No. 21-0215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

SPEEDWAY, LLC,

Petitioner,

v.

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

Respondent.

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 15-C-2017

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Petitioner's rhetorical question, like the majority of its brief, fails to inform this Honorable Court of the true facts giving rise to the jury's finding of liability on the fault of Speedway, LLC. It is undisputed that Speedway, on September 15, 2015, knew that its employee, Brandy Liggett, was suffering from some sort of impairment, which was open and obvious to its management as well as associate employees.

Moreover, while Speedway would have this Court believe that the lower court's decisions "create brand new liability", there could be nothing further from the truth. The lower court applied the principles contained within the landmark case of *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983), a decision finding an employer liable for the actions of its employee after hours and off the employers' premises. In *Robertson*, this Court recognized that "one who engages in affirmative conduct, and thereafter realized 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." The *Robertson* case sets the standard for imposing liability for injuries to third parties.

This case *sub judice* deals with an application of *Robertson*, not an expansion. Petitioner's slight of hand verbiage attempts to convince this Court that to affirm the lower court's decisions would amount to an apocalyptic crash of the State's judicial system, not to mention a total collapse of West Virginia's economy. Petitioner's exaggerated position fails to take into account the significant principles of notice and knowledge that give rise to duty and foreseeability, in accordance with *Robertson*, a 1983, case that established the standard for the imposition of liability of employers when a third person is injured by their employee. The record contains solid evidence that Speedway, via its management, knew

that Brandy Liggett was impaired either by impairment or otherwise on the date of the accident and, through its affirmative conduct in scheduling her to work overtime, and by allowing her to leave the premises in a disabled state, created an unreasonable risk of harm to the motoring public, including Mr. Jarrett. This affirmative conduct caused the death of a beloved husband, father, grandfather, co-worker and friend. That is the heart of the issues presented by this appeal. The lower court correctly and consistently applied *Robertson* and this Court, as recently as 2020 has recognized the societal need to impose liability for third party injuries under certain circumstances. *(See Wal-Mart Stores East L-P v. Ankrom,* 244 W.Va. 437, 854 S.E.2d 257 (2020).

I. STATEMENT OF FACTS

In its Statement of Facts, the Petitioner failed to inform this Court of the significant and relevant facts that give rise to liability on the part of Speedway.

Speedway, LLC employed Brandy Liggett at the Glen Dale store on September 12, 2015, three days prior to the accident, which took the life of Kevin Jarrett. (JA 2467). On September 15, 2015, the day of the wreck, Liggett was scheduled to work from 6:00 a.m. to 2:00 p.m., along with co-worker, Jennifer Wells and manager, Bobbi Jo Maguire. (JA 2478, 2513, 2520, 2615). Maguire testified that they were short-handed that day by one worker. (JA 2522).

During the course of the morning shift, Maguire admitted that she saw Brandy Liggett dozing off or falling asleep during training videos. (JA 2540, 2545). She was concerned that Liggett was unable to comprehend what she was watching on the videos. (JA 2573, 2574). At various times, Liggett was left alone in the office to view these videos and, when Maguire walked in, she could tell that Liggett had nodded off. When entering the

room, she startled Liggett. (JA 2621). Jennifer Wells, the shift leader on September 15, 2015, testified that Manager Maguire told her that Brandy Liggett was passing out while watching the training videos in the early morning. (JA 2690, 2691, 2692, 2693). This concerned Wells, who advocated for Speedway to utilize drug testing for their employees because she realized that drug using co-workers posed a danger to co-employees, customers, people on the roads and in the community. (JA 2681, 2691).

During the afternoon Maguire suggested that Liggett go outside to get some air so she sent her to change the outside trash. (JA 2581). Maguire admitted that she saw Liggett dozing off and staggering or off balance while changing the trash bags at the gas pumps (JA 2545, 2546, 2572). Maguire asked Wells to observe Liggett's actions outside at the trash cans and Wells observed Liggett's head bobbing as she appeared to be falling asleep while standing up. (JA 2692, 2694). This was very concerning to Wells, who thought that there was clearly something wrong with Liggett. (JA 2692, 2711). Wells then told Maguire that she thought there had to be something wrong with Liggett and that "something was going on with her." (JA 2696, 2698).

Wells was so convinced that something was wrong with Liggett that she approached Maguire to report it so that some action could be taken as she was trained to do by Speedway. (JA 2699). Although Maguire decided not to take any action based upon the report of Wells, she did acknowledge that there was something wrong with Liggett. (JA 2702). Both Wells and Maguire knew that. (JA 2702). Wells thought someone should be called to give Liggett a ride home that day. (JA 2710-2711). Wells testified that Liggett should not have been allowed to drive home that day (JA 2711, 2728) and specifically told Maguire that Liggett should not be allowed to drive home (JA 2713).

Maguire recalled that she saw Liggett falling asleep a couple of times during her shift but she doesn't recall the exact amount of times she nodded off. (JA 2578, 2586). Maguire admitted that Liggett fell asleep twice while standing up. (JA 2652). Liggett was falling asleep during the video training and hours later while she was at the gas pumps, which would have been 5-6 hours later. (JA 2694). Incredibly, Maguire was so concerned about Liggett's nodding off and falling asleep that she claims to have asked Liggett several times if she was ok and if she needed to go home. (JA 2624). When questioned, Liggett said that she was just tired and thinking about things at home. (JA 2587, 2590). It is obvious that Manager Maguire knew that there was a serious problem with Liggett continuing to work while falling asleep otherwise she would not have kept asking Liggett if she was alright.

As the workday progressed, there is no indication that Liggett's behavior appreciably changed. Although Maguire was scheduled to work from 6:00 a.m. to 4:00 p.m., she left at 2:30 p.m. for a personal appointment apparently dealing with her kids. (JA 2523). As a result of her leaving work early, Maguire asked Liggett to "stay over" her shift and new employee Liggett agreed. (JA 2478, 2524). Liggett testified she felt that she could not refuse to be scheduled to work overtime as it was only her third day on the job. (JA 2478-2479). According to Maguire, Liggett was left totally unsupervised after Maguire left at 2:30, with only another associate at the store. (JA 2539). Evidence was adduced at trial through the testimony of Speedway shift leader, Wells that there were not enough employees at the Glendale store and oftentimes they struggle with high turnover and people not working. (JA 2678).

Although clean and sober at the time of the first trial, a remorseful Brandy Liggett testified that she was high on the job during the shift that day and had taken drugs while at

work. (JA 2476-2477, 2483). Liggett admitted to odd mannerisms, stumbling and passing out on the day of the accident and testified she was told that by many other people. (JA 2507). Liggett testified that if she were around someone long enough on that day, they would have been able to tell that she was impaired. (JA 2482). According to Liggett, when she was using drugs, it was hard for her to stay conscious throughout the day. (JA 2485).

With respect to getting a ride home from work, Liggett testified that there would have been multiple family members listed as emergency contacts who would have been available to come and get her if she was unable to drive home from her shift. (JA 2479-2480). Also, if asked, Liggett had money to take a cab home (JA 2480-2481).

During the trial, the Respondent introduced into evidence Exhibit 15, which is a note that was authored and placed in Liggett's personnel file by Bobbi Jo Maguire that states "on something or for some reason kept falling asleep while here including emptying outside trash and while standing watching Maralearn." (JA 2326, 2516-2520, 2594, 2595). Maralearn is the video training system. (JA 2516). Maguire testified that she wrote the note after knowing that Liggett had been "on something" that day. (JA 2634). She testified that everything contained within the note was known to her on September 15, 2015. (JA 2654).

A few days after the fatality, Maguire sent texts to individuals including Wells, commenting that maybe that [meaning the impairment] was wrong with Liggett that last day she worked. (JA 2703, 2725). This is clearly an indication that Maguire knew that there was something seriously wrong with Liggett on that day.

Maguire admitted that Speedway's policy manual stated that the "[r]isks that such abuse [drug or alcohol] imposes upon other associates, customers and the communities in

which the company operates is intolerable." (JA 2565, 2752). It is undisputed that Maguire and Speedway knew the risks and dangers of someone coming to work while being "on something", i.e., impaired. Maguire admitted that such risks include traveling on the roads to and from work. (JA 2566, 2567). When asked why she did not ask Liggett about drug use, Maguire stated that she did not want to accuse Liggett of anything other than being tired as she was afraid it would "come back on her." (JA 2592-2593).

With respect to scheduling Liggett to work overtime in the condition she was in, Maguire admits that if she had a reasonable belief that Liggett was impaired she could have taken Liggett home or could have called to have someone else take her home. (JA 2640).

Respondent's expert, Gary Hanson, a safety expert who is experienced in the operations of convenience stores, opined that Speedway should not have continued Liggett's shift on at least three occasions after she was found to have passed out or fallen asleep twice on her feet. (JA 2746). Hanson also stated that it was a violation of industry standards to allow Liggett to continue to work her shift and to schedule Liggett to work overtime. (JA 2747, 2758). Further, Hanson testified that it would not be a recommended protocol to allow Liggett to drive home. (JA 2747). Hanson stated that Liggett was not fit for duty and therefore, posed an intolerable risk to the community. (JA 2747). According to Hanson, Brandy Liggett's drowsiness and falling asleep would have raised a reasonable suspicion for drug use. (JA 2753). There was sufficient information that would have led Maguire to correctly determine that Liggett was not fit for duty that day. (JA 2760). Hanson reasoned that if Liggett was falling asleep early in the shift, she would not have gotten better by exerting herself more during the day, rather, she would have become even more tired. (JA 2764, 2765). Hanson correctly noted that Maguire affirmatively acted each and

every time she made the decision to allow Liggett to continue working after having been found falling asleep. (JA 2783).

Tragically, Liggett left the Speedway on the date in question at 3:07 p.m.[1], and approximately one-half hour later at 3:42 p.m., collided into two vehicles including a motorcycle driven by Kevin M. Jarrett, traumatically severing his leg and killing him. He was on his way home from work. He was 59 years old.

II. Procedural Background[2]

On the outset, it is important to note that Petitioner has mischaracterized and misstated the allegations contained within the Amended Complaint filed on December 8, 2016, not December 12, 2015. Nowhere in the Amended Complaint does it allege that "Speedway had a duty to control the conduct of Ms. Liggett". The averments are consistent with the *Robertson* case. (JA 11- 23).

Petitioner filed a motion for summary judgment on November 16, 2018, that was appropriately denied by Order dated February 11, 2019, which contained findings of facts and conclusions of law. In particular, the lower court found, among other things, that Speedway, LLC engaged in affirmative conduct in scheduling Liggett to work overtime when she was obviously not fit for duty after knowing that she was falling asleep on the job

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[1] Petitioner states in its Brief on more than one occasion that Liggett left the Speedway at 3:00 p.m., which is a false statement. Because the exact time was not contained within Liggett's personnel file, and pursuant to a subpoena, counsel for Speedway LLC, Robert Massie represented that the time Liggett ended her shift and clocked out was 3:07 p.m. in a February 22, 2016 email. Please see attached hereto as Exhibit A in order to clarify this time for the Court and correct a misstatement by the Petitioner. Moreover, it is believed that the Petitioner has advised the amicus curiae parties of this incorrect time as the 3:00 p.m. time is contained within the briefs of those parties as well.

