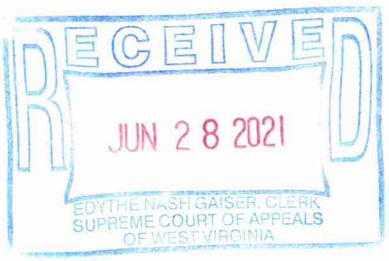
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0215



SPEEDWAY, LLC,
Defendant Below, Petitioner,

v.

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

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

AMICI CURIAE BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANT AND REVERSAL OF THE DECISION BELOW

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ASSIGNMENT OF ERROR ADDRESSED BY *AMICI CURIAE*

The Circuit Court misapplied West Virginia law when it imposed a duty on Speedway to control the actions of an employee who had a motor vehicle accident, after work and off premises, while under the influence of illegally obtained prescription medications.

INTEREST OF *AMICI CURIAE*

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation.[1] ATRA has previously expressed concern with the expansion of liability beyond traditional bounds in West Virginia. It has filed *amicus* briefs with this Court addressing important liability issues and supported efforts to adhere to traditional tort law principles in West Virginia.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files briefs as *amicus curiae* in cases, like this one, that raise issues of concern to the nation's business community.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National

[1] Pursuant to Rule 30(e)(5), *amici* certify that no party's counsel authored this brief in whole or in part and no counsel or a party made a monetary contribution specifically intended to fund the preparation or submission of the brief, other than the *amici* curiae, its members, or its counsel.

Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. Members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1961, the National Association of Convenience Stores (NACS) is a non-profit trade association today representing more than 1,500 retail and 1,600 supplier company members nationwide. NACS is the preeminent representative of the interests of convenience store operators. In 2020, the fuel wholesaling and convenience industry employed approximately 2.34 million workers and generated $548.2 billion in total sales.

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe. The American Insurance Association and Property Casualty Insurers Association of America merged to form APCIA in 2019.

Amici have a strong interest in this case because the judgment against Speedway departs from West Virginia precedent, places West Virginia tort law out of the mainstream, and effectively imposes a duty on the state's employers that would be almost impossible to satisfy.

STATEMENT OF THE CASE

Brandy Liggett was under the influence of illegally taken prescription medications when she lost control of her vehicle, crossed the centerline of a road, and struck Kevin Jarrett's motorcycle, causing his death. Mr. Jarrett's estate initially sued Ms. Liggett; later, her employer, Speedway, was named as a co-defendant. Ms. Liggett had worked for Speedway for just three

days. The accident occurred approximately one hour after Ms. Liggett's shift ended, seven miles from work, and after Ms. Liggett conducted a personal errand.

Plaintiff's theory is that Speedway had a duty to conduct pre-and post-hiring, as well as at-work drug testing; had a duty to stop Ms. Liggett from leaving the store or driving following a shift at which she appeared tired and disoriented; and should not have allowed Ms. Liggett to work an hour of overtime on the date of the accident. The Circuit Court adopted Plaintiff's argument that these allegations could constitute "affirmative conduct" under *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983), that created a risk of harm and made Speedway liable for Ms. Liggett's actions outside of her employment.

Ultimately, after trial, additur to the jury's award for lost wages, and a new trial on loss of household services and solace damages, the Circuit Court entered a judgment of over $2 million against Speedway, holding it 30% at fault for the Plaintiff's damages.

SUMMARY OF ARGUMENT

Employers are not insurers for the personal conduct of employees outside of work; nor are they empowered to act as police. Tort law may hold employers responsible for the tortious conduct of employees who are acting within the scope of their employment or, in some circumstances, for off-duty employee conduct on the employer's premises or when using the employer's property. In addition, West Virginia recognizes that an employer may be liable if its affirmative conduct in managing an employee creates a risk of injury that injures a third party.

The public policy underlying these rules is straightforward: An employer may sometimes be liable for the actions of its employees when the employer benefits from those actions, consents to the use of its property, or creates a risk of harm through its own actions—all of which an employer can control. An employer is not liable for an employee's negligence outside of work merely because of that person's association with the business.

The judgment below departs from these principles. It imposes liability on Speedway for a new employee's driving under the influence of illegally-obtained prescription medications simply because the employee appeared tired and disoriented at moments during her shift and Speedway did not stop her from leaving in her own car when her shift ended.

