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

CHARLESTON

SPEEDWAY, LLC,

Petitioner,

v.

Case No. 21-0215
(Marshall Co. Civil Action No. 20-C-101)

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

Respondent.

BRIEF ON BEHALF OF *AMICUS CURIAE* THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA

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I. INTEREST OF THE *AMICUS CURIAE*

The Defense Trial Counsel of West Virginia ("DTCWV") submits this Brief as *amicus curiae*[1] based on its members' interest in the judicial expansion of tort liability in West Virginia. The DTCWV is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil and administrative litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 20,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. DTCWV's goals include elevating the standards of legal practice within the State of West Virginia, working for elimination of Court congestion and delays in civil and administrative litigation in West Virginia, promoting improvement of the administration of justice in West Virginia, and increasing the quality of legal services provided to our citizens.

Petitioner's appeal addresses an important question for West Virginia litigators: To what extent are employers responsible for the conduct of their employees when the employees are off work and not on the employer's premises? DTCWV urges this Court to reverse the decision below because the Circuit Court's ruling goes too far in expanding the "affirmative conduct" exception to longstanding West Virginia precedent that employers are not responsible for their employees' conduct that is outside the scope of employment as articulated in *Robertson v. LeMasters*, 171 W. Va. 607, 301 S.E.2d 563 (1983).

The DTCWV served notice on the parties of its intent to file this amicus brief on June 22, 2021, by email, as required by Rule 30 of the West Virginia Rules of Appellate Procedure.

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[1] Statement required by Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure: This amicus brief was authored by counsel for the WVDTC. No counsel for any party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of the brief.

II. ARGUMENT

The Respondent seeks to hold Speedway, LLC ("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. "[U]nder traditional principles of master-servant law[,] an employer is normally under no duty to control the conduct of an employee acting outside the scope of his employment." *Robertson v. LeMasters*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). Under West Virginia's common law, a person usually has no duty to protect others from the criminal activity of a third party because the foreseeability of the risk is slight, and because of the social and economic consequences of placing such a duty on a person. *See, e.g.*, *Jack v. Fritts*, 193 W. Va. 494, 496, 457 S.E.2d 431, 433 (1995) (recognizing that the *Robertson* exception may be applicable in the context of a landlord-tenant relationship); *see also Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987) (recognizing that the *Robertson* exception is applicable to torts generally).

A. The facts here do not satisfy the narrow exception allowing liability recognized in *Robertson v. LeMasters.*

Robertson provides a narrow exception to West Virginia's general rule that one does not have a duty to intervene to prevent the wrongdoing of others: "[O]ne 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." *Robertson*, 171 W. Va. at 611, 301 S.E.2d at 567 (emphasis added). Respondent relies on this exception to the general rule in support of its claims against Speedway.

However, the *Robertson* case is substantially different than this case:

Robertson	***Speedway***

Employee was laborer performing heavy manual labor including laying railroad track and shoveling coal.	Employee was working as a convenience store trainee.
Employee was required to work 27 straight hours on threat of termination.	Employee offered to and was allowed to work one hour of overtime (total shift 9 hours) under no threat of any adverse action.
Employee was transported to secondary work site (derailed train) by employer, adding additional time to his trip home.	Employee transported herself to and from worksite.
Employee complained multiple times to supervisors that he was tired and hungry and needed to go home to rest.	Employee admitted to employer she was tired because of "a lot going on at home" but repeatedly insisted she was fine to continue working.
Other employees working the derailment were offered a ride home, but Robertson was not.	Employee did not request a ride home and testified if she had been offered a ride, she would have declined it.
Employer's interest in major overtime was working employees as hard as possible because the derailment was holding up large profits by stopping all rail traffic on the line.	Employer's interest in minor overtime was policy of having a minimum two employees on duty at any time.
Employee was attempting to go straight home.	Employee ran personal errands after leaving work; accident occurred 50 minutes after end of work shift.
Efficient proximate cause of third-party's injury was employee's exhaustion from being overworked by employer.	Efficient proximate cause of third-party's injury was employee's voluntary intoxication, unknown by employer, and unrelated to employment.
Employer engaged in affirmative conduct that contributed to plaintiff's injury: threats of termination; insisting the employee work until the job was done without rest breaks for over 27 hours; refusing requests for breaks or to be released from further work despite complaints of exhaustion.	Employer engaged in no affirmative conduct.

