the employer cannot then seek to have the employee work beyond her regular shift so its manager can leave early and then allow the impaired employee to get behind the wheel of a car without also being subject to liability for injuries caused by the impaired employee driving the vehicle as they leave the workplace.

The policy considerations recognized in *Robertson* for imposing a duty such as "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant" favor affirming Speedway's duty. *Robertson*, 171 W.Va. at 611, 301 S.E.2d at 567. The likelihood of injury caused by an impaired driver is well known and great. Speedway experiences little burden in guarding against placing an impaired employee on the road, Speedway simply needed to refrain from asking Brandy Liggett to continue working after

her shift was scheduled to end *or* assist in securing alternative transportation so she would not drive in an impaired state. While telling an employee a ride will be provided or arranged may be uncomfortable, it demonstrates the employer's concern for the safety of both its employees and the public in general. The consequence of placing the burden on Speedway – the goodwill of becoming known as an employer that cares about its employees, customers and neighbors and, maybe, the cost of a taxi. It certainly is not going to result in the doom and gloom predictions offered by the *amici curiae.*

D. Speedway had a legally cognizable duty under the unique facts of this case.

Whether Brandy Liggett was "just tired" as Speedway maintains she claimed at the time or she was high on illegally obtained prescription medications, Speedway's manager knew, at a minimum, that Brandy Liggett was so physically impaired that she nodded off while standing and stumbled while walking. Despite her obvious physical impairment, however caused, Speedway had Brandy Liggett work an extended shift so that the manager could leave early. The affirmative act of having Brandy Liggett continue working after the end of her shift placed Brandy Liggett at the scene of the crash at the time it occurred. Furthermore, it provided her with additional time in which her impairment could have become worse[4] and, thus, more dangerous to the traveling public. Indeed, Speedway's "we thought she was just tired" defense, places its conduct even more squarely within the bounds of *Robertson* because it knew she was "exhausted," had her continue working after the conclusion of her shift with knowledge of the "exhaustion" and took no action to prevent her from operating a vehicle in a state of exhaustion and jeopardizing the safety of the traveling public, including Kevin Jarrett. *See Faverty v. McDonald's Restaurants of Oregon, Inc.* 892 P.2d

[4] Impairment due to the purported exhaustion would likely become worse as rest would have been prevented. Moreover, assuming the impairment during her shift was drug induced as well, during the period after the manager left, Brandy Liggett was essentially unsupervised and would have been able to ingest pills undetected. J.A. 2538-2539.

703, 705, 710 (Ore. Ct. App. 1995) (finding employer may be held liable for acts of an off-duty employee who caused a car crash while driving home from work where employer knew employee was visibly fatigued and knew or should have known employee could not drive safely).

While we now know that the claimed "exhaustion" may actually have also included impairment from prescription drugs, it is a distinction without a difference. Speedway's affirmative actions were such that would contribute to its believed cause of Brandy Liggett's observed physical state, *i.e.,* exhaustion. It acted in a manner which it knew or should have known would cause further impairment and increased the risk to the public when she drove away from her place of employment after her extended shift ended. Thus, it falls squarely within a cognizable legal duty analysis under West Virginia law and squarely within *Robertson's* affirmative act proviso.

II. RESPONSE TO THE DIRE PREDICTIONS AND STRETCHED REASONING OF *AMICI CURIAE*

Two *amici curiae* briefs were filed in support of Speedway in this matter, one by the Defense Trial Counsel of West Virginia [hereinafter "DTCWV"] and one by the American Tort Reform Association, Chamber of Commerce of the United States of American, NFIB Small Business Legal Center, National Association of Convenience Storres, and American Property Casualty Insurance Association [hereinafter collectively "ATRA"]. Both *amici curiae* briefs take liberties with the timeline of events, liberties which create the illusion that the injury causing crash was far more remote in time from Speedway's involvement with Brandy Liggett than even Speedway admits.

DTCWV asserts the crash occurred 50 minutes after the end of work shift and Brandy Liggett ran errands for 45 to 50 minutes after her shift was over. DTCWV Brief, pp. 3, 9. ATRA goes further, asserting that the crash occurred a full hour after her shift ended. ATRA Brief, p. 3.