Robertson v. LeMaster, 171 W. Va. 607, 301 S.E.2d 563 (1983), requires reversal. Although the circuit court tried to justify its ruling under a narrow "affirmative conduct" exception recognized by this Court, this case dilutes the concept of "affirmative conduct" to have almost no meaning. Indeed, it would subject West Virginia employers to liability for employee misconduct far beyond employers' control. What happened to Mr. Jarrett was a tragedy, but it was a tragedy caused by Ms. Liggett. Subjecting Speedway to liability for this tragedy is an example of deep-pocket jurisprudence that would stretch tort liability to the extreme, without legal support or a sound policy basis. That expansion of liability may have unanticipated consequences, such as reducing opportunities for people who have overcome addictions or have criminal records to obtain gainful employment.

West Virginia has made considerable progress in recent years reestablishing a reputation as a state with tort law rules that are balanced and within the legal mainstream. The decision below erodes that progress. It is emblematic of the type of rulings that previously created a need for legislative reform. This Court should reject the extreme duty accepted by the Circuit Court and reverse the judgment.

ARGUMENT

I. IMPOSING LIABILITY ON EMPLOYERS FOR EMPLOYEE CONDUCT BEYOND THE WORKPLACE IS CONTRARY TO ESTABLISHED LAW

A. Traditional Principles of Tort Law Do Not Impose Liability on Employers for Employee Conduct Off Site and After Work Hours

It is black-letter law that an employer is normally under no duty to control the conduct of an employee acting outside the scope of employment. *See* Restatement (Second) of Torts § 317 (1965); *see also* Restatement (Third) of Agency § 7.07 (2006) (an employer is not liable for an employee's "independent course of conduct not intended by the employee to serve any purpose of the employer."). A person's mere status as an employee does not expose the employer to liability for that person's conduct outside of work.

The Restatement (Second) of Torts recognizes two narrow exceptions where an employer has a duty to prevent an employee from acting in a manner that creates an unreasonable risk of bodily harm to others: (1) when the employee is on the employer's premises, and (2) the employee is using the employer's property. *See* Restatement (Second) of Torts § 317 (1965). The element of employer control provides the foundation for these limited duties: an employer has the ability to control what occurs on its property or who uses its property. *See id.*

In states following the Restatement (Second) approach, an employer such as Speedway is not subject to liability when an employee such as Ms. Liggett causes an automobile accident unless there is either a work-related reason for the drive or the employee is driving a company vehicle. Otherwise, the employer would become an insurer for injuries caused by negligent or rogue employees that are beyond the employer's ability to prevent.

West Virginia generally follows these traditional rules. *See Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). An employer such as Speedway is "normally under no

duty to control the conduct of an employee acting outside the scope of his employment." *Id.* (citing Restatement (Second) § 317).

B. No Affirmative Employer Conduct Created the Risk that an Employee Would Drive Under the Influence of Prescription Medications

This Court has adopted a narrow exception to the traditional rules for employer liability if an employer's affirmative conduct creates an unreasonable risk of harm to another. As the employer here, Speedway, in no way created the risk that an employee would drive under the influence of prescription medications, this exception does not apply.

In *Robertson*, an employer required an employee to complete 27 hours of hard manual labor without rest, repeatedly denying the tired employee's pleas to go home. Eventually, the exhausted employee was taken to his car and told to "just go on home"—a 50 mile drive. 171 W. Va. at 608-09, 301 S.E.2d at 564-65. He fell asleep at the wheel and caused an accident. The Court held that the trial court erred in holding that the driver's employer owed no duty under the circumstances. The Court said, "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." 171 W. Va. at 613, 301 S.E.2d at 569.

And although the Restatement (Third) of Torts: Physical and Emotional Harm § 41 recognizes that certain "special relationships" may give rise to a duty of care to protect third parties, such when an employer "facilitates" an employee's causing harm to a third party, that approach (which is not recognized in all jurisdictions) is limited. Specifically, "[w]hen the employment relationship does not increase the risk of the employee harming another, the employer is not subject to liability." *Id.* Reporters' Note cmt. e. In fact, Section 41 draws support from *Robertson* as showing that an employer may have a duty to protect third parties if "in the course

of employment, an employee is subject to such extreme demands that even after the employee is off duty a risk of harm to others exists." *Id.* That is not what occurred here. None of the *Robertson* factors are present in the case before this Court, where a new employee worked an ordinary shift, did not ask to leave earlier, and left work in her own car on her own volition.

Nor can the judgment against Speedway be reconciled with *Overbaugh v. McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990), which the trial court said is "inapplicable" because it is a "social host alcohol liability case." Op. at 7. In *Overbaugh*, this Court ruled that no claim existed against an employer after an employee who became intoxicated serving himself drinks at a company-sponsored party became involved in a car accident that killed one person and injured several others. Drawing from *Robertson* and applying a common law negligence approach, this Court found that the employer had not engaged in affirmative conduct when it made alcohol available, did not know the employee had a drinking problem, and had suggested that the employee have someone give him a ride home. *See id.* at 392. Yet, here, where the employer did not provide or facilitate access to the prescription medications taken by its employee, the judgment imposes liability.