Respondent argues that under *Robertson*, Speedway engaged in "affirmative conduct" that created an unreasonable risk of harm to others when Ms. Liggett was (1) allowed to continue working, even though she appeared tired and was observed nodding off during her shift, and (2) allowed to work an extra hour past the end of her regular shift. Respondent further characterizes Speedway's "affirmative conduct" to include allowing Ms. Liggett to drive home after work without ensuring her safe transport. This argument fails, however, because it equates the very *lack* of affirmative conduct with *Robertson*'s requirement of affirmative acts. Put simply, doing *nothing* is not the same as doing *something*, in the context of the *Robertson* rule. Unlike the general tort concept of acts or omissions leading to liability, the *Robertson* exception only imposes liability upon an employer whose own affirmative acts have contributed to the risk of harm.

Price v. Halstead demonstrates the conflation of *acts* versus *omissions*. There, passengers in a vehicle whose driver was under the influence and caused a collision were held liable to third parties who were injured. *Price*, 177 W. Va. at 600, 355 S.E.2d 389. The passengers were held liable because *they affirmatively and substantially acted* to encourage and assist their driver in becoming intoxicated while driving: "In the present case, the facts are even more egregious than in *Robertson* as the passengers are alleged to have directly participated and to have encouraged the driver to continue to drink and smoke marijuana when he was already visibly intoxicated." *Id.* at 598, 355 S.E.2d at 387. Here, the record no evidence of affirmative conduct by Speedway.[2] Under *Robertson*, Speedway should not be held liable for the collision caused by its intoxicated employee where it did not engage in affirmative conduct that assisted or encouraged its employee to drive under the influence.

[2] [2] It should be noted that Respondent does not argue that Speedway is vicariously liable for the acts of Ms. Liggett.

West Virginia courts have long recognized the tension between ensuring adequate remedies to the injured and the need to limit exposure to tort liability. In *Aikens v. Debow*, 208 W. Va. 486, 493, 541 S.E.2d 576, 583 (2000), the Court stated "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability without limit." *Id.* (citing 57A Am. Jur. 2d *Negligence* § 87). When drawing this line and determining the scope of duty owed, the primary consideration is foreseeability. *Id.*, 208 W. Va. at 491, 541 S.E.2d at 581. However, beyond foreseeability, "'the existence of a duty also involves *policy considerations* underlying the core issue of the scope of the legal system's protection.'" *Id.* (quoting *Robertson*, 171 W. Va. at 612, 301 S.E.2d at 568) (emphasis added). Such policy considerations include "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Robertson*, 171 W. Va. at 612, 301 S.E.2d at 568.

Respondent's theory, as adopted by the Circuit Court, stretches the boundaries of *Robertson*'s narrow exception to the point where the exception swallows the rule. When considering the public policy considerations and implications of the Circuit Court's holding, this Court should reverse the lower court because its decision exposes West Virginia employers to unpredictable and almost unlimited liability.

B. Expanding the exception articulated in *Robertson v. LeMasters* will place too high a burden on employers.

Respondent seeks to hold Speedway liable based on its supposed "affirmative conduct" in (1) observing that Ms. Liggett was tired during her shift; (2) taking Ms. Liggett's word that she was alright; (3) allowing Ms. Liggett to volunteer to work overtime; and (4) failing to intervene in some way to prevent Ms. Liggett from driving herself home after her shift was completed. This case is not like *Robertson*, in that Respondent argues that Speedway's inaction -- as opposed to

affirmative conduct -- created an unreasonable risk of harm to others. Under Respondent's argument, for Speedway to shield itself from liability, it's store manager should have conducted a probing examination into Ms. Liggett's exhaustion and prevented her from leaving the premises after her shift was completed. In its order denying Speedway's Motion for Summary Judgment, the Circuit Court agreed, finding that Speedway "decided *not to* embark upon sufficient testing, investigation, or formal assistance for their employee, such as providing a call to a family member to insure [sic] the safe transport home, calling a cab or an Uber driver, or having someone from Speedway drive the affected employee home." [J.A. 1531 (emphasis added).]