[2] The Petitioner's Procedural Background section of its brief inappropriately includes argument; therefore, the Respondent will attempt to concisely respond and directs the court to the Argument otherwise.

and "out of it" and, thereafter, allowed her to drive off the premises thus creating a substantial risk of harm to the motoring public. (JA 1526-1534).

A. During the first trial, the Respondent made a prima facie case that Speedway owed a duty to Kevin Jarrett and that it breached that duty, thus the lower court appropriately denied Petitioner's Motion for Judgment as a Matter of Law at that time

As is apparent by the Statement of Facts, as to the first trial, the Respondent offered sufficient evidence to prove that Speedway owed a duty to Kevin M. Jarrett on the date of the tragic and fatal accident. As contained within the Joint Appendix, the trial transcript is replete with testimony proving that Speedway's manager was aware that Liggett was impaired and/or incoherent and/or exhausted (believing her to be "on something") but nonetheless Maguire affirmatively continued her work shift and affirmatively scheduled her to work overtime and allowed her to drive off the premises in an impaired condition thus subjecting the motoring public to a substantial risk of harm. *(See Statement of Facts above).* The Circuit Court was correct in denying Petitioner's motion and sending the issue to the jury as the Respondent clearly met her burden of proof to overcome judgment as a matter of law under Rule 50(a) after the close of Respondent's case-in-chief and explained in detail its rationale for doing so. (JA 2964-2970).[3]

With respect to the other arguments directed to alleged points of error regarding a demonstrative aid, exclusion of witness testimony, jury instructions and the like will be discussed in more detail herein. At this juncture, though, the Respondent contends that

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[3] The Petitioner attempts to mislead this court by stating that the lower court "made up patently false evidence about Speedway employees 'tee-heeing" in the back room" while watching Liggett fall asleep at the gas pumps. In reality, the court stated "And I can only imagine, reasonably so, although they put it more politely, they were back in there tee-heeing about this. Not taking it seriously." (JA 2968). Obviously, the judge was making inferences based upon the evidence and the demeanor of the witnesses who testified.

many of the alleged errors regarding the first trial to which Petitioner complains were not preserved by an appropriate Rule 59 motion and, therefore, by mandate of Rule 59(f) have been waived.[4]

The first trial commenced on July 23, 2019, with the jury rendering its verdict on July 26, 2019. With respect to damages in the first trial, the Respondent offered the testimony of Daniel Selby who opined to past and future wage losses in addition to the loss of household services. (JA 2824-2844). Testimony was elicited from the Respondent, Kevin Jarrett's widow, Deborah Jarrett (JA 2915-2944), as well as Kevin Jarrett's three adult children, Logan Jarrett (JA 2862-2876), Cody Jarrett (JA 2844-2862), and Jamie Jarrett Petit (JA 2876-2894), who in excruciating detail testified as to the tremendous loss and grief they suffered at the death of their husband and father.

The jury found that Speedway was negligent and that such negligence was a cause or contributing cause of the injuries to and death of Kevin Jarrett and that Speedway's percentage of fault was 30%. (JA 3288-3289). The jury awarded the following:

3. Pain and suffering for Kevin Jarrett $50,000.00

4.

Medical Bills	8,321.36
Funeral Bills	16,422.02
Lost wages to July 22, 2019	306,660.00
Lost earning capacity (Future)	262,000.00

5. For beneficiaries – Deborah Jarrett, Logan Jarrett, Cody Jarrett and Jamie Jarrett Pettit for:

   (a) The sorrow, mental anguish and solace, including loss of society, loss of companionship, loss of comfort, loss of guidance, loss of kindly offices and loss of advice of Kevin Jarrett: $ 80,000.00

   (b) The loss of services, protection, care and assistance

[4] *See* Respondent's "Argument" section on this issue.

provided by Kevin Jarrett:

$100,000.00

(JA 3288-3289).

The inadequate verdict made it clear that the jury failed to award the Estate of Kevin Jarrett the correct amount of his past lost wages which were testified to by Mr. Selby and which were uncontroverted at the trial by any evidence. During deliberations the jury posed the following written question to the lower court:

> "Requesting Mr. Selby's projective earnings and lost wages. (found W2s but can't find these). (JA 3202, 3256).

In response to this question, the judge responded by saying "Jury, you must rely on your collective memories." (JA 3202).

This question directly related to the calculation of damages relating to those figures offered into evidence by the Respondent and supports that the jury was in error when it awarded $306,660 as past lost wages instead of the correct figure of $477,708.00 opined by Mr. Selby during the first trial. (JA 2832).

B. The Circuit Court was correct in denying Speedway's renewed Motion for Judgment as a Matter of Law and correct in granting Respondent's Motion to Alter or Amend the Verdict by Way of Additur and Motion for New Trial on Unliquidated Wrongful Death Damages

Following the first trial, on August 15, 2019, Speedway filed "Defendant Speedway LLC's Motion for Judgment as a Matter of Law" and associated memorandum. (JA 3343-3368). The basis of Petitioner's Motion dealt only with the application of the *Robertson* standard of the duty owed by Speedway. Once again, by order dated November 18, 2019, the Court appropriately denied this motion under the same rationale for the denial of the Petitioner's first motion. (JA 3485-3490).

It is important to note, that nowhere in either the motion or memorandum did Speedway complain that errors were committed in any other aspect of the first Jarrett trial. Petitioner now attempts to raise new points of alleged error in its Brief but fails to inform this Court these were absent in its original motion after the first trial, the time when such contended errors occurred. Specifically, Petitioner failed to include claims of error regarding (1) the admission of Speedway's internal policies and guidelines; (2) the admission of Bobbi Maguire's note from Liggett's personnel file; and (3) the exclusion of the trial testimony of Anthony Carf, Speedway's corporate representative.[5] Respondent respectfully requests that all such points of error be stricken from Petitioner's brief and not considered as such were not preserved in the lower court and are therefore waived.

On August 16, 2019, Respondent filed "Plaintiff's Motion to Alter or Amend the Verdict by Way of Additur to Jury Verdict and Judgment Order and Motion for New Trial on Unliquidated Wrongful Death Damages and/or Motion for Relief from Judgment or Order as a Result of Mistake and Other Reasons" (Plaintiff's Rule 59 and 60 Motions). (JA 3294-3342). One basis for this motion was that the jury made a mistake as to the amount of the past lost wage calculation evidenced by the fact that it sent a message to the judge asking for that amount during deliberations. The court struck the jury's finding of $306,660 (the incorrect amount of past lost wages) and reformed the verdict to include the correct amount of $477,708.[6] Also, the amount awarded to the beneficiaries for unliquidated losses

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[5] Although it is the Respondent's position that these alleged points of error were waived as they were not brought forth within the time required after the first trial, the Respondent will, in the alternative, address those specific points later in this brief.

[6] The Petitioner inappropriately inserts into its Brief what it claims to have been an off-the-record comment made by the lower court. Such statement is clearly inappropriate and outside the Rules of Appellate Procedure.

was found inadequate. The lower court, considering the motion, within the same order entered on November 18, 2019, granted an additur on the past lost wages and granted a new trial solely on the issue of noneconomic wrongful death damages. (JA 3485-3490).

C. The Circuit Court committed no prejudicial errors during the second trial on the limited issue of wrongful death damages

A second trial on damages only was held on March 3, 2020, whereby Respondent again offered the testimony of Daniel Selby, with respect to the loss of household services, as well as of the Jarrett family, along with other lay witnesses, Mark Robbins, David Cain and Chris Yanen. (JA 3766-4046). The jury reached a verdict awarding the Respondent $5,500,000.00 in damages for the sorrow, mental anguish and solace, including loss of society, loss of companionship, loss of comfort, loss of guidance, loss of kindly offices and loss of advice of Kevin Jarrett. (JA 4049). Additionally, the jury awarded $362,323.00 for the loss of services, protection, care and assistance. (JA 4049).

Because the first trial resolved the issues of liability and most of the damage issues, including damages for medical bills, funeral bills and future lost earnings, and the court, by way of additur, reformed the past lost wage amount to the correct figure, the Circuit Court correctly and appropriately granted Respondent's motion *in limine* to preclude any evidence or testimony that was unrelated to the damage issue to be decided, namely the unliquidated wrongful death damages. (JA 3784-3786). In doing so, the lower court refused the Petitioner's Jury Instruction No. 2, which would have advised the jury of the prior verdict on liability, that being that Liggett was found 70% at fault and Speedway 30% as well as of the prior awards for medical and funeral bills and past lost and future lost wages. (JA 3688-89). The Circuit Court found that this information was irrelevant, unnecessary and confusing and, thus, refused to allow it. (JA 3784-3786).

Further, the Circuit Court's rulings regarding the value of household services lost by the Estate, were correct as will be more fully set forth herein.

With regard to the demonstrative aid used by Respondent's counsel in closing argument, it is clear that (1) this aid comported with W.Va. Code §55-7-6(c)(1); and (2) was not admitted into evidence. Speedway's argument does not contend that this was an incorrect application of the law as instructed by the Court; rather, it is upset that Kevin Jarrett had four beneficiaries that would be entitled to prove each type of damage, namely, loss of protection, loss of care, loss of assistance, loss of services, sorrow, mental anguish, solace (which may include society, companionship, comfort, guidance, kindly offices and advice). (JA 4048). The Circuit Court, having correctly found that these damages were exactly those listed on the verdict form, appropriately allowed the demonstrative aid to be used in closing argument. (JA 4020).

Insofar as suggesting a number for the value of Kevin Jarrett's life, counsel for the Respondent did not tell the jury that Mr. Jarrett's life was worth a set amount. Rather, he complied with West Virginia law, which permits an attorney in closing arguments to mention specific dollar amounts under appropriate circumstances, by telling the jury that the valuation of a life is a difficult determination but one which must be undertaken as part of the wrongful death damage award before them. The mere suggestion of a few figures, namely that some jurors may think "six million is too much . . . eight million not enough" (that did not ask for a sum certain) does not direct the jury to give a particular number; rather, it is a suggestion to the jurors that it is entirely up to them as a body to determine the value of damages which is a difficult decision to make. (JA 4029). Also, the jury was

charged by the judge and instructed that the arguments of counsel are not evidence and, therefore, cannot be used as a basis for the verdict rendered. (JA 3758-3759).

The jury returned a verdict for a total award of $5,862,323, neither figure mentioned by counsel in closing argument. (JA 4049).

As for the Final Judgment Order entered on August 5, 2020, the Circuit Court appropriately determined that post-judgment interest on Speedway's portion of the jury verdict of July 26, 2019, that being $244,355.41 (inclusive of Speedway's share of the reformed past lost wage amount), should have been calculated from the date of such jury verdict, and the lower court's denial of Speedway's objection was correct. Moreover, the Petitioner waived objections to the interest calculations and the timing of such. (JA 4540).

