No. 21-0215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SPEEDWAY LLC,

Defendant Below, Petitioner

vs.

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

Plaintiff Below, Respondent.

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 15-C-217

REPLY BRIEF OF PETITIONER SPEEDWAY LLC

Robert L. Massie, Esquire (WVSBN 5743)
Jennifer W. Winkler, Esquire (WVSBN 13280)
Nelson Mullins Riley & Scarborough LLP
949 Third Ave., Suite 200
P.O. Box 1856
Huntington, WV 25701
Phone: (304) 526-3500
Facsimile: (304) 526-3599
bob.massie@nelsonmullins.com
jennifer.winkler@nelsonmullins.com

COUNSEL FOR SPEEDWAY LLC

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INTRODUCTION

Respondent concedes that Brandy Liggett was off-duty and was acting outside the scope of her employment with Speedway at the time of the accident giving rise to this lawsuit. Respondent also concedes that well-established West Virginia law required Respondent to establish at trial that Speedway engaged in affirmative conduct creating an unreasonable risk of harm to Kevin Jarrett. Respondent's brief then presents a jumbled hodgepodge of alleged conduct that appears designed to confuse the relevant facts but which cannot possibly give rise to any legal duty owed by Speedway to Mr. Jarrett. So, what then does Respondent actually contend is the affirmative conduct by Speedway that created an unreasonable risk of harm to Mr. Jarrett to allow this jury verdict to stand?

Respondent ultimately argues that the "crux" of her case is the supposed "affirmative conduct" of Speedway's manager, Bobbie Jo Maguire, in allowing Ms. Liggett to continue working her assigned shift, asking Ms. Liggett if she could work a single hour over time, and deciding to "abandon a full investigation" of Ms. Liggett during her shift and before "allowing" Ms. Liggett to leave the workplace at the end of her shift. According to Respondent, each of these "affirmative decisions" was made "after Maguire had already realized or should have realized that Liggett was exhausted and/or incapacitated." The problem with this argument is that it fails to recognize that this conduct did not cause Brandy Liggett to be impaired. Her impairment was caused by illegal and surreptitious drug use. Even Respondent's argument were true, however, none of this alleged conduct constitutes the affirmative conduct required to impose a duty of care owed by Speedway under *Robertson v. LeMaster*.

Because Speedway did not engage in any affirmative conduct giving rise to a legal duty, Speedway could not possibly have been negligent, and thus this Court should reverse the Circuit Court's denial of Speedway's Motions for Judgment as a Matter of Law and enter judgment in

Speedway's favor. Alternatively, the Court should reverse the Circuit Court's decisions granting Respondent's Motion to Alter or Amend the Verdict by Way of Additur and Motion for a New Trial on Unliquidated Damages and denying Speedway's alternate Motion for a New Trial on all issues. As a final alternative, this Court should reverse the Circuit Court's denial of Speedway's alternate Motion to Alter or Amend the Court's August 5, 2020 Final Judgment Order and remand with instructions to correct the award of post-judgment interest.

ARGUMENT

I. Respondent failed to establish any affirmative conduct by Speedway creating an unreasonable risk of harm to Mr. Jarrett because no such conduct occurred.

In West Virginia, "under 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 [or her] employment." *Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). However, there is an exception to this rule which states that an employer "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." *Id.* at Syl. Pt. 2 (emphasis added). Thus, under clear and well-established West Virginia law, Speedway only had a duty to prevent its employee, Brandy Liggett, from driving off-premises and off-duty on the day of the accident if it engaged in some affirmative conduct that created an unreasonable risk of harm to another. That is, Respondent was required to prove that Speedway's conduct caused Brandy Liggett's impairment. Respondent failed to produce any evidence at trial that Speedway engaged in such conduct, and the reason for this is simple – there is none.

A. Respondent's argument that Speedway was aware Ms. Liggett was under the influence on the day of the accident is simply not "affirmative conduct" to impose liability under clear West Virginia law.

Once Ms. Liggett finished her shift at Speedway on September 15, 2015,[1] Speedway had no duty to prevent her from driving away unless Speedway engaged in affirmative conduct that *caused* Ms. Liggett to create an unreasonable risk of harm to others. Even taking the evidence most favorable to Respondent, it was established at trial that Ms. Liggett was under the influence of prescription medications she surreptitiously ingested on the day of the accident, and this impairment caused the accident of September 15, 2015, resulting in the death of Kevin Jarrett. Respondent does not dispute that Ms. Liggett affirmatively hid her abuse of these medications from Speedway, deliberately concealing her ingestion of the medication. Nor does Respondent dispute that Ms. Liggett deliberately lied to Speedway employees about her condition in a further effort to prevent Speedway from discovering her abuse of prescription medication.