Allowing liability here places a substantial burden on employers by imposing a duty to screen employees before they leave work to ensure they are fit to drive. More specifically, that burden falls on the individual managers at each store to police each employee's fatigue level, interrogate about each employee's sleep and other activities the previous evening, and make determinations on whether the employee should be allowed to continue to work or should be allowed to leave the workplace by foot or by car. The facts here make the point. When Ms. Liggett showed signs of fatigue during her shift, she was asked if she was alright and replied she was tired. [J.A. 875, 876.]. Although Ms. Liggett was tired, she agreed to stay an extra hour beyond the end of her shift because Speedway was short-staffed. [J.A. 876.] Under the duty articulated by the Circuit Court and urged by the Respondent, an employer is under a legal duty to ignore an employee's statement that she was "alright" and conduct an invasive investigation into her personal life, and then going so far as to physically take her keys, refuse to let her leave on her own, and call a cab or Uber or otherwise arranged to have her taken home, all after she says that she is "alright." That places a heavy, and nearly impossible duty on employers.

Notably, these facts are different from *Robertson*, where the employee was required to work over 27 hours without rest, repeatedly requested to go home due to fatigue, and was affirmatively told to "just go on home." *Robertson*, 171 W. Va. at 608–10, 301 S.E.2d at 564–66. There is a fundamental difference between an employee working one hour over her allotted 8-hour scheduled shift, and an employee working over 24 hours without adequate rest.

Although Ms. Liggett appeared tired during her shift, the circumstances did not indicate that she was so tired she was unfit to drive, nor did anyone at Speedway know that Ms. Liggett was under the influence of illegal prescription medication. [J.A. 876, 879.]

Unlike cases in which an employee is visibly intoxicated—making it at least arguably foreseeable that an adverse consequence is likely to occur if the employee is permitted to drive—here, Speedway is being asked to determine that its employee is, in fact, so incapacitated from fatigue that an accident would be reasonably foreseeable. Because fatigue is subjective, and because Speedway did not have actual knowledge of intoxication, it is profoundly more difficult to determine whether a person is so "incapacitated" that they are at risk of causing an accident, unless the facts are as extreme as the ones in *Robertson*. *See, e.g.*, *Jenkins v. Kemlon Prod. & Dev. Co.*, 923 S.W.2d 224, 226 (Tex. App. 1996) ("However, knowingly allowing an intoxicated person to leave your establishment has a much greater element of foreseeability of adverse consequences than allowing a tired employee to go home after work."). Without any visible intoxication, and without any other objective evidence that put Speedway's store manager on notice of intoxication, requiring the store manager to conduct a probing investigation into whether an employee is "incapacitated" to the point that she should not be allowed to drive herself home places the store manager into an untenable position.

Speedway and other employers should not have to shoulder the burden of closely monitoring employees' behavior during their shifts and preventing them from leaving work. The devil is in the details of how employers are supposed to determine whether an employee is fit or able to drive himself or herself home. Are managers on-site supposed to screen each employee before the employee leaves the employer's premises? What gives employers the right to do so, especially when questions would necessary probe a person's personal life outside of work? What criteria are employers to use to determine fitness to drive? (How much sleep is sufficient sleep, and was it REM sleep, and what else were you doing last night?) What information is an employee obligated to provide? How are employers to enforce this duty on employees? Should a manager physically restrain an employee from leaving the workplace thereby opening the employer to a false imprisonment claim? If a manager attempts to physically restrain an employee, and a physical altercation ensues, is the employer liable for the injuries to both the manager and employee? Are employers required to provide employees with alternative transportation home such as calling a cab Uber or Lyft? Are employers likely to take the risk of giving anyone with a past disciplinary or criminal history a second chance if the employer could be found liable for not predicting and preventing that employee's wrongdoing when the employee was not at work? These concerns led the *Robertson* Court to a decision based on a narrow and specific set of facts, but the facts here expand its holding into unprecedented (and unpredictable) tort liability.