D. The Circuit Court appropriately denied Speedway's renewed Motion for Judgment as a Matter of Law, Alternative Motion for a New Trial, and Alternative Motion to Alter and Amend the Court's August 5, 2020, Judgment Order

On August 19, 2020, following the second trial, Speedway again renewed its Motion for Judgment as a Matter of Law based upon the same arguments contained within its two prior Motions (one at the close of Respondent's case and one filed after the first judgment order was entered) and, in addition, moved for a new trial under Rule 59 but added points of error from the first trial that were not timely preserved by its Motion for Judgment as a Matter of Law filed after the first trial. (JA 4054-4077). In addition, on that same date, the Petitioner filed "Defendant Speedway's LLC's Motion Alter or Amend August 5, 2020 Final Judgment Order" which objected to post-judgment interest calculations. (JA 4171).

By order dated February 26, 2021, the Circuit Court appropriately denied these latest Speedway post-trial motions. (JA 4531).

SUMMARY OF ARGUMENT

I. The Circuit Court correctly ruled, in accordance with well-established West Virginia law, that there was sufficient evidence to prove that Speedway engaged in affirmative conduct, and, thereafter, realized or should have realized that such conduct created an unreasonable risk of harm to another, in this case, Kevin M. Jarrett, and therefore, Speedway was under a duty to exercise reasonable care to prevent the threatened harm.

The West Virginia Supreme Court of Appeals in *Robertson v. LeMaster,* 171 W.Va. 607, 611, 301 S.E.2d 563, 567 (1983), established a rule whereby "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." Despite Petitioner's continuous mischaracterization that Respondent is attempting to expand *Robertson*, the truth of the matter is that this case applies a case specific application of *Robertson.* Moreover, nowhere in *Robertson* did the court limit its rulings to the facts of that case.

With respect to the issues at hand, Respondent proved at trial that Speedway, through its manager, Bobbi Jo Maguire, affirmatively: continued the shift of Brandy Liggett after observing Liggett fall asleep on the job at least four times, (two of which were on her feet); scheduled her to work overtime when she was observably in an impaired state; deciding on multiple occasions not to conduct a full investigation despite suspicious conduct; leaving the premises before the end of the shift: leaving Liggett with no supervision shortly before she left the premises by vehicle; not requesting help or more expertise to deal with the suspicious behavior on 4-5 occasions; and, deciding not to have a full evaluation of Liggett before allowing her to drive a vehicle at the end of the overtime shift. Trial testimony supports that Liggett fell asleep multiple times while sitting down watching training videos. Further, she fell asleep standing up watching videos and fell asleep outside near the gas pumps when she was sent to change the garbage bags so she

could get some air. This was not normal conduct. (*See Statement of Facts herein*). Maguire realized or should have realized that this conduct created an unreasonable risk of harm to the motoring public by turning Liggett loose on the highway after having overworked an obviously impaired employee. It is the foreseeable nature of this act that gives rise to duty on the part of Speedway. Respondent need not prove that Speedway "created" the impaired condition of Liggett; rather Speedway, in affirmatively continuing to allow an exhausted/impaired employee to work only making her more tired and exhausted, created an unreasonable risk. Despite Petitioner's mischaracterization of *Robertson,* it has admitted, in its brief that, taken in a light most favorable to Respondent, the evidence did show that Maguire should have known that Liggett was under the influence of something, or otherwise impaired, while at work that day. (*Petitioner's Brief, Pg. 12, ¶2*).

II. The Circuit Court correctly ruled that the Respondent was entitled to relief from the jury verdict in the first trial in the form of (a) additur under Rule 60(b) as the jury made a mistake in the actual pecuniary loss of past wages, thus rendering that award inadequate, and (b) a new trial under Rule 59, as the jury's award of unliquidated wrongful death damages was grossly inadequate and so low that under the facts of the case reasonable minds cannot differ about its inadequacy.

The jury's verdict of July 26, 2019 incorrectly set forth the amount of past lost wages after having asked the Court during deliberations as to the past lost wage figure testified to by Daniel Selby, Respondent's economist. Pursuant to Rule 60(b), this mistake in the amount of past lost wages, which was uncontroverted at trial, was appropriately corrected by additur by the Circuit Court.

Moreover, the July 26, 2019, award of solace damages under the wrongful death statute was woefully inadequate and inconsistent with the remainder of the jury's verdict. The Circuit Court under Rule 59 was correct in awarding a new trial on these unliquidated

wrongful death damages and, based upon West Virginia law had the authority to weigh the evidence and consider the credibility of the witnesses prior to rendering that decision.

The trial court did not abuse its discretion with respect to either of these rulings.

III. The Circuit Court correctly denied Speedway's Alternate Motion for New Trial under Rule 59, in that (a) Speedway waived its objections to certain rulings by not filing a motion for new trial regarding those issues in a timely manner after the first trial and, in the alternative (b) there were no prejudicial errors detrimentally affecting Speedway in the first trial.

After the first trial, which concluded on July 26, 2019, Speedway failed to include alleged points of error that it eventually included in its post-trial motion on August 19, 2020, more than a year after these alleged trial errors occurred. Based upon the mandates of Rule 59, any objections to these rulings were long waived by the time Petitioner sought relief.

Further, in the alternative, the alleged error to which Speedway complained in its late filed post-trial motion, were not errors and do not warrant reversal.

IV. The Circuit Court correctly denied Speedway's Alternate Motion to Alter or Amend the Court's August 5, 2020, Final Judgment Order under Rule 59(e)

The Circuit Court correctly assessed post-judgment interest beginning on the date the jury returned its verdict in the first trial, that being July 26, 2019, as that was when the jury found Speedway liable and awarded damages as to the past lost wages, as well as other damages. Under West Virginia law, there was no impropriety with respect to the timing, calculation or rate of interest with respect to the Circuit Court's Final Order in connection with post-judgment interest.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is warranted pursuant Rule 19 of the West Virginia Rules of Appellate Procedure. The Respondent, Deborah Jarrett, respectfully submits that the

decisional process would be significantly aided by oral argument in that this appeal involves the application of settled law, vis-à-vis, the landmark precedent of *Robertson v. LeMaster,* 171 W.Va. 607, 301 S.E.2d 563 (1983), and not the Circuit Court's expansion of *Robertson* as has been suggested by the Petitioner.

ARGUMENT

IV. The Circuit Court correctly ruled, in accordance with well-established West Virginia law, that there was sufficient evidence to prove that Speedway engaged in affirmative conduct, and, thereafter, realized or should have realized that such conduct created an unreasonable risk of harm to another, in this case, Kevin M. Jarrett, and therefore, Speedway was under a duty to exercise reasonable care to prevent the threatened harm

Speedway's continued assertion that Repondent's case revolved around an allegation that Petitioner should have controlled the conduct of Brandy Liggett outside the scope of her employment on the date in question is misleading. Clearly, after nearly five years of litigating the issues, Speedway knows that the crux of Respondent's case is the affirmative conduct of Speedway relating to its interactions with and observations of Brandy Liggett during her work shift and the company's affirmative decisions to have her continue her shift, work overtime, and to abandon a full investigation or remedial action to prevent a foreseeable risk of harm on September 15, 2015.

At the heart of any negligence case is the concept of duty. Generally, in order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. *Aikens v. Debow,* 208 W.Va. 486, 541 S.E.2d 576 (2000). The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by defendant must be rendered by the court as a matter of law. *Id.,* Syl. Pt. 5.

As this Court is aware, it has been long held in West Virginia, "negligence 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." Syl. Pt. 1, *Dicken v. Liverpool Salt & Coal Co.,* 41 W.Va. 511, 23 S.E. 582 (1895). And, the most a court can ordinarily do, when the question of care or negligence depends upon a variety of circumstances, is to define the degree of care and caution required by the law and parties with the duties required of them under the circumstances. *Washington v. Baltimore & O R. Co.,* 17 W.Va. 190, 1880 WL 4028 (1880), Syl. Pt. 2.

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? *Id.* Syl. Pt. 8 (citing Syl. Pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 571 S.E.2d 82 (1988)).

With respect to the determination of duty, our Supreme Court has held that:

> A court's overall purpose in its consideration of foreseeability in conjunction with duty owed is to discern 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. If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question.

Strahin v. Cleavenger, 216 W.Va. 175, 603 S.E.2d 197 (2004), Syl. Pt. 12.

Both parties agree that *Robertson, supra,* is the primary applicable precedent upon which the Respondent bases her claims against Speedway. What the Petitioner fails to recognize, however, is that *Robertson* specifically dictates the opposite of what Speedway would have this Court believe is the standard by which the case is to be decided – it is not

the control of the employees after-work conduct that is at issue. Specifically, and ironically directly applicable to issues raised in Petitioner's brief, this Court in *Robertson* held that:

> The appellee argues that as a matter of law it owed no duty to control an employee acting outside the scope of employment. We recognize that 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 employment. **The issue presented by the facts of this case, however, is not the appellee's failure to control LeMaster** while driving on the highway; rather it is whether the appellee's conduct prior to the accident created a foreseeable risk of harm. [Emphasis added] [Citations omitted].

Robertson, 301 S.E. at 567.

Incredibly, despite this clear holding in Robertson, the Petitioner's Brief is replete with repetitive rhetoric that revolves around an insistence that the Respondent is attempting to show that there exists affirmative conduct imposing a duty to control Liggett outside the scope of her employment --- the very thing the *Robertson* court warned against. The Respondent's evidence adduced at the trial of this matter established that Speedway, engaged in multiple acts of affirmative conduct prior to the fatality that created a foreseeable risk of harm.

A. Standard of Review

In West Virginia when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party. *See,* Syllabus Point 2, *Alkire v. First Nat. Bank of Parsons,* 197 W.Va. 122, 475, S.E.2d 122 (1996).

In *Fredeking v. Tyler,* 221 W.Va. 1, 680 S.E.2d 16 (2009), the Supreme Court of Appeals of West Virginia, when reviewing the lower court's decision granting a motion for

judgment as a matter of law and overturning a jury verdict in favor of the defendants in a car accident case, reiterated prior precedent and stated that:

> Although a trial court does have some role in determining whether there is sufficient evidence to support a jury's verdict, it is not the role of the trial court to substitute its credibility judgments for those of the jury. The circuit court's role in determining whether sufficient evidence exists to support a jury's verdict was set forth in Syllabus Point 5 of *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983).

Id., 680 S.E.2d at 21.

The court in *Fredeking* went on to explain that in *Orr*, the Court held that:

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Id.

Further, the court in *Fredeking* stated that "[i]n determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." *Id. (citing Syl. Pt. 3, Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963).