Instead, Respondent continues to focus on whether Speedway knew or should have known about Ms. Liggett's impairment and what other employees at Speedway thought about Ms. Liggett's behavior during her shift that day. None of this, however, is pertinent to the question of whether Speedway's actions caused Ms. Liggett to create an unreasonable risk of harm to others. The Speedway conduct that Respondent argues is "affirmative conduct" that creates an unreasonable risk of harm to others was Ms. Maguire allowing Ms. Liggett to continue working after she was impaired, asking Ms. Liggett if she could work a single hour over time, and "deciding not to conduct an investigation of" or "fully evaluate" Ms. Liggett during her shift. (Resp't Br. at

[1] Respondent asserts in her Brief that Speedway "state[d] in its Brief on more than one occasion that Liggett left the Speedway at 3:00 p.m." and attaches as "Appendix A" a document not admitted into evidence. (Resp't Br. at 7 n.1.) Respondent's assertion is both inaccurate and irrelevant. At no point in its Brief did Speedway specify the precise minute Ms. Liggett "left" the Speedway store in her own vehicle after finishing her shift on September 15, 2015. Instead, Speedway twice stated, consistent with Ms. Liggett's own trial testimony, that "Ms. Liggett agreed to stay until 3:00 p.m., when her original shift was scheduled to end at 2:00 p.m.," and that "Ms. Liggett finished her [extended] shift at 3:00 p.m." (Speedway's Br. at 3, 18.) Moreover, the precise minute shortly after 3:00 p.m. during which Ms. Liggett punched the clock and pulled off Speedway's premises is irrelevant, where Respondent does not dispute that Ms. Liggett was off duty and acting outside the scope of her employment at the time she drove away from Speedway's property on the day of the incident.

27.) None of this constitutes the affirmative conduct required to impose a duty under *Robertson,* and at no point did Respondent ever prove that such alleged conduct actually contributed to Ms. Liggett's condition that caused the accident. Instead, all of this conduct occurred after Brandy Liggett was allegedly already impaired.

Affirmative conduct giving rise to a legal duty involves actually engaging in some willful action that increases the risk of harm to others. *Compare Robertson, supra* (employer required employee to work for 27 hours straight over his objection, suggested that the employee would be fired if he left work, gave him a ride to his car in a clearly exhausted state, and told him to drive home, which imposed legal duty on employer) and *Courtney v. Courtney*, 186 W. Va. 597, 604, 413 S.E.2d 418, 425 (1991) (mother provided drugs and alcohol to her adult son, which gave rise to a legal duty to control his conduct when mother knew son would become violent after using) *with Overbaugh v. McCutcheon*, 183 W. Va. 386, 387–88, 396 S.E.2d 153, 154–55 (1990) (employer did not engage in affirmative conduct giving rise to a duty by providing alcohol on a self-serve basis at a party), and *Miller v. Whitworth*, 193 W. Va. 262, 265, 455 S.E.2d 821, 824 (1995) (landlord did not engage in affirmative conduct giving rise to a duty through inaction in protecting tenant from criminal conduct of third party even though landlord knew of criminal activity around his property).

In this case, even viewed favorably to Respondent, Speedway's conduct is clearly different from the conduct of the defendants in *Robertson* and *Courtney* which conduct caused the employee's impairment. In *Robertson*, the employer railroad required employee to perform heavy manual work for 27 hours straight labor and refused to allow the employee to leave despite the employee's repeated requests to leave because he was exhausted. *Robertson*, 301 S.E.2d at 564–65. Then, having *caused* the employee's fatigue, the employer gave him a ride to his car in a

clearly exhausted state, and told him to drive home. *Id.* at 565. The Supreme Court of Appeals held that under the facts presented, the employer had a legal duty because it "could have reasonably foreseen that its exhausted employee, who had been required to work over 27 hours without rest, would pose a risk of harm to other motors while driving the 50 miles from the employer's office to his home." *Id.* at 568. In so holding, the Court emphasized that the negligent conduct under these facts was the employer's "affirmative conduct in requiring [its employee] to work unreasonably long hours and then driving him to his vehicle and sending him out on the highway in such an exhausted condition as to pose a danger to himself or others." *Id.* at 569.

Similarly, in *Courtney*, the Supreme Court of Appeals held that a defendant mother engaged in affirmative conduct giving rise to a legal duty when she provided Valium and alcohol to her son. *Courtney*, 413 S.E.2d at 425. The mother was aware of her son's violent history while on those substances, and her son attacked his ex-wife while under the influence of the drugs she provided. *Id.* The Court held that the mother was under a legal duty because she provided her son with Valium and alcohol despite knowing he would likely become violent. *Id.*

Speedway's conduct, even as alleged by Respondent, is completely different from the conduct in *Robertson* or *Courtney*. First, unlike the employer in *Robertson*, Speedway did not require Ms. Liggett to work unreasonably long hours upon threat of being fired; rather, Ms. Liggett was scheduled for an ordinary shift and, when asked, agreed to stay for a single extra hour.[2] (JA 2524.) Further, unlike in *Robertson* when the employer refused to allow the employee to leave

[2] Notwithstanding Respondent's contention that her expert, Gary Hanson, "stated that based on his experience a tired worker at a convenience store would not get less tired during the day but, rather, would only get more tired as the shift wore on" (Resp't Br. at 29), Mr. Hanson was unable to point to any industry duty, responsibility, standard or practice that would have applied to the situation on the day of the accident. Likewise, Mr. Hanson was unable to identify any law or regulation that would require Speedway to behave differently. Following Mr. Hanson's testimony, the Circuit Court stated, "I can't remember the last time I've been so angry about an expert witness. . . . I do not appreciate this gentleman wasting the Court's time, counsel's time, parties' time, precious time, not answering questions, then giving gratuitous opinions, unsolicited, to the Jury deciding this case." (JA 2812.)