Neither brief provides a citation to the Appendix in support of these "factual" statements *because these "facts" simply do not exist in the record.* As acknowledged in Speedway's own brief, at most 42 minutes passed from the time Brandy Liggett left the workplace in her vehicle and the crash. Speedway Brief, p. 3 (Liggett's shift ended at 3:00 p.m., she drove 2 miles to Moundsville Middle School to take football equipment to her son, began to drive home and the crash occurred 5 miles from school at approximately 3:42 p.m.). Under Speedway's own timeline, at most 42 minutes, not 50 minutes or even an hour, elapsed and that is assuming Brandy Liggett was in her vehicle and on the road at 3:00 p.m. Speedway has not produced evidence of the actual time Brandy Liggett clocked out on September 15, 2015, so the time between leaving the workplace and killing Kevin Jarrett may have actually been much shorter.

More disheartening, however, is that DTCWV and ATRA continue with the mantra they have chanted for the past quarter century attempting to cast West Virginia as an outlier and home of "deep-pocket" jurisprudence. At some point, their attacks on our judicial system and the threats of businesses leaving or avoiding our state must come to an end. As demonstrated above, the circuit court did not deviate from the long-established West Virginia law and upholding the jury's verdict will not create new and impossible burdens on employers. If anything, upholding the jury's verdict reaffirms public perception of what constitutes a good business neighbor, a business which looks out for the health and safety of its employees and the public.

A. Response to DTCWV

DTCWV argues in its *Amicus Curiae* Brief that holding Speedway liable for the actions of its off-duty trainee Brandy Liggett, who made the unfortunate decision to commit the crime of driving while under the influence of illegal substances, resulting in a motor vehicle accident that caused the death of Respondent's decedent was wrong. DTCWV Brief, p. 2. What makes this

argument the weakest is that it fails to recognize that at the time Brandy Liggett left the premises, her impairment from illegal substances was not known to her employer. Her drug impairment was not discovered until after she caused the crash that took the life of Kevin Jarrett. Most importantly, however, is the fact that her supervisor and coworkers recognized something was wrong with her but did not do anything to protect the public from her recognized impairment. Instead, her supervisor continued her shift throughout the day and asked her to work an extended shift, despite the knowledge that she was impaired by "exhaustion" if nothing else, and then she was permitted to drive home, thus putting herself and the public in danger of a deadly crash. Significantly, DTCWV does not provide citations to the Appendix for the "factual" statements contained in its chart on page 3 of its brief, statements attempting to distinguish this case from *Robertson*.

Of the limited West Virginia cases cited by DTCWV in support of its position, none are helpful to DTCWV's analysis. Indeed, *Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987), a case upon which DTCWV relies heavily, supports upholding Speedway's liability as it extended *Robertson* to impose liability upon a guest passenger who encouraged or assisted in a driver's impairment which caused injuries to a third person. Syl. pt. 12, *Price*, 177 W.Va. 592, 355 S.E.2d 380. Here, Speedway's actions assisted in the further impairment of Brandy Liggett when it extended her shift beyond its scheduled end knowing she was already significantly impaired through exhaustion or otherwise. The issue in *Brown v. City of Wheeling*, 212 W.Va. 121, 569 S.E.2d 197 (2002) (*per curiam*), was whether an employee was acting within the course and scope of employment *for workers' compensation purposes* when killed in a single vehicle accident. *See* DTCWV Brief, p. 9 discussing *Brown*. Also, unlike here where DTCWV admits there is no claim that Speedway may be vicariously liable for Brandy Liggett's action, the question in *Pratt v. Freedom Bancshares, Inc.*, No. 18-0180, 6016075 (Nov. 16, 2018) (memorandum decision), was

one of vicarious, not direct liability. *See* DTCWV Brief, p. 9 discussing *Pratt*. DTCWV's reliance upon cases *not* discussing duty as well as its avoidance of the West Virginia cases discussing how a legal duty is to be determined for negligence purposes is telling. Discussing applicable law and actual facts, rather demonstrates the circuit court did not err and the jury's liability verdict should be upheld notwithstanding DTCWV's the sky is falling rhetoric.