B. Respondent established that Speedway owed a duty to Kevin Jarrett by engaging in affirmative conduct and realized or should have realized that such conduct created an unreasonable risk of harm to another

Again, Petitioner's argument that "Speedway did not engage in any affirmative conduct imposing a duty to control Ms. Liggett's conduct outside the scope of her employment" is simply misplaced under *Robertson. (See Petitioner's brief, p. 16).* The test as per *Robertson* is whether Speedway's affirmative conduct gave rise to a foreseeable risk of harm prior to the accident as stated above not whether it controlled Liggett's conduct after work. Speedway is using the same arguments the employer, N & W Railway Co., the losing side, made in *Robertson.*

In *Robertson v. LeMaster,* 171 W.Va. 607, 301 S.E.2d 563 (1983), this Court analyzed an employer's liability when its employee injured a third party off premises and off hours. The lower court directed a verdict in favor of the employer holding that the elements of duty and proximate cause had not been established. This Supreme Court reversed.

Without belaboring the lengthy details surrounding the case, in summary, Lemaster worked for 27 hours, after having been compelled to work overtime by the rail company, fell asleep while driving and crashed into the vehicle driven by the Robertsons. N&W offered to drive other members of the crew, other than LeMaster, to their homes but LeMaster was only driven to his car after the shift. The issue raised by the appellants in *Robertson* was whether the employer's conduct requiring LeMaster to work over 27 hours and then setting him loose upon the highway without providing its exhausted employee with alternate transportation or rest facilities created an unreasonable risk of harm to others that was foreseeable, which was based upon the principle of primary negligence and not *respondeat superior. Id.* at 301 S.E.2d 567. The Robertsons' claim was one for tort alleging that the employer "knew or should have known that its employee constituted a menace to the health and safety of the public." *Id.* at 301 S.E.2d 566.

This Court stated that "the liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another." *Id.* at 567 *(citing Blaine v. Chesapeake & O.R.Co.,* 9 W.Va. 252 (1876)). In *Robertson*, the employer argued that as a matter of law it owed no duty to control an employee acting outside the scope of employment but the Supreme Court stated that the issue was not whether the employer failed to control LeMaster (the employee) while driving upon the highway; rather it is whether the employer's conduct prior to the accident created a foreseeable risk of harm. *Id.* [Emphasis added].

The *Robertson* court explained the relationship with conduct and risk of harm and stated that "it is well established that one who engages in affirmative conduct, and thereafter realized 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.* And that, "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." *Id. (citing W. Prosser, §53)).*

As this court is aware, duty is inextricably tied to the concept of foreseeability. In *Robertson,* the Court reiterated longstanding West Virginia law and stated that in determining the scope of the duty that an actor owes to another, the focus is foreseeability. *Id. (citations omitted).* Foreseeability that harm might result has become a primary factor in determining whether a duty exists. *Id.* [Emphasis added]. The court in *Robertson,* quoting Harper and James, stated that:

> The obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.

Id. at 568 *(quoting F. Harper & F. James, The Law of Torts §18.2 (1956)).*

Although the West Virginia Supreme Court of Appeals, prior to *Robertson,* had never explicitly addressed the question of the existence of duty as a product of foreseeability of injury, the Court did affirm that it held in the past that "[a]ctionable negligence necessarily includes the element of reasonable anticipation that some injury might result from the act of which complaint is made" and that "[t]hese past decisions implicitly support the proposition that the foreseeability of risk is a primary consideration in establishing the element of duty in tort cases." *Id.* at 568 [Citations omitted] [Emphasis added]. Further, the *Robertson* court held that "when such affirmative action is present, liability may be imposed regardless of the existence of a relationship between the defendant and that party injured by the incapacitated individual." *Id.* at 568-569.

The Petitioner's argument that "Speedway's alleged conduct in this matter is strikingly different from the conduct of the defendants in *Robertson*" is absurd. The truth of the matter is that Respondent's facts are directly in line with *Robertson* -- the employer, Speedway, knowing that the overtime employee, Liggett, was exhausted, nonetheless sent her out on the highway in such an exhausted/impaired condition as to pose a danger to herself or others, including Kevin Jarrett. According to *Robertson,* "when such affirmative action is present, liability may be imposed regardless of the existence of a relationship between the defendant and the party injured by the incapacitated individual." *Id.* at 569.

Moreover, the key to the establishment of a duty in *Robertson* was foreseeability (knowing a person was likely impaired and/or exhausted and was allowed to engage in driving a motor vehicle on public highways), not that the railway company forced LeMaster to work 27 hours. In *Robertson*, this Court stated that the employer's reliance upon *Pilgrim v. Fortune Drilling Co., Inc.*, 653 F.2d 982 (5th Cir. 1981) was misplaced. In that 5th Circuit case, the plaintiff's claim was based on the employer's negligence in failing to prevent an employee from driving 117 miles to his home after completing a 12-hour shift, there was no evidence that the employee was incapacitated, or that the conduct of the employer involved an affirmative act which increased the risk of harm. *Id.* It is not the length of time of the shift that was the decisive factor – it was the incapacitation of the employee that was critical. Likewise, in the Jarrett case, the fact that Brandy Liggett was incapacitated during her shift is the crucial fact, not the length of overtime she was scheduled to work. As adduced at trial, a person does not get less tired by work, but rather gets more tired.

With respect to the Petitioner's motion for judgment as a matter of law, the *Robertson* court reiterated longstanding law and stated that "[u]pon a motion for a directed verdict, all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed" *Id.* at 568 (Citations omitted). In reversing the lower court's granting of a directed verdict, the *Robertson* court found that:

> Viewing these facts in the light most favorable to the appellants, we believe that the appellee 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 motorists while driving the 50 miles from the appellee's office to his home.

and

> . . . the trial court erred in ruling that the appellee owed no duty

> to the appellants. We are unable to say as a matter of law that the appellee's conduct in requiring its employee to work such long hours and then setting him loose upon the highway in an obviously exhausted condition did not create a foreseeable risk of harm to others which the appellee had a duty to guard against.

Id.

Once a court establishes that a duty exists, such as was appropriately done in this case, then the jury is tasked with determining "[t]he questions of negligence . . . when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw difficult conclusions from them." *Id.* at 569.

As per *Fredeking, supra,* with respect to the jury's verdict, the facts adduced at trial, considered in the light most favorable to the Respondent, assuming that all conflicts in the evidence were resolved by the jury in favor of the Respondent, assuming as proved all facts which the Respondent's evidence tends to prove and giving the Respondent the benefit of all favorable inferences which may be drawn from the facts proved, it is clear that Respondent proved that Brandy Liggett was obviously impaired and/or exhausted at the time Maguire authorized and scheduled Liggett to work overtime and then, thereafter, allowed to drive her vehicle home from her overtime shift. Maguire and Wells admitted to knowing there was something noticeably wrong with Liggett that day but Maguire, nonetheless scheduled Liggett to work overtime and allowed her to leave the premises when she was in a state that put the motoring public, particularly Kevin Jarrett, at an unreasonable risk of harm. The Court was correct in its denial of Petitioner's motions at the end of the plaintiff's case in chief, the end of Petitioner's rebuttal case, and Petitioner's original and renewed motions for judgment as a matter of law.

The evidence adduced at trial, in accordance with *Robinson* proved that Speedway engaged in affirmative conduct in that its manager: (1) authorized Brandy Liggett to continue to work after knowing she was impaired and/or exhausted; (2) authorized and scheduled Brandy Liggett, an impaired worker, to work overtime; and, (3) turned her loose on the highway in an obviously exhausted/impaired condition. In addition, there is other conduct that arguably qualifies under *Robertson* as affirmative conduct, namely: (4) deciding not to conduct an investigation of Liggett's impairment; (5) deciding to abandon the impaired worker with no supervision; and, (6) deciding not to fully evaluate her before and after her overtime shift. Such conduct also violates the duty to exercise reasonable care to prevent the threatened harm. Each of these affirmative actions occurred after Maguire had already realized or should have realized that Liggett was exhausted and/or incapacitated. Such conduct created an unreasonable risk of harm to others, including Kevin Jarrett. Therefore, Speedway was under a duty to exercise reasonable care to prevent the threatened harm, which it breached according to the jury's finding of negligence and proximate cause. (JA 3288-3289).

The Petitioner relies upon *Courtney v. Courtney,* 186 W.Va. 597, 413 S.E.2d 418 (1991), a case that does not apply, where a mother who knew that her son was violent after using drugs and alcohol but nonetheless supplied him with the same leading him to attack his ex-wife and son. That case dealt with a mother who illegally provided drugs and alcohol to her son who then committed a crime. The Respondent does not allege that Speedway provided drugs to Liggett; nor it is obligated to do so under *Robertson.* Rather, the affirmative conduct of Speedway as set forth herein satisfies the requirements of that

landmark case and in comparison, this case has many more acts of affirmative conduct than *Robertson*.

A case that does have persuasive value is *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Texas 1983), where the Supreme Court in Texas, citing *Lemaster, supra,* dealt with a similar claim against the employer of a motorist who struck and killed plaintiffs' decedents while said employee was intoxicated. The facts of the *Otis Engineering* case are eerily similar to the case at bar as follows:

> Pyle [co-worker] testified that he knew of Matheson's drinking problems and that he told Roy [supervisor] on the day of the accident that Matheson was not acting right, was not coordinated, was slurring his words, and that "we need to get him off the machines." David Sartain, a fellow worker, testified that Matheson was either sick or drinking, was getting worse, "his complexion was blue and like he was sick," and that he was weaving and bobbing on his stool and about to fall into his machine. The supervisor testified that he observed Matheson's condition and was aware that other employees believed he should be removed from the machine. When Matheson returned from his dinner break, Roy suggested that he should go home. Roy, as he escorted Matheson to the company's parking lot, asked if he was all right and if he could make it home, and Matheson answered that he could. Thirty minutes later, some three miles away from the plant, the fatal accident occurred.

Id., at 308.

Like *Jarrett*, the *Otis case* dealt with a co-worker and supervisor who knew that an employee was not acting right, not coordinated and possibly intoxicated at which time the supervisor asked the employee if he was alright to which he said that he was. In affirming a reversal of summary judgment in the lower court, the appellate court held:

> Therefore, the standard of duty that we now adopt for this and all other cases currently in the judicial process, is: when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others. Such a duty

> may be analogized to cases in which a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons. *See, e.g., Restatement (Second) of Torts § 319,* W. Prosser, *supra,* at 350. Additionally, we adopt the rule from cases in this Restatement area that the duty of the employer or one who can exercise charge over a dangerous person is not an absolute duty to insure safety, but requires only reasonable care. [Citations omitted]. *Id.* at 311.

Specifically, the Texas Supreme Court, in precluding summary judgment in *Otis*, held that there was a "material issue of fact as to whether employer acted as a reasonable prudent employer in permitting obviously intoxicated employee to drive, resulting in automobile accident killing plaintiffs' wife, precluded summary judgment in wrongful death action against employer." *Id., Syl. Pt. 5.* The lower court in the case *sub judice*, like *Otis,* correctly ruled that the facts support a duty on behalf of the employer.