when asked, when Ms. Maguire noticed that Ms. Liggett seemed to be tired, she asked if Ms. Liggett was okay and offered to let her leave and come back another day to finish training. (JA 2582, JA 2585.) Ms. Liggett refused this offer. Unlike the mother in *Courtney*, Speedway was unaware that Ms. Liggett had any drug problem, as Ms. Liggett hid her drug use and addiction from everyone. (JA 2495–97.) And importantly, and unlike the mother in *Courtney,* Speedway did not provide Ms. Liggett any drugs, illegal or otherwise, which caused the accident. Speedway's conduct in this case is simply not the type of affirmative conduct required to impose a legal duty to prevent Ms. Liggett from driving off-duty on September 15, 2015.

Indeed, Speedway's conduct is far below that of defendants in cases where this Court expressly found no duty existed to impose liability. In *Overbaugh*, the defendant employer allowed its employee to continue drinking and was unable to prevent its employee from driving away, yet the employer owed the plaintiff no duty. *Overbaugh*, 396 S.E.2d at 159. Further, in *Overbaugh* the employer actually knew that the employee consumed alcohol and knew that the employee was impaired but no liability was imposed by this Court because the employer did not cause the employee's impairment. Relying on *Robertson* and applying a common law negligence approach, this Court held that, under those circumstances, "[a]n employer will not be held liable to a third party where there is a *lack of affirmative conduct* creating an unreasonable risk of harm to another on the part of the employer gratuitously furnishing alcohol to an employee." Syl. Pt. 3, *Overbaugh, supra* (emphasis added). Similarly, in *Miller*, the landlord was aware of a number of police reports related to criminal activity around his property and took no steps to protect his tenants from such criminal activity, yet there was no duty on the landlord imposed by this Court. *Miller*, 455 S.E.2d at 827.

Put simply, under West Virginia law as clearly expressed by this Court, simply knowing

of a condition—whether an employee's intoxication, recent criminal activity, or someone's addiction—is inadequate to establish a legal duty. As such, Respondent's argument that Speedway engaged in affirmative conduct when Ms. Maguire allowed Ms. Liggett to continue working on the day of the accident fails, and the Circuit Court should have granted judgment as a matter of law in Speedway's favor.

B. Not preventing Ms. Liggett from leaving Speedway property when the workday ended does not create a duty of care.

To the extent Respondent argues that a duty was created by Ms. Maguire "allowing" Ms. Liggett to drive away from Speedway property, Respondent puts the cart before the horse. Respondent seemingly argues that the relationship between Ms. Maguire's conduct in "allowing" Ms. Liggett to continue working and then leave the premises in an impaired state and the risk that Ms. Liggett would wreck her vehicle and injure another gives rise to a legal duty. (*See* Resp't Br. at 32–33.) This argument, however, is legally backward. Ms. Maguire had no legal duty to prevent Ms. Liggett from leaving her place of work on September 15, 2015, *unless* she had engaged in some affirmative conduct causing her incapacity or otherwise creating the risk of Ms. Liggett harming another. The undisputed evidence and testimony at trial was that Ms. Liggett's incapacity was caused by her drug use. Respondent did not produce any evidence that any conduct by Ms. Maguire or anyone else at Speedway is what caused Ms. Liggett to become impaired.

Likewise, Speedway did not engage in affirmative conduct based on Respondent's new and unsupported allegations that Ms. Maguire "decid[ed] not to conduct an evaluation of Liggett's impairment" and "decid[ed] not to fully evaluate her before and after her overtime shift." As an initial matter, this argument was neither raised in Respondent's briefing below nor argued by her counsel at trial. *State v. Costello*, 857 S.E.2d 51, 58 (W. Va. 2021) ("If any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised

properly in the lower court cannot be broached for the first time on appeal."); *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. . . . [P]arties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.").

Nonetheless, Respondent's newfound belief that Ms. Maguire should have conducted some sort of undefined "evaluation" or "investigation" or otherwise "should have done something" is not the affirmative conduct required to impose a legal duty to prevent Ms. Liggett from driving her own vehicle after work. The evidence at trial was insufficient to establish that *anything* Speedway actually did created an unreasonable risk of harm to others.

This Court's ruling in *Robertson* was clear—an employer only has a duty to control the off-the-clock conduct of its employees when the employer has engaged in affirmative conduct giving rise to an unreasonable risk of harm to others. Respondent produced no evidence to show that Speedway caused any impairment. At trial Ms. Liggett testified, without rebuttal, that her secretive abuse of prescription medications caused her impairment. That does not impose a duty on Speedway, and the evidence did not establish that Speedway engaged in any affirmative conduct creating a risk of harm to others that gives rise to a legal duty. Therefore, the Circuit Court erred in denying Speedway's Motions for Judgment as a Matter of Law at trial under Rule 50(a) and post-trial under Rule 50(b).

II. Respondent failed to establish that the damages awarded to her were so low as to require relief from the jury's verdict by way of additur and a new trial on certain elements of damages.

A. Contrary to Respondent's unsupported assertion, the jury did not make a "mistake" in its award of damages, including Mr. Jarrett's past lost wages.