C. The consequences of imposing liability on Speedway will subject employers to expansive tort liability.

Affirmance here will create a new tort duty on employers in West Virginia. Where an employee appears tired or disorientated, the employer must investigate and prevent the employee from leaving work. This is a significant burden. Even further, the ability to foresee the potential adverse consequences of a tired employee driving home is more attenuated by the fact that Ms.

Liggett ran errands for 45 to 50 minutes after her shift was over and the accident occurred more than 7 miles away from her workplace. Not only was Speedway held liable for failing to prevent Ms. Liggett from leaving work after her shift was over, but also for her conduct 45 to 50 minutes after she left the store and while she was running personal errands—acts over which Speedway had no control. *See, e.g.*, *Brown v. City of Wheeling*, 212 W. Va. 121, 125–26, 569 S.E.2d 197, 201–02 (2002) ("It is the general rule in West Virginia that when an employee is injured while going to and coming from work, that employee is not considered to be in the course of his or her employment . . . .The reasoning underlying this rule is that the employee is being exposed to a risk identical to that of the general public; the risk is not imposed by the employer."); *Pratt v. Freedom Bancshares, Inc.*, No. 18-0180, 2018 WL 6016075, at *3 (W. Va. Nov. 16, 2018) (holding that an employee was not acting within the scope of his employment when he "made no stops from the time he left home until the accident; did not conduct or intend to conduct any business on behalf of Freedom on the way to the meeting; and was operating a vehicle registered to Hott's Farming, Inc., which is not related to Freedom").

This Court has approached the expansion of tort liability with caution. As noted in *Aikens*, courts are responsible for drawing "the line demarcating tort liability":

> Who, in our society, has the burden of defining the existence and extent of the element of "duty" in tort actions? It necessarily falls to the courts to consider all relevant claims of the competing parties; to determine where and upon whom the burden of carrying the risk of injury will fall; and to draw the line, to declare the existence or absence of "duty," in every case, as a matter of law.

Aikens, 208 W. Va. at 493, 541 S.E.2d at 583. In *Overbaugh v. McCutcheon*, 183 W. Va. 386, 391, 396 S.E.2d 153, 158 (1990), the Court rejected the plaintiff's attempts to impose a duty on an employer who served liquor at an employer-sponsored party to prevent an employee from operating a motor vehicle when the employee leaves the party. Distinguishing both *Robertson* and

the Texas Supreme Court's decision in *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983), the Court determined that the employer was not liable because (1) the employer had no knowledge of the employee's drinking problem, and (2) the employer instructed the employee to wait for a ride home. *Id.* at 392, 396 S.E.2d at 159. The Court found that the employer did not engage in "affirmative conduct" because there was "no evidence to indicate that the employer exercised control over an incapacitated employee sufficient to create a duty on the employer." *Id.*

Unlike the situation here, where Respondent seeks to hold Speedway liable for failing to prevent Ms. Liggett from driving home, the Court in *Overbaugh* declined to hold the employer liable for failing to ensure that its employee did not operate a motor vehicle, even though the employer knew the employee was incapacitated. *Id.* The Court recognized that imposing liability under those set of facts simply stretched the line of duty of care too far.

Imposing this duty on employers results in "tort liability almost without limit." *Harris v. R.A. Martin, Inc.*, 204 W.Va. 397, 403, 513 S.E.2d 170, 176 (1998) (Maynard, J., dissenting) (commenting that by ignoring public policy and social considerations, "the majority so expands the element of duty, that its existence now becomes almost a given in any tort cause. If a party is injured by the conduct of another, there must have been a duty to avoid such conduct."). Allowing the Circuit Court's orders to stand violates the long-established rule that employers are not responsible for their employees' conduct outside the scope of employment, with the result that employers will be faced with expansive and unpredictable liability.

III. CONCLUSION

For these reasons, this Court should reverse the rulings of the Circuit Court and find that the narrow exception articulated in *Robertson v. LeMasters* does not apply to the facts of the underlying case.

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CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., counsel for the Defense Trial Counsel of West Virginia, do hereby certify that on the 28th day of June 2021, I have served a true and exact copy of the foregoing **Brief of Amicus Curiae on Behalf of the Defense Trial Counsel of West Virginia** via the United States Postal Service, by placing the same in a stamped envelope, addressed to the following counsel of record:

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