Petitioner incorrectly states that there was "no testimony whatsoever regarding any effect working at Speedway that day may have had on Ms. Liggett" when in fact, Gary Hanson, Respondent's expert 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. (JA 2764-2765). With each instance Maguire recognized Liggett falling asleep, she took affirmative action in deciding to continue Liggett's shift when she could have merely stopped Liggett from working that day and got her a ride home. In a state where there is a known opioid epidemic, it was reasonable for Wells and Maguire to have also suspected that Liggett was "on something". Maguire's note shows that this was the true suspicion all along.

Finally, it is not the Respondent's entire case that Speedway should have investigated Liggett's condition on that date for suspected drug use. In reality, the crux of

Respondent's case was that Liggett was noticeably and obviously impaired and/or exhausted and/or incapacitated during her shift, and therefore, not fit for duty and not able to be sent out on the highways when it was apparent to do so would create an unreasonable risk of harm.

C. The Respondent need not prove that Speedway was aware that Liggett was intoxicated, that Speedway caused her impairment or that Speedway "forced" her to drive home and Respondent's reliance on *Overbaugh* is misplaced as that case has no relevancy to the issues on this appeal

The Petitioner relies upon the case of *Overbaugh v. McCutcheon,* 183 W.Va. 386, 396 S.E.2d 153 (1990), which is not an employment case *per se* but rather dealt with an off the clock Christmas party hosted by Brady Cline Coal Company, Gauley Coal Sales Company and Holly Coal Company for employees and friends at the corporate offices located near Summersville, West Virginia where alcohol was served, but it was neither sold nor served by a bartender to any of the persons attending the party, rather it was available on a self-serve basis. *Id.* 396 S.E.2d at 154. McCutcheon attended the party but it was disputed as to whether he was, in fact, an employee. Following the party, McCutcheon, while operating a truck, swerved across the center line of the road and struck a vehicle driven by Elizabeth Overbaugh, who was transporting several family members. Both drivers died and several occupants of the Overbaugh vehicle were injured. *Id.* Blood alcohol tests confirmed that McCutcheon was intoxicated at the time of the crash. *Id.* at 155.

In *Overbaugh,* evidence adduced during the course of the case showed that McCutcheon was noticeably drunk. It was stipulated that the defendant, Jack Cline, knew that McCutcheon was intoxicated and intended to operate a motor vehicle and Cline testified that he told McCutcheon not to drive but to stay put until either Cline or one of his

sons could drive him home. Cline left McCutcheon and went back to work at a different site. According to Cline, both he and his son again spoke with McCutcheon on the telephone while they were still at the work site and requested that McCutcheon wait for them so Cline or his son could take him home. Unfortunately, he did not wait and thereafter caused the fatal crash. *Id.*

This Court in *Overbaugh* held that "[a]bsent a basis in either common law principles of negligence or statutory enactment, there is generally no liability on the part of the social host who gratuitously furnishes alcohol to a guest when an injury to an innocent third party occurs as a result of the guest's intoxication." *Id.*, Syl. Pt. 2. And, in Syllabus Point 3 held that "[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. *Overbaugh* is based on the gratuitous furnishing of alcohol, a different issue than in the case sub judice.

The *Overbaugh* court in applying *Robertson* found that the plaintiff could not offer evidence that the coal company's conduct rose to the level of affirmative conduct creating an unreasonable risk of harm. The facts of that case are dramatically different from those in this case. First, *Overbaugh* dealt with a social host not an employment case. In fact, it was disputed as to whether McCutcheon was even an employee of the coal company. Liggett was an employee. Second, when Cline found McCutcheon to be intoxicated, he advised McCutcheon not to drive and arranged for him to get a ride home which McCutcheon himself failed to wait on. Maguire did not arrange for Liggett to get a ride home; rather, she continued Liggett's shift and authorized and scheduled her to work overtime. Third, McCutcheon was not on duty at the time and not asked to continue to

work despite his obvious impairment. Liggett was made to work throughout her shift while impaired and scheduled to work an extra hour. Finally, in *Overbaugh*, the social host defendant recognized the danger in allowing McCutcheon to drive and planned for him to have a ride home. Maguire recognized the risk but chose to not arrange a ride for Liggett, instead scheduling her to work an additional hour.

Speedway's claim that Maguire took steps to minimize the risk to third parties is laughable. (Please note that in other portions of the Petitioner's Brief, Speedway claims Maguire did not know there was a risk so it is disingenuous for them to suddenly take the position that she did anything to reduce risk). The mere action of asking Liggett why she was nodding off did nothing to alleviate the foreseeable risk of harm that would arise if Liggett was sent out onto the highway in an exhausted state especially when Liggett's behavior did not coincide with the story she was telling.

The Petitioner continuously contends that Speedway cannot be held liable because it did not provide drugs to Liggett. There is absolutely nothing in the *Robertson* opinion that indicates it is necessary to prove that the Petitioner caused the initial impaired and/or exhausted state. The evidence adduced at trial proved that Maguire, when realizing that there was something wrong with Liggett, affirmatively decided to allow Liggett to continue to work which thereby made her more tired and more impaired and created a risk. It is irrelevant if Maguire knew Liggett was impaired --- she knew that there was something wrong with Liggett that prevented her from being fully attentive to her job and the tasks at hand. Under *Robertson*, it is not required that Maguire knew the mechanism behind Liggett's odd behavior; rather Maguire was on notice that there was something wrong preventing Liggett from being able to function as a Speedway associate. In fact, the

evidence proved that Maguire knew that by her own testimony. She was so bothered by Liggett's condition that she repeatedly questioned Liggett in connection with her falling asleep, therefore she was never convinced that nothing was wrong. Moreover, Maguire's affirmative decision to allow Liggett to continue her shift and work overtime exacerbated Liggett's exhaustion, creating a greater risk of harm to others when Liggett left her shift and took to the highway.

Finally, Speedway mischaracterizes what is required under these circumstances. The Petitioner states that taking the evidence in the light most favorable to the Respondent, all the Respondent can show is that Maguire should have known Liggett was under the influence of something when she was nodding off at work, which Speedway says is insufficient. But, under *Robertson,* "it is well established that one who engages in affirmative conduct, and thereafter realized 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* at 567. [Emphasis added]. Therefore, Speedway now admits that the evidence, when reviewed in a light most favorable to Deborah Jarrett does establish that the Petitioner owed the Respondent a legal duty.

In summary, the Circuit Court appropriately denied Petitioner's motions for judgment as a matter of law having correctly found that Speedway owed a duty to Kevin Jarrett and, taken in the light most favorable to Respondent, and the evidence adduced at trial was more than sufficient to support the jury's verdict.

II. The Circuit Court was correct in granting Respondent's post-trial motions seeking relief from the jury's verdict in the first trial in the form of additur under Rule 60(b) and a new trial on noneconomic wrongful death damages because the jury's verdict was woefully inadequate

With respect to the adequacy of damages, the Petitioner, citing *Kaiser v. Henley*, 173 W.Va. 548, 318 S.E.2d 598 (1983), fails to include the relevant part of that case which pertains to the issues at hand. In *Kaiser*, this Court explained that "where a verdict does not include elements of damage which are specifically proved in uncontroverted amounts and a substantial amount as compensation for injuries and the consequent pain and suffering, the verdict is inadequate and will be set aside." *Id.* (citing *King v. Bittinger,* 160 W.Va. 129, 231 S.E.2d 239, 243 (1976)).

Moreover, in Syllabus Point 2 of *Sullivan v. Lough,* 185 W.Va. 260, 406 S.E.2d 691 (1991), this court addressed the issue of a possible mistaken view of the case by the jury and held that " verdict of the jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case." *Id.* (citing Syl. Pt. 3, *Raines v. Faulkner,* 131 W.Va. 10, 48 S.E. 393 (1947)).

Although in an appeal from an allegedly inadequate damage award, the evidence concerning damages is to be viewed most strongly in favor of the defendant, a damage award "which disregards the instructions of the court or constitutes a mistake and by virtue thereof does not cover the actual pecuniary loss properly proved," is an inadequate award. *Kaiser v. Hensley,* 173 W.Va. 548 at 548-549, 318 S.E.2d 598 at 598-599 (1983)(citing, syl. pt. 3, *Richmond v. Campbell,* 148 W.Va. 595, 136 S.E.2d 877 (1969).

As will be more fully explained below, it was within the Circuit Court's province to correct the jury's award of past lost wages based upon a mistake and order a new trial on the unliquidated wrongful death damages as those in the first jury trial award were woefully inadequate.

A. The Circuit Court appropriately applied legal precedent and did not disregard constitutional protections nor did it impermissibly invade the province of the jury in granting Respondent's post-trial motions

The Respondent agrees that the West Virginia Constitution protects the right to a jury trial and the resulting verdicts, but as emphasized by Article III, Section 13, a verdict can be reexamined "according to the rule of court or law." W.Va. Const. Art. III, § 13. What the Circuit Court did was to reexamine the verdict, apply legal precedent and appropriately rule that portions of the verdict were inadequate based upon the evidence adduced at trial.

As set forth more fully below, the Circuit Court applied the correct standards under statutory and common law of the State of West Virginia and appropriately granted an additur and new trial on certain damages. The Petitioner's diatribe of repetitive complaints regarding these rulings does not make its position valid. The Circuit Court reviewing the verdict in connection with all of the evidence presented determined that the jury was mistaken in its dollar amount of past lost wages and woefully inadequate in its low award for the beneficiaries of a beloved husband, father and grandfather. This decision should not be disturbed on appeal absent a showing of abuse of discretion.

B. The Circuit Court correctly granted Respondent's Motion to Alter or Amend the Verdict by Way of Additur as the Jury Erred in Its Award of The Past Lost Wages of Kevin Jarrett

1. Standard of Review

This Court "affords broad discretion to a circuit court deciding a Rule 60(b) motion." *Mey v. Pep Boys-Manny, Moe & Jack,* 228 W.Va. 48, 717 S.E.2d 235 (2011). It is well settled that "a motion to vacate a judgment made pursuant to Rule 60(b), *W.Va. R.C.P.* is addressed to the sound discretion of the court and the court's ruling on such motion will not be

disturbed on appeal unless there is a showing of an abuse of such discretion." Syllabus Point 5, *Toler v. Shelton,* 157 W.Va. 778, 204 S.E.2d 85 (1974).

2. The Jarrett case is one in which additur was not only appropriate but also necessary in order to correct a mistake made by the jury in accordance with West Virginia law

Rule 60(b) of the West Virginia Rules of Civil Procedure provides that:

> (b) Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; . . .

Rule 60(b), W.V.R.C.P., as amended 1998.

In analyzing a motion under Rule 60(b), a court, in the exercise of discretion given to it by the remedial provisions of the rule should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits. Syl. Pt. 6, *Toler v. Shelton, 157 W.Va. 778, 204 S.E.2d 85 (1974).*

In the recent case of *Phillips v. Stear,* 236 W.Va. 702, 783 S.E.2d 567 (2016), when discussing the parameters of Rule 60(b), this Court reiterated longstanding precedent on the subject and explained that:

> The purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from a final judgment. The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of <u>*all*</u> the facts. [Citations omitted].