Permitting liability in this case would impose upon employers a new duty to prevent any employee who appears tired or disoriented from leaving work in his or her own vehicle. This would result in a marked departure from West Virginia law. Here, Speedway did not engage in any affirmative conduct that created a risk of harm. No liability can attach in these circumstances.

C. Imposing Liability Would Make West Virginia an Outlier

Courts across the country have routinely applied established principles of tort law to reject claims that an employer is liable for an employee's conduct outside of work in similar circumstances, as well as in cases involving more significant employer conduct than occurred here. West Virginia will become an outlier if the judgment against Speedway is affirmed.

Recently, for example, a Georgia appellate court ruled that a trial court properly granted summary judgment for an employer in a case in which an employee, on his commute to work, lost control of his car and struck another vehicle, killing two people. *See DMAC81, LLC v. Nguyen*, 853 S.E.2d 400 (Ga. Ct. App. 2021). The court applied the ordinary rule that "in absence of special circumstances a servant going to and from work in an automobile acts only for his own purposes and not for those of his employer." *Id.* at 404. It adhered to this approach even though an assistant manager knew the deli employee sometimes used marijuana, the employee had the drug in his system at the time of the accident, and the employer had called the employee into work early during a winter storm warning. The court observed that finding special circumstances in this context "would result in the exception swallowing the rule." *Id.* at 406. Since the employee was not acting within the scope of employment during his commute, the court also affirmed the trial court's dismissal of negligent hiring and retention claims premised on the employer's failure to conduct a background check that would have identified citations for reckless driving and DUI and an arrest for marijuana possession. *See id.* at 403, 406.

Courts in Tennessee have also rejected liability for employers in cases involving disoriented, slow, or intoxicated workers who were in car accidents after leaving work. In *Thompson v. Best Buy Stores, L.P.*, 2016 WL 6946786 (Tenn. Ct. App. Nov. 28, 2016), a Best Buy employee appeared "slow, tired and not very responsive" at work, and was asked to leave by a supervisor, before becoming involved in a car accident. *Id.* at *1. Unbeknownst to the store, the employee had taken an illicit mail-order drug before beginning his shift. As here, the plaintiff alleged that the employer had a duty to prevent the employee from leaving work while appearing tired. The court ruled that an employer has no duty to restrain an employee from voluntarily leaving the workplace in his or her own car. *Id.* at *7. Similarly, courts in Tennessee had rejected liability

for after-work car accidents involving a disoriented, slow, and tired Wal-Mart employee and a visibly intoxicated Waffle House waitress who were in car accidents after leaving work. *See Williams v. Wal-Mart Stores East, L.P.*, 832 F. Supp. 2d 923, 928 (E.D. Tenn. 2011) (retailer had no duty to prevent an employee who appeared disoriented, slow, and tired from driving home in her own vehicle); *Lett v. Collis Foods, Inc.*, 60 S.W.3d 95, 105 (Tenn. Ct. App. 2001) ("It is important . . . to recognize that Collis Foods did absolutely nothing to contribute to Mills' state of intoxication or her decision to drive herself home."). In each of these three cases, the courts recognized that the employer did not contribute to the employee's condition or decision to drive home, and was not subject to liability.

These principles apply equally when an employee surreptitiously uses drugs or alcohol at work. For example, the Connecticut Supreme Court, drawing from the law of several jurisdictions, ruled that a homeowner was not liable for an accident caused by a plasterer and painter who consumed alcohol before driving away from the premises because the homeowner "neither facilitated nor condoned" that conduct. *Cannizzaro v. Marinyak*, 93 A.3d 584, 589-91 (Conn. 2014). An Indiana appellate court similarly ruled that an automaker had no duty to prevent an employee who consumed several beers and a bottle of whiskey during his shift from driving when the accident did not occur on the employer's premises or involve an employer-provided vehicle. *See Pursley for Benefit of Clark v. Ford Motor Co.*, 462 N.E.2d 247, 248, 252 (Ind. Ct. App. 1984). Likewise, a Washington employer was not liable when, after construction workers shared a keg of beer on a job site, one crashed his truck into the plaintiff's car. *See Tallariti v. Kildare*, 820 P.2d 952, 953 (Wash. Ct. App. 1991). As the Restatement (Second) recognizes, an employee's misconduct on an employer's premises does not impose a duty on the employer to prevent that employee from engaging in conduct that poses a risk of harm to others when outside the scope of

employment "on the public streets." *See* Restatement (Second) of Torts § 317, Reporter's Notes, cmt. b. Even the Restatement (Third), which often takes a more expansive view of liability, indicates that "the location of the drinking [on the employer's premises] did not increase the risk that the employee would be intoxicated while commuting to or from work." Restatement (Third) of Torts: Phys. & Emot. Harm § 41, Reporters' Note cmt. e.