"An award of additur is appropriate under West Virginia law only where the facts of the

case demonstrate that the jury has made an error in its award of damages and the failure to correct the amount awarded would result in a reduction in the jury's *intended* award." *Bressler v. Mull's Grocery Mart*, 194 W. Va. 618, 621, 461 S.E.2d 124, 127 (1995) (emphasis added); *see also* Syl. Pt. 3, *Bostic v. Mallard Coach Co., Inc.*, 185 W. Va. 294, 302, 406 S.E.2d 725, 733 (1991). Here, there is no evidence whatsoever that the jury "made an error in its award of damages," or that the jury intended to award any more damages than what was returned in the verdict. Therefore, "[t]his case simply does not fall within the parameters of limited scenario in which this Court has approved the use of additur." *Id.* at 621, 461 S.E.2d at 127.

Respondent continues to argue disingenuously that Mr. Jarrett's "past lost wages were not contested in any manner and essentially came into evidence as a stipulated amount," because "[c]ounsel for Speedway, did not question the amount of past lost wages when cross-examining Mr. Selby." (Resp't Br. at 39.) Notwithstanding that a decision not to cross-examine a witness in no way constitutes a "stipulation," the jury was not required to accept Mr. Selby's damage calculation opinions as true because juries are not bound to accept as conclusive the testimony of any witness, including an expert witness. *Tabor v. Lobo*, 186 W. Va. 366, 368–69, 412 S.E.2d 767, 769–70 (1991) ("[I]t is within the province of the jury to evaluate the testimony[,]" and "[t]he jury may then assign the testimony such weight and value as the jury may determine.").

Likewise, properly viewed in the light most favorable to Speedway, the jury's question seeking the printout of Mr. Selby's calculations does not demonstrate that the jury actually made an error in its award of damages or that the jury intended to award more. Again, the jury was free to accept or disregard Mr. Selby's testimony as it saw fit, and there is no indication of what verdict would have been returned if the jury had a copy of those calculations. Moreover, "the jury's award of [damages] is not inadequate as a matter of law solely because it does not conform exactly with

the damage testimony of the . . . expert witness on the issue." *Bressler*, 194 W. Va. at 622.

B. Respondent's mere dissatisfaction with the jury's verdict cannot support a finding that the damages awarded were manifestly inadequate.

This Court "will not find a jury verdict to be inadequate unless it is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy." Syl. Pt. 2, *Moore v. St. Joseph's Hosp. of Buckhannon, Inc.*, 208 W. Va. 123, 127–28, 538 S.E.2d 714, 718–19 (2000) (quoting Syl. Pt. 2, *Fullmer v. Swift Energy Co., Inc.*, 185 W.Va. 45, 404 S.E.2d 534 (1991)). "[A] mere difference in opinion between the court and the jury as to the amount of recovery in such cases will not warrant granting of a new trial on the ground of inadequacy unless the verdict is so small that it clearly indicates the jury was influenced by improper motives." *Moore*, 208 W. Va. at 127–28, 538 S.E.2d at 718–19; Syl. Pt. 2, in part, *Richmond v. Campbell*, 148 W.Va. 595, 136 S.E.2d 877 (1964); *Sargent v. Malcomb*, 150 W.Va. 393, 396, 146 S.E.2d 561, 564 (1966) ("[A] mere difference of opinion between the court and the trial jury concerning the proper amount of recovery will not justify either the trial court or this Court in setting aside the verdict on the ground of inadequacy or excessiveness.").

Respondent continues to primarily rely on this Court's decisions in *Linville v. Moss* and *Martin v. Charleston Area Medical Center* as support for her position that the jury's award of non-economic damages was "woefully inadequate." (Resp't Br. at 42–44, citing *Linville v. Moss*, 189 W.Va. 570, 433 S.E.2d 281 (1993), and *Martin v. Charleston Area Medical Center*, 181 W.Va. 308, 382 S.E.2d 502 (1989)). In *Linville*, testimony at trial established $3,719 in funeral expenses and an estimated value of replacement services of $240,180. *Linville*, 189 W. Va. at 573, 433 S.E.2d at 284. The jury returned a verdict of $4,000 for reasonable funeral expenses and "awarded nothing to decedent's wife and son for loss of services, sorrow, mental anguish, or companionship." *Id.* Because the jury awarded nothing for those categories of damages, this Court

concluded that the jury's award of only the funeral expenses "must have been based upon some misinterpretation of the law of damages." *Id.* at 575, 433 S.E.2d at 286. Here, unlike in *Linville*, the jury's verdict included an award for all categories of damages requested; there were no categories of damages that the jury failed to award. (*See* JA 3288–89.)

Nor is *Martin* analogous on the issue of non-economic damages in this case. First, the jury in *Martin* simply returned a gross award. Here, the jury made specific awards of non-economic damages. Second, and critically, this Court's decision finding the jury's award inadequate in *Martin* was "informed to some extent by the fact that the plaintiff [was] a black woman suing for the death of a black husband and father on behalf of herself and four black children. In cases of this type involving white plaintiffs, when plaintiffs prevail at all, the awards are substantially higher." *Martin*, 181 W.Va. at 312, 382 S.E.2d at 506. Here, Respondent has failed to demonstrate that the jury used some improper motive (such as the plaintiff's race) to reach its determination in reaching non-economic damages, and or that the Circuit Court's instructions on these elements of damages were misleading or incorrect.