783 S.E.2d at 575.

With respect to a jury award, a court may invoke the concept of additur should there be a component of the verdict that is inadequate. Although in an appeal from an allegedly inadequate damage award, the evidence concerning damages is to be viewed most strongly in favor of the defendant, a damage award "which disregards the instructions of the court or constitutes a mistake and by virtue thereof does not cover the actual pecuniary loss properly proved," is an inadequate award. *Kaiser v. Hensley,* 173 W.Va. 548 at 548-549, 318 S.E.2d 598 at 598-599 (1983)(citing, syl. pt. 3, *Richmond v. Campbell,* 148 W.Va. 595, 136 S.E.2d 877 (1969)). And, "where a verdict does not include elements of damage which are specifically proved in uncontroverted amounts and a substantial amount as compensation for injuries and the consequent pain and suffering, the verdict is inadequate and will be set aside." *Hall v. Groves,* 151 W.Va. 449, 153 S.E.2d 165 (1967); *see also, King v. Bittinger,* 160 W.Va. 129, 231 S.E.2d 239, 243 (1976).

Moreover, "in determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syl. Pt. 3, *Walker v. Monongahela Power Company,* 147 W.Va. 825, 131 S.E.2d 736 (1963).

In *Bressler v. Mull's Grocery Mart,* 194 W.Va. 681, 461 S.E.2d 124 (1995), this Court held that additur was appropriate where the facts of a case demonstrated that the jury erred in calculating its damage award and failing to correct the amount awarded to comport with jury's intention would result in reduction of the jury's intended award. Further, any error that occurs in a jury's failure to return stipulated expenses in a

negligence action can be cured by a trial court's additur. *Johnson v. Garlow*, 197 W.Va. 674, 478 S.E.2d 347 (1996).

Also, in *Stone v. United Engineering, a Div. of Wean, Inc.*, 197 W.Va. 347, 475 S.E.2d 438 (1996), in a similar situation regarding the lost wage calculation, a worker at an aluminum manufacturing plant whose leg was amputated was awarded a jury verdict of $722,195.11 after finding the plant owner 25% at fault. In that case, the jury awarded the plaintiff $75,000 in past lost wages but the actual past lost wage amount was $71,166. The court entered an order modifying the jury's award in order to comply with the actual calculated lost wage amount by evidence presented at trial and by remittitur changed the lost wage figure to the correct amount and entered an order to that effect. 475 S.E.2d at 443. This case shows that the Court may correct the damage mistake, increasing or decreasing it.

Further, this Court upheld the order of the lower court modifying the past lost wage sum and held that the award for past lost wages was supported by the evidence. Specifically, the court stated that:

> As we held in syl. pt. 2, *Earl T. Browder, Inc. v. County Court of Webster Co.*, 145 W.Va. 696, 116 S.E.2d 867 (1960), "'when the illegal part of the damages ascertained by the verdict of a jury is clearly distinguishable from the rest, and may be ascertained by the court without assuming the functions of the jury and substituting its judgment for theirs, the court may allow plaintiff to enter a remittitur for such part, and then refuse a new trial.'" [Citations omitted].

Id., 475 S.E.2d at 457.

The jury's verdict in this case awards the plaintiff sums for past lost wages in the sum of $306,660.00, despite the fact that the uncontroverted past lost wage sum testified to by Mr. Selby was $477,708.00. (JA 2832). The jury's confusion as to this sum and its

intention to enter the correct sum on the verdict form is evidenced by its request to the Court during deliberations. Clearly, the jury was making an attempt to award the accurate past lost wage figure in that it advised the court that while the W2s were reviewed, the jury could not locate the exact amount of projective earnings and lost wages. Because the Court advised the jury to rely on its collective memory, the incorrect figure was entered onto the verdict form. The Petitioner's argument that the jury may have decided to disregard Mr. Selby's calculation simply does not comport with the evidence or the clear intention of the jury in inquiring about the exact amount of such wages.

The past lost wages were not contested in any manner and essentially came into evidence as a stipulated amount. Speedway's counsel did not question the amount of past lost wages when cross-examining Mr. Selby. Moreover, this case did not involve any dispute as to Kevin Jarrett's salary or benefits. The Respondent clearly met its burden of proof on the value of the past lost wages.

The actions of the jury "constitute a mistake and by virtue thereof does not cover the actual pecuniary loss properly proved" and does not include elements of damage which are specifically proved in uncontroverted amounts. Therefore, the Circuit Court, in light of all of the facts and evidence presented at trial, did not abuse its discretion in granting Respondent's motion under Rule 60(b) for correcting the jury's award of past lost wages by additur, to the uncontroverted amount of $477,708.00.

C. The Circuit Court was correct in granting Respondent's Rule 59 Motion for a New Trial on Unliquidated Damages Because the Jury's Award was manifestly inadequate

Pursuant to Rule 59, the Circuit Court, in exercising its discretion, appropriately granted Respondent a new trial on the limited issue of unliquidated damages. The original

award was for a mere $80,000 for the wrongful death damages to the four beneficiaries, (wife and three adult children) of 59 year-old Kevin Jarrett.

1. Standard of Review

A trial judge has the authority and broad discretion to vacate a jury verdict and award a new trial pursuant to Rule 59. *In Re State Public Bldg. Asbestos Litigation,* 193 W.Va. 119, 124, 454 S.E.2d 413, 418 (1994). "Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited." *Id.* (citing *Wright & Miller*, §2803 at 32-33).

This Court in *In Re State Public Bldg. Asbestos Litigation, supra,* discussed the standard of review to be accorded to the decision of a trial judge when setting aside a jury verdict and awarding a new trial, stating that the trial judge under Rule 59 has the authority to weigh the evidence as if he or she were a member of the jury. 454 S.E.2d at 125. This Court explained that:

> . . . on a motion for a new trial on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the evidence for himself. Indeed, it has been said that the granting of a new trial on the ground that the verdict is against the weight of the evidence 'involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself.

Id. (citing *Wright & Miller*, §2806 at 43-45 (1973)).

According to this Court in *In Re State Public Bldg. Asbestos Litigation,* the rationale behind this concept is that fact that the trial judge was "on the spot and is better able than an appellate court to decide whether the error affected the substantial rights of the parties." *Id.* (citation omitted). Moreover, the Court stated that it has recognized when addressing the trial judge's authority to award a new trial that "the trial court has

opportunities to observe many things in the course of a trial which the printed record presented to an appellate court does not disclose." *Id.* (citing *Browning v. Monongahela Transp. Co.*, 126 W.Va. 195, 203, 27 S.E.2d 481, 485 (1943)).

In sum, the Court explained in Syllabus Point 3 that

> A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Id. at 422.

Finally, this Court in *In Re State Public Bldg. Asbestos Litigation* discussed potential reversal and held in Syllabus Point 2 that "it takes a stronger case in an appellate court to reverse a judgment awarding a new trial than one denying it and giving judgment against the party claiming to have been aggrieved." *Id.* (Citations omitted). The court further in Syllabus 3 to clarify that "an appellate court is more disposed to affirm the action of a trial court setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial. *Id.* (Citations omitted).

2. The jury's award of unliquidated wrongful death damages of the Estate of Kevin Jarrett were manifestly inadequate

Rule 59(a) of the West Virginia Rules of Civil Procedure provides that a new trial may be granted to any of the parties on all or part of the issues, and "in a case where the

question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages." Syl. pt. 4, *Richmond v. Campbell, supra. See also, England v. Shufflebarger,* 152 W.Va. 662, 166 S.E.2d 126 (1969). Further, "in a civil action for recovery of damages for personal injuries in which the jury returns a verdict for the plaintiff which is manifestly inadequate in amount and which, in that respect, is not supported by the evidence, a new trial may be granted to the plaintiff on the issue of damages on the grounds of the inadequacy of the amount of the verdict." Syl. pt. 3, *Biddle v. Haddix, 154 W.Va. 748, 179 S.E.2d 215 (1971).*

In *Linville v. Moss*, 189 W.Va. 570, 433 S.E.2d 281 (1993), where a pedestrian's widow brought suit after her husband was killed in an automobile accident and the jury awarded damages in the amount of $4,000 and found the defendants 51% negligent, this Court analyzed the sufficiency of the verdict, that being an award of $4,000 for reasonable funeral expenses and nothing to decedent's wife and son for loss of services (which were valued by an expert to be $200,000), sorrow, mental anguish, or companionship. 433 S.E.2d at 574. The decedent, who did not work outside the home, was close to his wife and 12 year-old son and made significant contributions to the family. *Id.* at 574.

Following the trial, the appellant Estate moved to set aside the verdict and to award a new trial on all issues or simply on the issue of damages. The Circuit Court denied the motion, holding that under *Freshwater v. Booth*, 160 W.Va. 156, 233 S.E.2d 312 (1977), the jury's verdict was a defendant's verdict perversely expressed and therefore should be affirmed. The lower court classified the case as a type 3 *Freshwater* case in that the damages must have been "so inadequate as to be nominal under the evidence of the case."

Id. Although the Supreme Court recognized that in an appeal from an allegedly inadequate damage award, the evidence must be viewed most strongly in favor of the defendant, it also agreed with the lower court's apparent conclusion that the damages were inadequate and explained the general standard that in assessing the adequacy of an award, "we 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 adequacy." *Fullmer v. Swift Energy Co.,* 185 W.Va. 45, 404 S.E.2d 534 (1991).

In reversing the lower court's decision and granting a new trial on the issue of damages only, the Supreme Court in *Linville* held that:

> Under the particular facts of this case, we are compelled to conclude that the jury's award of only the funeral expenses must have been based upon some misinterpretation of the law of damages. "A verdict of a jury will be set aside where the amount thereof is such that, when considered in the light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case." Syl. Pt. 3, *Raines v. Faulkner,* 131 W.Va. 10, 48 S.E.2d 393 (1947).

Id.

In *Martin v. CAMC,* 181 W.Va. 308, 382 S.E.2d 302 (1989), the Supreme Court of Appeals reversed a lower court's decision denying a motion for new trial in a medical malpractice wrongful death case where a jury awarded an estate only $250,000 total for economic and noneconomic damages, reduced by the plaintiff's decedent's 40% comparative fault when the decedent was a husband and father to four children and granted a new trial due to the inadequacy of the jury's verdict. In justification for its ruling, this Court held that there should be a "floor" or lower limit to death cases of this nature:

> If, indeed, we must determine the upper limits to jury awards, as we did in Stevens Clinic, notwithstanding that such a determination is highly subjective, it is then also appropriate that we vouchsafe a fair floor to such awards. In Stevens Clinic we also pointed out:

> "Obviously, if the measure of damages were the value of a human life then, arguably, no jury verdict could be excessive. The death of a family member, particularly a child, involves inconsolable grief for which no amount of money can compensate. *Id.,* 176 W.Va. 500, 345 S.E.2d at 800. Certainly the same applies to the loss of a husband and father.