B. Response to ATRA

The political rhetoric, avoidance of facts and stretched representations of law to achieve a desired result go even further in ATRA's *Amici Curiae* Brief. ATRA's argument that to uphold the finding of Speedway's liability would constitute an unprecedented expansion of liability and proverbial return to the dark ages and its multiple "outlier" and "deep pocket jurisprudence" statements should be taken for what they are – political rhetoric designed to be inflammatory and unduly influence this Court. ATRA Brief, pp. 4, 7, 11-15. As such, they should be dismissed out of hand and ATRA reminded that this Court will look to law and precedent, not blatant political rhetoric when deciding fundamental issues of West Virginia law.

Like DTCWV, ATRA avoids any real discussion of governing West Virginia law or the actual facts of this case. Perhaps that is because, as ATRA admits on page 6 of its brief, where an employer increases the risk of an employee harming a third person, the employer may be held directly liable to the person harmed. ATRA focuses on Brandy Liggett's apparent ingestion of prescription drugs, something that was not known prior to the fatal collision, in an obvious attempt to ignore the undisputed fact that Speedway had actual knowledge of Brandy Liggett's obvious impairment, Speedway purportedly believed it was due to "exhaustion" and Speedway nevertheless continued working Brandy Liggett throughout her entire shift *and after* so that a manager could leave early and preventing Brandy Liggett from resting and recovering from known

exhaustion. ATRA Brief, p. 7. ATRA, like DTCWV, completely avoids any acknowledgment of Speedway's purported belief that Brandy Liggett was simply exhausted and its affirmative actions in having her continue to work after her shift was over so its manager could leave early for the day. Whether or not prescription drugs were in the mix, Speedway knew and believed she was working in an exhausted and impaired state *and continued to work her after her scheduled shift ended.*

One must only look at a sampling of the foreign jurisdiction cases cited by ATRA in support of its "outlier" argument to realize the lengths to which ATRA will go to create an appearance that upholding the circuit court's application of established West Virginia law and the jury's liability verdict would have catastrophic consequences. For example, ATRA relies on *DMAC81, LLC v. Nguyen*, 853 S.E.2d 400, 402 (Ga. Ct. App. 2021), a case where the fatal accident at issue occurred *while the employee was on his way to work* after being called in early during a winter storm not, as here, where the employee left work visibly impaired. ATRA Brief, p. 8. ATRA's reliance on *Thompson v. Best Buy Stores, L.P.*, 2016 WL 6946786 (Tenn.Ct.App. Nov. 28, 2016) is also curious. ATRA Brief, pp. 8-9. In *Thompson*, an employee who had ingested a drug received in the mail before going to work, sued his own employer for allowing him to leave work in an inebriated state and he crashed his own vehicle on his way home. *Thompson*, 2016 WL 6946786, *1. In *Thompson*, the court correctly noted that it would be "plainly absurd" to hold an employer liable for an injury to an employee caused by the employee's own actions in becoming impaired before reporting to work.

Williams v. Wal-Mart Stores East, L.P., 832 F.Supp.2d 923 (E.D.Tenn. 2011), another case relied upon by ATRA on page 9 of its Brief, involves a claim against an employer on behalf of an employee who died in a single vehicle accident after leaving work early. *Williams*, 832 F.Supp.2d

at 925. In *Williams*, as in *Overbaugh*, the undisputed facts demonstrated that Wal-Mart, did not contribute to the employee's impairment, offered to call someone to drive the employee and the employee refused. *Id.* at 928. Significantly, there was no evidence as to the cause of the fatal accident, "much less any action or inaction of Wal-Mart [that] caused the accident." *Id.* at 929.

In the third Tennessee case relied upon by ATRA, *Lett v. Collis Foods, Inc.*, 60 S.W.3d 95 (Tenn. Ct. App. 2001), the court was again dealing with an employee who arrived at work intoxicated. Again, like in *Overbaugh* and *Williams* but unlike Speedway, the employer attempted to provide a ride home for the intoxicated worker and the employee refused. *Lett*, 60 S.W.3d at 97. Additionally, the employer in *Williams* took steps to attempt to sober the employee up and sleep it off. *Id.* at 98. Eventually, the employee left against the employer's express order and caused the collision at issue. *Id.* Of course, liability should not be imposed on the employer in such circumstances. However, this is precisely the opposite of what Speedway did. Speedway continued Brandy Liggett's shift after it was scheduled to end with knowledge that she was impaired and, at a minimum, exhausted and took no steps to prevent her from driving in such an impaired state.