"In instances where the evidence does not indicate and the plaintiff does not aver that the jury was misled or motivated by passion, prejudice, partiality, or corruption, this Court will set aside an allegedly inadequate verdict in a wrongful death action only where the verdict is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy." *Vargo v. Pine*, 208 W. Va. 416, 422, 541 S.E.2d 11, 17 (2000). When the evidence in this case is properly viewed in the light most favorable to Speedway, the jury provided a damages award for all forms of damages established at trial and returned a verdict for significant sums on these elements of damages – $80,000 for sorrow and mental anguish and $100,000 for lost household services. Therefore, the jury's damage award was not manifestly inadequate, and the Circuit Court should

not have granted a new trial on the issue of unliquidated damages.

III. Speedway is entitled to a new trial on all issues due to the presence of multiple prejudicial errors at both trials.

A. Speedway did not waive its right to move for a new trial based on any of the errors asserted in its alternative Motion for a New Trial.

Pursuant to Rule 59, "[a]ny motion for a new trial shall be filed not later than 10 days after the entry of the judgment." W. Va. R. Civ. P. 59(b). The Circuit Court's Final Judgment Order was entered on August 5, 2020, and Speedway timely filed its Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial on August 19, 2020.[3] (JA 4054.)

In her Brief, Respondent argues that the "majority" of errors pertaining to the first trial in this case "were waived[.]" (Resp't Br. at 46.) According to Respondent, Speedway waived all errors that occurred during the first trial, "with the exception of Mr. Selby's testimony," because its motion for a new trial was filed after the entry of the Circuit Court's Final Judgment Order, and not immediately following the Circuit Court's entry of the first judgment order in 2019. (*Id.*)

Respondent's argument completely ignores Respondent's counsel repeatedly argued that the prior judgment order was not "final." In fact, Respondent explicitly sought to dismiss Speedway's appeal on the basis that the Circuit Court's November 8, 2019 order "was not a final order." (*See* JA 3521.) In support of her motion to dismiss, Respondent repeatedly made such statements as "the order did not represent a final decision"; "the true character of the lower court's order . . . was not a final order"; "there has not been a final order"; and "[t]he order from which the appeal is taken is not a final order[.]" (*See generally id.* JA 3520–25.) Throughout a section of Respondent's motion entitled, "THE LOWER COURT'S ORDER IS NOT FINAL," she repeatedly urged that the Circuit Court's previously entered "final judgment order," was not, in

[3] When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. W. Va. R. Civ. P. 6(a).

fact, a final judgment under W. Va. Code § 58-5-1. (*See id.*)

Only after the dismissal of Speedway's appeal (and the subsequent partial new trial) did Respondent completely reverse course and argue that the Circuit Court should consider the prior judgment orders to be "final" orders for purposes of post-judgment interest and waiver of Speedway's post-trial arguments. Respondent's counsel improperly argues whatever is convenient at the moment regardless of prior positions. Having successfully urged that the November 8, 2019 order "was not a final order," Respondent cannot now argue the exact opposite simply because it suits her. Speedway timely moved for a new trial on all issues following the entry of the August 5, 2020 Final Judgment Order and waived nothing.

B. Multiple prejudicial errors require the grant of a new trial on all issues.

1. The Circuit Court erroneously overruled Speedway's objections to Mr. Selby's testimony regarding the value of lost household services.

Mr. Selby's testimony on the value of lost household services should have been excluded as speculative and as an improper attempt to offer an improper economic quantification of an element of general damages. This is because "[t]he loss of customary activities constitutes the loss of enjoyment of life." *Flannery v. U.S.*, 171 W. Va. 27, 30, 297 S.E.2d 433, 436 (1982). And, under West Virginia law, "[t]he loss of enjoyment of life resulting from personal injury is part of the general measure of damages flowing from the permanent injury and is not subject to an economic calculation." Syl. Pt. 4, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993); *see also Liston v. Univ. of W. Va. Bd. of Trustees*, 190 W.Va. 410, 415, 438 S.E.2d 590, 595 (1993).

Respondent relies on a 2011 unpublished decision to support the proposition that Respondent was entitled to offer expert testimony as to the value of the loss of customary activities. (Resp't Br. at 47, citing *Johnson v. Buckley*, No. 11-0060, 2011 WL 8199962 (W. Va. Nov. 28, 2011) (memorandum opinion)). While memorandum decisions may be cited as legal authority,

"their value as precedent is necessarily more limited," and where any conflict exists between a published opinion and a memorandum decision, "the published opinion controls." Syl. Pt. 5, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014). Further, in *Johnson*, the argued error was in allowing Mr. Selby to testify without underlying medical expert opinions about the level and permanency of plaintiff's impairment upon which Mr. Selby could then base his testimony. In the memorandum decision the Court did not address the point raised here – that it is improper for an economist to offer an economic calculation and testify to a numerical value on a general element of damages such as loss of household services. *See Doe v. Pak*, 237 W.Va. 1, 748 S.E.2d 328 (2016) (holding that loss of household services are not liquidated damages not are they special damages subject to prejudgment interest).

2. The Circuit Court erroneously overruled Speedway's objection to the admission of Speedway's internal guidelines and policies.