Id., 382 S.E.2d at 312

In a recent decision, *Gunno v. McNair,* 2016 WL 5006 (W.Va., Nov. 17, 2016, 15-0825), this Court held that:

> "When jury verdicts answering several questions have no logical internal consistence and do not comport with instructions, they will be reversed and the cause remanded for a new trial." Syl. pt. 1, *Reynolds v. Pardee & Curtin Lumber Co.,* 172 W.Va. 804 310 S.E.2d 870 (1983) Petitioner argues that the jury's finding that Petitioner was injured as a result of the accident—an accident that Respondent admits was his fault—is inconsistent with an award of zero damages for her losses. In determining whether jury verdicts are inconsistent, "such inconsistency must appear after excluding every reasonable conclusion that would authorize the verdict." *Prager v. City of Wheeling,* 91 W.Va. 597, 599, 114 S.E.2d 155, 156 (1922).

Id. at *3.

Considering the above, with respect to the jury's verdict in this case, it is clear by the evidence submitted at trial that the award of only $80,000 for the tremendous loss suffered by the Jarrett family is inadequate. Just as the $100,000 reward for services, care, etc. is equally inadequate, Speedway offered not one scintilla of evidence or even one suggestion to the jury that the grief of Deborah Jarrett, Logan Jarrett, Cody Jarrett and Jaime Jarrett Pettit was anything less than the heartbreaking testimony offered by them at trial. In fact, Speedway did not cross-examine any of the beneficiaries and did not argue damages in closing. It is incredulous to believe that the jury intended to award only $20,000 each for solace damages to these members of Kevin Jarrett's family that were left behind after his tragic death. Such verdict is manifestly inadequate in amount and not supported by the

evidence, warranting a new trial on the issue of damages pursuant to *Biddle, supra.*

Further, the sum of $80,000 to all of the beneficiaries is "so low that under the facts of the case, reasonable men cannot differ about its adequacy." *Fullmer v. Swift Energy Co.,* 185 W.Va. 45, 404 S.E.2d 534 (1991). Likewise, the services, protection, care and assistance damages of only $100,000 total is woefully inadequate.

Finally, it is clear that the jury's award of merely $80,000 for the beneficiaries of Mr. Jarrett is inconsistent with the other damage award amounts contained within the jury's verdict. The jury awarded $50,000 for Mr. Jarrett's conscious pain and suffering which would have been estimated to be a matter of seconds or possibly minutes before his terrible death at the scene of the crash. As for past lost wages, although incorrect as stated above, the jury awarded $306,660, with future earning capacity totaling $262,000. In addition, the plaintiff was awarded the total amount requested for the funeral bill ($16,422.02) and $100,000 for loss of services. The $20,000 per beneficiary is inconsistent with the above figures, as is the low award of $100,000 or $25,000 per beneficiary for services, protection, care, etc.

As stated above, in addition to awards that are manifestly inaccurate, when jury verdicts answering several questions have no logical internal consistence and do not comport with instructions, they will be reversed and the cause remanded for a new trial. It is the plaintiff's contention that the jury's award for the solace and grief type damages for Kevin Jarrett's beneficiaries has no "logical internal consistence" and this inconsistency is another basis for the award of a new trial on damages only.

III. The Circuit Court Appropriately Denied Speedway's Alternate Motion for a New Trial on All issues under Rule 59 as there were no prejudicial errors on either trial and all such points of error alleged by Speedway were waived as to the first trial

A. Standard of Review – See Section II, C, 1 above

B. The Circuit Court did not err in denying Speedway's Motion for New Trial on All Issues as there were no prejudicial errors in either trial and the majority of those alleged were waived after the first trial

Rule 59(f) provides that:

> (f) Effect of Failure to Move for New Trial. If a party fails to make a timely motion for a new trial, after a trial by jury in which judgment as a matter of law has not been rendered by the court, the party is deemed to have waived all errors occurring during the trial which the party might have assigned as grounds in support of such motion; provided that if a party has made a motion under Rule 50(b) for judgment in accordance with the party's motion for judgment as a matter of law and such motion is denied, the party's failure to move for a new trial is not a waiver of error in the court's denying or failing to grant such motion for judgment as a matter of law.

Rule 59, W.V.R.C.P., (2014 as amended).

The Petitioner failed to preserve the errors to which it now complains in items 2 – 6 of this section of its brief. All of these errors, with the exception of Mr. Selby's testimony, dealt with evidence adduced only at the first trial of this matter. None of these were raised in a motion under Rule 59; rather, the Petitioner filed its Motion for Judgment as a Matter of Law under Rule 60. At the time of that filing, Petitioner had no idea that the Circuit Court would grant a new and second trial on the issue of damages, thus making their waiver a strategy decision. In the alternative, the Respondent avers that none of these points of error are legitimate in that the Circuit Court made appropriate rulings on each and every one as explained below.

1. Mr. Selby's testimony regarding lost household services was admissible

The Petitioner complains that expert Dan Selby's testimony regarding household services was error in that such a loss is part of the loss of enjoyment of life. Once again, the Petitioner misses the mark on its interpretation of existing West Virginia law.

It is undisputed that in West Virginia an expert may offer admissible evidence as to the value of loss of household services. In *Johnson v. Buckley*, 2011 W.Va. 8199962 (W.Va. 2011), this Court affirmed a lower court's ruling and held that an expert's testimony about the value of household services of an injured passenger, who was a stay-at-home parent for 14 years, was admissible in a personal injury case brought by the passenger himself. *Id. at *2. (See also, Stratford v. Brown,* 2018 WL 5649901 (W.Va. 2018); *Harris v. Martinka Coal Co.,* 201 W.Va. 578, 499 S.E.2d 307 (1997)*).*

The Circuit Court did not commit error in the admission of Mr. Selby's testimony as to the valuation of loss of Kevin Jarrett's household services.

2. The Circuit Court appropriately admitted evidence of Speedway's internal policies and guidelines

Petitioner wrongfully asserts how Speedway's evidence of internal policies and guidelines were used at trial. Respondent did not need Speedway's internal guidelines and policies to prove duty. Rather, for example, Respondent introduced evidence to show that Speedway, vis-à-vis Bobbi Jo Maguire, did not recognize company policy as it related to her dealings with Brandy Liggett. Respondent did not use policies to establish duty; rather, the policies/guidelines served to show that Bobbi Jo Maguire, when faced with an impaired employee, affirmatively acted by continuing the shift of Liggett rather than using available policies dealing with potentially impaired individuals. This was some evidence that Maguire realized or should have realized that continuing Liggett's shift and scheduling/authorizing her to work overtime created a substantial risk of harm to the

motoring public, including Kevin Jarrett. Maguire, having been trained that "[r]isks that such abuse [drug or alcohol] imposes upon other associates, customers and the communities in which the company operates is intolerable" knew that policy was in effect and had actual knowledge of the risk. (JA 2565, 2752).

Moreover, the failure to drug test was not the heart of the Respondent's case. The issue of duty relates to Ms. Maguire's scheduling of Brandy Liggett to work overtime, deciding to disregard investigation on 4-5 occasions, leaving an impaired employee unsupervised, deciding not to take remedial action 4-5 times and then allowing her to drive her vehicle home after the overtime shift when she knew that Liggett was either impaired or exhausted. With respect to the drug testing policy --- or in this case, the lack of using a policy already on the books – it is Respondent's position that Speedway, via its manager Maguire, did not take seriously potential drug use of its employees. The existence of policy that is neither followed nor put in practice by management evidences the recklessness of Maguire, i.e., Speedway, in dealing with its impaired employees.

Petitioner's citations to cases prohibiting the introduction of policies and procedures and prohibiting drug testing simply do not apply to the facts of this case. Those policies and procedures evidenced notice, and knowledge on the part of Maguire.

3. The Circuit Court correctly admitted Bobbi Jo Maguire's note in Brandy Liggett's personnel file

Respondent correctly contended that Bobbi Jo Maguire's handwritten note represented a damaging admission that Speedway had knowledge that Brandy Liggett was "on something", i.e., impaired on September 15, 2015.

The note, found in Liggett's personnel file is admissible as an exception under Rule 803(6). This similar issue was discussed in *McKenzie v. Carroll Intern. Corp.*, 216 W.Va. 686,

610 S.E.2d 341 (2004), where it was contended that the trial court erred in admitting handwritten notes of a plant manager commenting on the plaintiff employee.

The *McKenzie* court, relying on Syllabus point 7 of *Lacy v. CSX Transportation, Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999), addressed the application of 803(6) in this context and found that:

> Before evidence may be admitted under W.Va. R. Evid. 803(6), the proponent must demonstrate that such evidence is (1) a memorandum, report, record, or data compilation, in any form; (2) concerning acts, events, conditions, opinions, diagnoses; (3) made at or near the time of the matters set forth; (4) by, or from information transmitted by, a person with knowledge of those matters; (5) that the record was kept in the course of regularly conducted activity; and (6) that it was made by the regularly conducted activity as a regular practice.

Id.

Also, this Court further relied on Syllabus point 12 of *Lacy* and held that "a record of a regularly conducted activity that otherwise meets the foundational requirements of W.Va. R. Evid. 803(6) is presumptively trustworthy, and the burden to prove that the proffered evidence was generated under untrustworthy circumstances rests upon the party opposing its admission." *Id. (citing Lacy,* 205 W.Va. 630, 520 S.E.2d 418)*).* Based on those principles, the *McKenzie* court found there was no error in the admission of the notes of the plant manager and stated that there was evidence presented that said the manager routinely wrote comments recorded in the job cost records. *Id.*

Clearly Maguire's handwritten note is admissible under Rule 803(6) as it was made a part of Brandy Liggett's personnel file and kept in the regular course of regularly conducted activity regarding employees of Speedway. In fact, Speedway admitted as much. With respect to the requirements set forth in *Lacy*, it is undisputed that: (1) it is a

memorandum or report; (2) concerning an act, event, condition and/or opinion; (3) made at or near the time of the matters set forth, as it appears that even if the defendant's time frame was true it was within a short time following the accident; (4) by Bobbi Jo Maguire who had knowledge of the facts contained within said note; (5) that the record was kept in the personnel file; and (6) was a regular practice as it was embodied in the personnel file.

Moreover, the note in question is relevant under the Rules of Evidence despite Petitioner's objections. In *McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995),* our Supreme Court held that:

> Rule 401 provides "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probably than it would be without the evidence." Under Rule 401, evidence having any probative value whatsoever can satisfy the relevancy definition. Obviously, this is a liberal standard favoring a broad policy of admissibility. For example, the offered evidence does not have to make the existence of a fact to be proved more probable than not to provide a sufficient basis for sending the issue to the jury.

Id., 455 S.E.2d at 795.

In the present case, the note in question is extremely relevant in that it re-iterates and supports the plaintiff's claim that Brandy Liggett displayed signs of impairment and/or fatigue during her shift at Speedway on the date of the accident. Moreover, the note also reveals Liggett's behavior and confirms that Speedway's affirmative conduct created a substantial risk of harm to Kevin Jarrett.