WVAJ could continue to demonstrate that the cases relied upon by ATRA to demonstrate that upholding the lower court's decisions and the jury's verdict would render West Virginia an "outlier" and cause the destruction of our economy do not actually say what ATRA wants this Court to assume they say nor do they stand for the propositions ATRA claims but the point has been made. This Court can see through ATRA's rhetoric and doomsday prognostications. West Virginia courts should apply the law of this jurisdiction consistently and without regard for the specific outcome, regardless of who "wins" the case. In a death case, such as this, there are no winners or losers, simply persons seeking redress under the law for conduct which caused or

contributed to the untimely death of a husband, father and grandfather. The circuit court determined that there was a duty; the jury was properly instructed; Speedway made its arguments and presented its evidence; the jury did the right thing—it imposed liability on Speedway for its affirmative conduct that caused the death of Kevin Jarrett.

CONCLUSION

Application of West Virginia precedent, including *Robertson*, to the unique facts of this case reveals that the circuit court correctly found disputed facts existed upon which the jury could conclude that it was foreseeable that Speedway's actions as they pertained to Brandy Liggett on September 15, 2015, were likely to cause a risk of harm to others. Accordingly, the circuit court was required to submit the issue to the jury. Upon consideration of all of the facts, not simply the select highlighted by Speedway and its *amici curiae*, the jury found Speedway to be 30% liable for Kevin Jarrett's death. The verdict is consistent with established West Virginia law and should be upheld.

Respectfully submitted,

West Virginia Association for Justice,
Amicus Curiae,

By Counsel,

Michelle Marinacci
W.Va. Bar No. 7482
GOLD, KHOUREY & TURAK, L.C.
510 Tomlinson Avenue
Moundsville, WV 26041
mlm@gkt.com
Phone: 304.845.9750
Facsimile 304.845.1286

And,

David A. Sims
W.Va. Bar No. 5196

LAW OFFICES OF DAVID A. SIMS, PLLC
P.O. Box 5349
Vienna, West Virginia 26105
david.sims@mywvlawyer.com
Phone: 304-428-5291
Facsimile: 304-485-5293

Counsel for Amicus Curiae
West Virginia Association for Justice

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
Case No. 21-0215

SPEEDWAY, LLC,

Petitioner,

v.

DEBORAH L. JARRETT,
As the Executrix of the Estate of
Kevin M. Jarrett,

Respondent.

Certificate of Service

I, Michelle Marinacci, do hereby certify that a copy of the foregoing ***Amicus Curiae Brief from the West Virginia Association for Justice in Support of Respondent, Deborah L. Jarrett, Executrix of the Estate of Kevin M. Jarrett*** was served on counsel of record on the 10th day of August 2021, through the United States Postal Service, postage prepaid, to the following:

Robert L. Massie
Jennifer W. Winkler
NELSON MULLINS RILEY & SCARBOROUGH
949 Third Avenue, Suite 200
P.O. Box 1856
Huntington, WV 25701

Gregory A. Gellner, Esq.
GELLNER LAW OFFICES
1440 National Road
Wheeling, WV 26003

Robert P. Fitzsimmons, Esq.
FITZSIMMONS LAW FIRM, PLLC
1609 Warwood Avenue
Wheeling, WV 26003

Richard R. Heath, Jr.
BOWLES RICE LLP
600 Quarrier Street (25301)
Post Office Box 1386

Charleston, WV 25325-1386

Mark A. Behrens
Cary Silverman
SHOOK HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, DC 20006

Thomas J. Hurney, Jr.
Blair E. Wessels
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322

Todd A. Mount
Shaffer & Shaffer, PLLC
330 State Street
Madison, West Virginia 25310

Michelle Marinacci
W.Va. Bar No. 7482
Gold, Khourey & Turak, L.C.
510 Tomlinson Avenue
Moundsville, WV 26041
mlm@gkt.com
Phone: 304.845.9750
Facsimile 304.845.1286

And,

David A. Sims
W.Va. Bar No. 5196
Law Offices of David A. Sims, PLLC
P.O. Box 5349
Vienna, West Virginia 26105
david.sims@mywvlawyer.com
Phone: 304-428-5291
Facsimile: 304-485-5293

Counsel for Amicus Curiae West Virginia Association for Justice