Respondent apparently concedes that evidence of Speedway's internal guidelines, policies, and procedures were irrelevant to the duty of cared owed by Speedway to Mr. Jarrett. (*See* Resp't Br. at 47 ("Respondent did not need Speedway's internal guidelines and policies to prove duty.")). Respondent's concession is consistent with the law cited in Speedway's Brief.

The duty of care is an objective standard based upon what an ordinary careful and prudent person would have done under the same or similar circumstances. Industry customs or standards do not establish a legal standard of care," as that "would permit industry to dictate the terms under which its members could be held liable for negligence." *Smoot ex rel. Smoot v. American Elec. Power,* 222 W. Va. 735, 739 n.12, 671 S.E.2d 740, 744 n. 12 (2008) (citation omitted). Thus, there is generally no legal duty in tort for a company to follow its own internal guidelines.

While stating that Speedway's internal policies were not offered to establish Speedway's duty of care, Respondent simultaneously contends that the policies "served to show that Bobbi[e]

Jo Maguire did not, when faced with an impaired employee, take the appropriate action." (Resp't Br. at 47.) However, the content of Speedway's policies is not at issue, and this case is not about whether Speedway complied with its internal policies. Rather, this case is about whether Speedway engaged in affirmative conduct giving rise to a legal duty, and if so, whether that duty was breached. Speedway could not have breached a duty that was never owed.

Respondent similarly concedes that Speedway's alleged "failure to drug test was not the heart of the Respondent's case." (Resp't Br. at 48.) Notwithstanding Respondent's unsupported assertion that Ms. Maguire "did not take seriously potential drug use of [Speedway] employees," *id.*, Respondent's introduction of Speedway's drug testing policy was not appropriate under West Virginia law as there is simply no legal duty to drug test employees or potential employees. *See Baughman v. Wal-Mart Stores, Inc.*, 215 W.Va. 45, 592 S.E.2d 824 (2013); *Twigg v. Hercules Corporation*, 185 W.Va. 155, 406 S.E.2d 520 (1990). Moreover, even if Speedway had drug tested Ms. Liggett during her three days of employment, Respondent offered no evidence to support the conclusion that it would have somehow affected the events of September 15, 2015.

3. The Circuit Court erroneously overruled Speedway's objections to the admission of Ms. Maguire's note in Ms. Liggett's personnel file.

In her Brief, Respondent contends that the note Ms. Maguire made in Ms. Liggett's personnel file (the "Note") was a relevant "admission that Speedway had knowledge that Brandy Liggett was 'on something,' i.e., impaired." (Resp't Br. at 48.) Despite Respondent's assertion, the Note is irrelevant because it has no tendency to make any fact more or less probable than it would be without it. The sole issue for the jury was whether Speedway engaged in affirmative conduct and if so, whether it thereafter realized or should have realized that such conduct created an unreasonable risk of harm to another. (*See* JA 1534, ¶ 14.) While part of the jury's analysis is what Speedway management knew, the relevant knowledge is necessarily limited to what was

known *on the date of the incident.*

In apparent recognition of this temporal requirement, Respondent asserts that the Note "reiterates" Respondent's claim that Ms. Liggett displayed signs of impairment "on the date of the incident." (Resp't Br. at 50.) But Respondent's factual assertion is directly contradicted by the record in this case. As the Circuit Court previously recognized (and Respondent did not dispute), the Note was created by Ms. Maguire *after* she was informed Ms. Liggett's criminal drug charges so as to prevent Ms. Liggett from being rehired. (*See* JA 2492; JA 2488; *see also* JA 1532, ¶ 31 (recognizing prior to trial that Ms. Maguire made the Note "following notice that [Ms. Liggett] had killed Mr. Jarrett.")). As such, the information in the Note reflects knowledge Ms. Maguire only acquired after the accident took place and in no way indicates that on the day of the accident Ms. Maguire suspected Ms. Liggett was under the influence. The Note had no impact on Ms. Maguire's conduct on the day of accident and proves nothing except that Ms. Maguire later became aware of facts or allegations regarding Ms. Liggett's alleged drug use and she made a note of it in Ms. Liggett's personnel file. Accordingly, the Note is irrelevant and should not have been admitted.

4. The Circuit Court erroneously excluded the trial testimony of Speedway's corporate representative, Mr. Carf.

Respondent argues that Speedway's counsel did not "reveal [during the deposition] that Mr. Carf would be testifying as expert," but ignores that Speedway's counsel explicitly confirmed at trial that Mr. Carf's testimony "would have not been expert in nature." (JA 3034–37.) As explained by Speedway's counsel, Mr. Carf's testimony would have properly included topics relating to matters contained within his deposition testimony but not read into the record by way of the deposition transcript, such as Speedway's operations of the Glen Dale store and its training for managers and new hires. *Id.* His testimony should have been admitted, and there is no legal basis for his exclusion.

5. The Circuit Court erroneously prohibited reference to the first jury trial

and refused to give Speedway's proposed jury instruction regarding the types of wrongful death damages during the second trial.