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

Andrew Carf was Speedway's designated 30(b)(7) corporate representative for risk management/safety. Germane to the issues presented in this motion, Mr. Carf was asked a series of hypothetical questions related to the operations of Speedway stores. Speedway's

counsel objected as to the form and indicated he did not feel that Mr. Carf was going to be called at an expert witness in this case. Specifically, when asked if he intended to render expert opinions in this matter, Mr. Carf indicated that he was not aware of such a role. Further, at no time during the deposition did Speedway's attorney reveal that Mr. Carf would be testifying as an expert herein. (JA 249-254).

Then, months later, on January 2, 2018, Speedway filed its expert disclosure in this matter and disclosed Mr. Carf as an expert witness. In lieu of providing required Rule 26(b)(4) information, the defendant merely stated that each expert would testify regarding his expertise "as applied to the issues of the case, consistently with his corporate testimony" and that "Speedway hereby incorporates his previously completed deposition testimony as exemplary of the types of opinions" Speedway expects such witness to provide at trial. (JA 260-264).

Based upon these inadequate disclosures, Respondent filed a "Motion to Compel Depositions of Defendant, Speedway's Expert Witnesses, Anthony Carf and Brian Seifert, or in the Alternative, Motion to Strike the Same", as Speedway had refused to provide them for further deposition. (JA 239-276). Thereafter, the Court entered an order as follows:

> Plaintiff's motion to compel depositions or alternatively strike with regard to Anthony Carf and Brian Seifert is denied in part and granted in part. Mr. Carf and Mr. Seifert will be allowed to testify consistent with or noncompliance with Speedway's policies. However, these witnesses shall not be allowed to offer opinion testimony regarding whether Speedway employees complied with industry standards. Likewise, the testimony that can be offered by these individuals shall be restricted to the testimony contained within their depositions previously taken in this matter, and no matters outside said testimony or relating to or arising from such matters.

(JA 319-320)

Consequently, at the time of trial, after Petitioner had designated certain portions of the transcript to be read at trial, there was nothing more for those witnesses, including Carf, to offer. Speedway had ample opportunity to designate portions of the transcript and in fact, did so. Thereafter, it attempted to bolster its evidence by having Mr. Carf appear on the witness stand and re-iterate testimony that was already submitted into evidence via deposition. Presumably, if Speedway felt there was important evidence to be offered in the way of Carf's testimony, it would and could have designated those portions of the transcript.

The court did nothing in error with respect to Mr. Carf; it was simply following its prior rulings, ones that were known by Speedway at the time it submitted its Rule 32 designation of the Carf transcript. The court had limited Carf to only matters contained in his deposition. Speedway knew the law of the case and tried to violate the prior order.

5. The Circuit Court Appropriately Excluded Reference of the first jury trial and its verdict and Petitioner's Jury Instruction No. 2 during the second trial on damages

As set forth more fully in the Procedural History, the Circuit Court granted a new trial solely on the issue of wrongful death damages. The jury was not tasked with anything other than to decide the amount of those damages proven by a preponderance of the evidence. The injection of any other issues of matters into the trial would have only served to confuse and prejudice the jury. The Petitioner has not pointed to any case law or other precedent to support its position that the failure to give its Instruction No. 2 was error.

6. The Circuit Court appropriately overruled Petitioner's objections to Respondent's counsel's closing argument

First, Petitioner's citation to the *Ashcraft* case is misplaced. Respondent's counsel was not using an exhibit not admitted into evidence during his closing argument. Rather,

counsel made use of a demonstrative chart which set forth the specific categories of damages in W.Va. Code §55-7-6(c)(1) claimed by each of the Estate's beneficiaries in column format. (JA 4048). This aid did not go back into the jury room and was used to explain the damages by appropriate argument totally consistent with the law. Petitioner relies on nothing to support its assertion that "there is a reasonable probability that the jury's verdict was influenced by the improprieties." The chart is akin to writing on a chalkboard in closing or simply explaining the elements of damage. There were no improprieties.

With respect to mentioned numbers in closing argument, in West Virginia, it is well established that counsel during closing argument can utilize an amount under certain conditions and Petitioner's counsel met those mandates.

In *Page v. Columbia Natural Resources, Inc.,* 198 W.Va. 378, 480 S.E.2d 817 (1996), this Court affirmed a lower court denial of a new trial despite the following argument:

> I'm not going to suggest that number to you, that's something that you jurors come together in your wisdom and common experience in our community and decide. One of you might say, "Well, we should give her $25,000." Another of you might say, "Well, now wait a second. Getting fired is a much more horrible thing than that. What she went through. Everything that happened to her. Let's give her $150,000." And one of you may say to the first one, "That's not enough." And, another of you may say to the second one, "That's too much." Someone else might even say, "Well, I think we should give her more."

Id., at FN 18.

The Court held that counsel's comment was not in error and stated that "we believe that counsel's statement was only intended to be an example and in no manner could be considered error or prejudicial to the appellants." *Id.,* 480 S.E.2d at 834 *(citing Adkins v. Foster,* 187 W.Va. 730, 421 S.E.2d 271 (1992)*).* The Court in *Page* upheld the emotional

distress award in *Page,* despite the fact that the jury awarded the exact sum mentioned by plaintiffs' counsel in closing. In the instant case, attorney Fitzsimmons mentioned $6,000,000 and $8,000,000 but the jury did not award either amount. If the *Page* court did not find that the jury was obviously influenced in awarding the same $150,000 argued by counsel, the plaintiffs cannot fathom any rationale to assume that the jury was influenced by Mr. Fitzsimmons's remarks.

The defendant's attempt to place reliance on *Bennett v. 3 C Coal Company,* 180 W.Va. 665, 379 S.E.2d 388 (1989), is faulty in that the *Bennett* court discussed whether or not an attorney can argue the amount sued for in closing argument which is unlike Jarrett.

Likewise, *Roberts v. Stevens Clinic Hosp., Inc.,* 176 W.Va. 492, 345 S.E.2d 791 (1986), is misplaced as well. In that case, counsel compared the life of a person to that of a racehorse, which he stated to be worth exactly $10,000,000, with the jury thereafter awarding $10,000,000. The argument of Attorney Fitzsimmons was nothing akin to that – in fact, counsel for the Respondent appropriately left the decision up to the jury not suggesting an exact number. Simply stated, Respondent's argument cannot legitimately support a new trial. The court did not err in any manner regarding the closing argument.

IV. The Circuit Court did not err in denying Speedway's Alternate Motion to Alter or Amend the August 5, 2020 Final Judgment Order assessing post-judgment interest

A. Standard of Review

Although a motion under Rule 59(e) should be granted where: "(1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice" under the *Mey, supra,* decision, Petitioner cannot prove that any of those factors

occurred. In fact, under Rule 59(e) the reconsideration of a judgment after its entry is an extraordinary remedy, which should be used sparingly.

B. The Final Judgment Order did not erroneously assess post-judgment interest

The crux of Petitioner's argument is that the Circuit Court calculated post-judgment interest on the jury's first verdict commencing on July 26, 2019, the date upon which the verdict was rendered and with the 2019 interest rate of 5.5%. At controversy is the additur amount which was included in this judgment Order dated November 18, 2019, as a corrected award for the past lost wages, which increased from $306,600 (the incurred amount) to $477,708 (the correct amount). Since the trial court merely reformed this amount by additur, it was perfectly acceptable to calculate interest on that true amount beginning with the date of the jury's verdict.

Moreover, the Final Judgment Order entered after the second trial used the appropriate date of July 26, 2019, the date the jury found Speedway to be 30% liable to the Estate. *(For additional factual details on this issue please see JA 4494-4497).*

In *Trimble v. Michels,* 214 W.Va. 156, 159, 587 S.E.2d 757, 760 (2003), this Court reiterated long standing law and stated that:

> Where a judgment is susceptible of two interpretations, that one will be adopted which renders it the more reasonable, effective and conclusive, and which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered.

Id. (Citations omitted).

The Circuit Court's calculation of the interest from the time of the first verdict is perfectly reasonable, effective and conclusive in that the jury's original verdict awarding lost wages was clearly wrong and should have included the correct amount. To disallow

interest for this time period would be unjust in that the jury simply made a simple mistake in calculating the award. Moreover, Speedway did not object to the calculation of interest or the date it commenced on the orders entered on August 8, 2019, or November 18, 2019, and when it did following the August 5, 2020, entry of the order, its objections were untimely, and if sustained would result in no interest being calculated from July 26, 2019, until November 18, 2019, which would be highly prejudicial, unjust and plain error.

Petitioner's claim that since the Respondent argued in this Court that the initial judgment order was not final, that somehow that translates into no award for post-judgment interest in that interim time period between the first trial and entry of the judgment order. The issue raised by Respondent involved dealing with whether the case was ripe for appeal not whether the assessment of pre and post judgment interest was appropriate. These are two entirely separate issues.

The Circuit Court was correct in denying Speedway's Motion to Alter or Amend the August 5, 2020 Final Judgment Order.

CONCLUSION

Inasmuch as this case primarily deals with the correct application of *Robertson v. LeMaster,* 171 W.Va. 607, 301 S.E.2d 563 (1983), not its expansion in any sense, the Circuit Court was correct in denying Petitioner's motions for judgment as a matter of law. Further, the Circuit Court committed no error in any of the rulings about which Petitioner complains. Therefore, the Respondent respectfully requests that petitioner's requested relief be denied and all rulings of the Circuit Court germane to this appeal be affirmed.

Respectfully submitted,

DEBORAH L. JARRETT, as the Executrix of the Estate of KEVIN M. JARRETT, and DEBORAH L. JARRETT, individually,
Respondent

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No. 21-2015

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SPEEDWAY LLC,

Petitioner

v.

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

Respondent

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 15-C-2017

CERTIFICATE OF SERVICE

Service of the foregoing ***Respondent's Brief*** was had upon the following by sending a true and correct copy thereof by regular U.S. Mail, postage prepaid, at their last known address this 10th day of August, 2021, as follows:

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Greg Gellner

From: Bob Massie <Bob.Massie@nelsonmullins.com>
Sent: Monday, February 22, 2016 1:53 PM
To: Greg Gellner
Cc: Lisette Hobson
Subject: RE: Subpoena for Brandy Liggett records

Greg,

Call me about the subpoena please.

As for hours worked, Evans worked from 11:58 to 18:01, Seagrave worked from 0:00 to 6:44 and from 23:00 to 24:00, Wells worked from 12:59 to 21:01 and Marella worked from 5:17 to 20:01. Our records show that Liggett worked from 6:00 to 15:07.

As for phone numbers and addresses that is personal information of employees. However, I indicated if you wanted to talk with those employees I would make arrangements for that to happen.

Again, give me a call and I think we can work out any issues.

From: Bob Massie
Sent: Monday, February 22, 2016 10:48 AM
To: 'Greg Gellner'
Cc: Lisette Hobson
Subject: RE: Subpoena for Brandy Liggett records

Greg,

Attached please find Speedway's response to your subpoena. Please do not hesitate to contact me if you have any questions.

Nelson Mullins

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EXHIBIT
A