Respondent offers no substantive response to Speedway's arguments regarding the Circuit Court's failure to provide pertinent information to the second jury regarding the result of the first trial and the types of damages that had been awarded. As fully set forth in Speedway's Brief, the Circuit Court's instruction was misleading and had the reasonable potential to mislead the jury as to the correct legal and factual framework to guide its decision. As such, the instruction is presumed to be prejudicial to Speedway and warrants a new trial.

6. The Circuit Court erroneously overruled Speedway's objections to Respondent's counsel's improper closing arguments.

Respondent's demonstrative exhibit, which included 52 separate lines that Respondent's counsel argued should be "added up" to determine the damages to be awarded, improperly suggested to the jurors that they were to "fill in" all the lines in Respondent's chart in order to determine their verdict. (*See* JA 4027.) Indeed, Respondent's counsel explicitly told the jury, "You have to fill in a number for every one of those. There's fifty-two of them, fifty-two." (JA 4026.) Although Respondent argues that the chart "did not go back to the jury room" (Resp't Br at 53), an exhibit used during closing argument need not be admitted into evidence to mislead and confuse the jury. *See State v. Ashcraft*, 172 W. Va. 640, 651, 309 S.E.2d 600, 611–12 (1983) (trial courts should "cautiously examine the use during closing arguments of exhibits which have not been admitted into evidence" and "depending upon the impact [demonstrative] exhibits may reasonably have on a jury, their use may rise to the level of prejudicial error.").

Finally, Respondent's counsel's suggestion of a verdict amount to the jury was prejudicial to Speedway and constituted reversible error. In *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W.Va. 492, 345 S.E.2d 791 (1986), a wrongful death case, this Court recognized that implying that the jurors have a duty to place a value on the decedent's life is inconsistent with West Virginia's

wrongful death statute. *Id.* at 499–500, 375 S.E.2d at 798–800. Here, as in *Roberts*, Respondent's counsel's argument was inconsistent with the wrongful death statute, which sets forth specific losses for which damages can be recovered, because counsel told the jurors that it was their "obligation" to "put a specific dollar on a person's life; the value." (*See* JA 4023.)

To the extent Respondent relies on *Page v. Columbia Nat. Res., Inc.* to argue that her counsel's closing argument was proper, this reliance is misplaced. (*See* Resp't Br. at 53–54, citing 198 W. Va. 378, 383, 480 S.E.2d 817, 822 (1996)). Counsel in *Page* was representing an employee in a wrongful discharge action against her former employer, and the Court found that counsel's comment regarding a specific dollar amount for emotional distress damages was not in error. *See Page*, 198 W. Va. at 395, 480 S.E.2d at 834. Unlike in *Page*, here the wrongful death statute sets forth the specific losses for which damages could be recovered, and Respondent's counsel's comments during closing argument could have improperly led the jury to believe that their job was to evaluate Mr. Jarrett's life in terms of money rather than to award damages allowed under the West Virginia Wrongful Death Act.

IV. Respondent's attempt to apply a "reasonableness" analysis to the Circuit Court's assessment of post-judgment interest is supported by neither the law nor the record.

It is beyond dispute that the date that post-judgment interest commences is the date the judgment order is actually entered. *See* W. Va. Code § 56-6-31(a) ("[E]very judgment or decree for the payment of money, whether in an action sounding in tort, contract, or otherwise, *entered* by any court of this state shall bear simple, not compounding, interest, whether it is stated in the judgment decree or not.") (emphasis added). Respondent does not address the statutory provision cited in Speedway's Brief, nor contest that the statute plainly ties the commencement of post-judgment interest to the entry of the judgment order. Instead, Respondent argues that the Court's August 5, 2020 Final Judgment Order is "reasonable" and therefore should not be amended.

(Resp't Br. at 55.) Notwithstanding Respondent's erroneous contention that it was "reasonable" to commence post-judgment interest from the date the jury first returned its verdict because jury's "original verdict was clearly wrong" (*id.*), the commencement of post-judgment interest is not based on a determination of "reasonableness."

To the extent Respondent relies on *Trimble v. Michels* for the proposition that it is "reasonable" to commence post-judgment interest on a date other than when the judgment order is entered, this reliance is misplaced for several reasons. (Resp't Br. at 55, citing *Trimble v. Michels*, 214 W. Va. 156, 159, 587 S.E.2d 757, 760.) First, this Court's decision in *Trimble* did not address (or much less decide) the date on which post-judgment interest properly begins to accrue under West Virginia law. Rather, the Court vacated a circuit court order to the extent it purported to nullify past child support payments owed under a 1992 Colorado judgment order. Specifically, the Court found that the circuit court had "misinterpreted" the "ambiguous language" in a 1998 order that had vacated, in part, the 1992 order. Unlike in *Trimble*, "where the [1998] judgment [was] susceptible of two interpretations," here, there is no need to construe the judgment in order to determine the "more reasonable, effective, and conclusive" interpretation. *See id.*

Further, even where a judgment is susceptible of more than one interpretation, the Court in *Trimble* in no way suggested that post-judgment interest may commence on any date that the circuit court deems "reasonable." Nor did the Court indicate that a circuit court judge has discretion to determine the date from which post-judgment interest runs. Rather, to the limited extent the Court in *Trimble* addressed post-judgment interest, it simply remanded the case "for an accurate accounting of monies received or paid . . . as a result of the nullification of the Colorado decretal judgment as well as any interest accrued thereon." *Id.* at 160, 587 S.E.2d at 761. West Virginia law is clear that the date that post-judgment interest commences is the date that the

judgment order is actually entered, and Respondent provides no authority to support a contrary conclusion.

Similarly, Respondent does not substantively address that the August 5, 2020 Final Judgment Order assesses post-judgment interest beginning on July 26, 2019, on an element of damages (past wage loss) that was not even assessed until November 18, 2019. Respondent cites no authority to support the proposition that post-judgment interest should be assessed on a judgment that has not even been entered, nor can she. It would be inherently unfair to assess post-judgment interest in this case from July 2019, and there exists an obvious injustice to Speedway if the Final Judgment Order is not amended to reflect the correct date from which the interest runs.

Finally, and notwithstanding Respondent's truncated explanation of her prior position, the record is clear that Respondent explicitly sought to dismiss Speedway's prior appeal on the basis that the Circuit Court's November 18, 2019 order "was not a final order." Respondent's attempt to completely reverse course and argue that she should be awarded post-judgment interest on an award pursuant to a non-final order should not be sanctioned.

CONCLUSION

For the foregoing reasons, Speedway asks this Court to reverse the Circuit Court's denial of Speedway's Motions for Judgment as a Matter of Law and enter judgment in Speedway's favor. Alternatively, the Court should reverse the Circuit Court's erroneous decisions granting Respondent's Motion to Alter or Amend the Verdict by Way of Additur and Motion for a New Trial on Unliquidated Damages, denying Speedway's alternate Motion for a New Trial on all issues, and denying Speedway's alternate Motion to Alter or Amend the Court's August 5, 2020 Final Judgment Order.

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Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Robert L. Massie, Esq. (WVSBN 5743)
Jennifer W. Winkler, Esq. (WVSBN 13280)
NELSON MULLINS RILEY & SCARBOROUGH, LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Telephone: (304) 526-3500
Facsimile: (304) 526-3599
Email: bob.massie@nelsonmullins.com
Email: jennifer.winkler@nelsonmullins.com

Counsel for Petitioner Speedway LLC

No. 21-0215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SPEEDWAY LLC,

Defendant Below, Petitioner

vs.

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

Plaintiff Below, Respondent.

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 15-C-217

CERTIFICATE OF SERVICE

I, Robert L. Massie, hereby certify that true and correct copies of the foregoing ***Reply Brief of Petitioner Speedway LLC*** was served upon the following individuals via U.S. Mail, postage prepaid at Huntington, West Virginia on this 30th day of August, 2021:

Gregory A. Gellner, Esq.
GELLNER LAW OFFICES
1440 National Road
Wheeling, WV 26003
GGellner@gellnerlaw.com

Robert P. Fitzsimmons, Esq.
FITZSIMMONS LAW FIRM, PLLC
1609 Warwood Avenue
Wheeling, WV 26003
bob@fitzsimmonsfirm.com
Counsel for Plaintiff

Richard R. Heath, Jr., Esquire
BOWLES RICE LLP
Post Office Box 1386
Charleston, WV 25325-1386
rheath@bowlesrice.com

Mark A. Behrens, Esquire (PHV-44607)
Cary Silverman, Esquire (PHV-44605)
SHOOK HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, DC 20006
mbehrens@shb.com
csilverman@shb.com

Counsel for Amici Curiae American Tort Reform Association, Chamber of Commerce of the United States of America, NFIB Small Business Legal Center, National Association of Convenience Stores, and American Property Casualty Insurance Association

Thomas J. Hurney, Jr., Esquire
Blair E. Wessels, Esquire
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
thurney@jacksonlcelly.com
blair.wessels@jacksonkelly.com

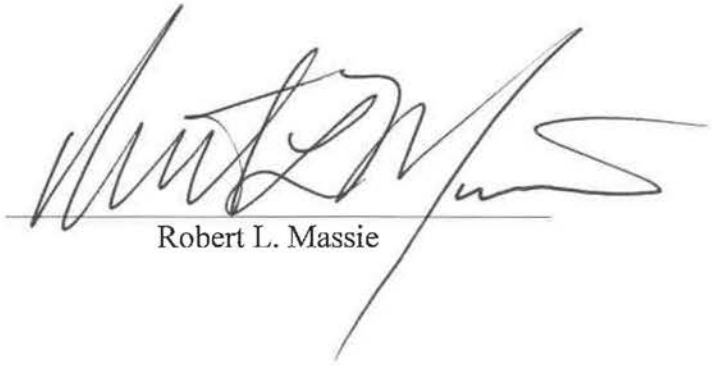
Todd A. Mount, Esquire
Shaffer & Shaffer, PLLC
330 State Street
Madison, West Virginia 25310
tmount@shafferlaw.com

Counsel for Amicus Curiae The Defense Trial Counsel of West Virginia

Michelle Marinacci, Esquire
Gold, Khourey & Turak, L.C.
510 Tomlinson Avenue
Moundsville, WV 26041
mlm@gkt.com

David A. Sims, Esquire
Law Offices of David A. Sims, PLLC
P.O. Box 5349
Vienna, West Virginia 26105
david.sims@mywvlawyer.com

Counsel for Amicus Curiae West Virginia Association for Justice



Robert L. Massie