Other courts have also refused to hold employers liable for injuries stemming from poor choices by employees outside their scope of work. *See Killian v. Caza Drilling, Inc.*, 131 P.3d 975, 986 (Wyo. 2006) (holding hit-and-run accident by employees who had consumed alcohol and smoked marijuana at a job site "was a natural and probable consequence of the voluntary decision by [the employees] to operate a motor vehicle while intoxicated on their own time off company premises"); *Biel v. Alcott*, 876 P.2d 60, 63 (Colo. Ct. App. 1994) (employer had no duty to plaintiff injured by employee who drove home after drinking wine because the employee was off duty, off premises, did not possess the employer's property, and was driving her own vehicle for purposes unrelated to work).

There are many other examples of courts rejecting claims against employers based on an employee driving while intoxicated before or after work, some of which involve far more employer knowledge or involvement than this case. For instance, Massachusetts's highest court held that an employer was not liable for an employee's car accident even after the employee became intoxicated at dinner with a supervisor to discuss work-related issues. *See Lev v. Beverly Enter.-Mass., Inc.*, 929 N.E.2d 303, 308 (Mass. 2010). The court noted that the employee had ordered and paid for the alcohol and the "scope of employment ended when he left [the restaurant] to travel home." *Id.* An Arizona appellate court ruled that an employer was not subject to liability for a car accident when it instructed an employee, who had a known history of drug abuse and arrived at

work conspicuously intoxicated, to leave the premises. *See Riddle v. Arizona Oncology Servs., Inc.*, 924 P.2d 468, 473-74 (Ariz. Ct. App. 1996). A New York employer that immediately fired and sent home a machine operator whose eyes "didn't look right" and smelled of alcohol was not subject to liability for a car accident that followed. *See D'Amico v. Christie*, 518 N.E.2d 896, 897-98 (N.Y. 1986). The reasoning underlying these rulings applies equally here and requires reversal.

II. HOLDING EMPLOYERS RESPONSIBLE FOR EMPLOYEES' MISUSE OF PRESCRIPTION MEDICATIONS IS UNSOUND DEEP-POCKET JURISPRUDENCE

The judgment against Speedway is deep-pocket jurisprudence that should be rejected. Deep-pocket jurisprudence occurs when an innocent party is made to pay the cost of a harm because the actual wrongdoer, for whatever reason, cannot be sued or lacks the resources to pay a judgment. *See* Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 359 (2017). Courts are tempted to stray from the fundamental principle that one is responsible only for his or her own misdeeds by stretching the law to provide compensation to someone with an injury.

This Court should not abandon established principles of tort law and expand liability for West Virginia employers under these circumstances. As one state high court has recognized, "[d]eep-pocket jurisprudence is law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (rejecting theory that would impose liability on maker of brand-name prescription drug when the plaintiff only used generic version of the drug made by other companies). Indeed, when presented with the invitation to expand an employer's liability for an employee's drunk driving after work, the New York Court of Appeals observed, "we cannot create a new legal duty" that would require an entity that lacked the opportunity to supervise and control a tortfeasor "to respond in damages, as an insurer, for plaintiff's injuries." *D'Amico*, 518 N.E.2d at 900. Doing so

would have "broad ramifications" and raise "vexing questions" about where the scope of an employer's duty ends. *Id.* at 902.

Expanding liability under these circumstances is likely to lead to lawsuits alleging that employers have a duty to prevent a wide range of criminal or other misconduct by employees outside of work simply by virtue of the employer allegedly having some degree of knowledge of an employee's addictions, physical or medical conditions, attitudes, or other issues.[2] Employers might be incentivized to avoid workers with past records of drug or alcohol abuse or criminal records in order to avoid tort liability. This would frustrate the re-integration of these individuals into the workforce and reduce opportunities for people who have overcome addictions to obtain gainful employment.

III. IMPOSITION OF LIABILITY WOULD RETREAT FROM RECENT PROGRESS THAT HAS RESTORED BALANCE AND IMPROVED THE REPUTATION OF WEST VIRGINIA'S CIVIL JUSTICE SYSTEM

West Virginia has made substantial progress in recent years at moving into the legal mainstream and cultivating a perception that the state's civil justice system is balanced and adheres to established principles of law. *See* Cary Silverman & Richard R. Heath, Jr., *A Mountain State Transformation: West Virginia's Move Into the Mainstream*, 121 W. Va. L. Rev. 27 (2018). Exposing West Virginia employers to liability for employee conduct outside of work by affirming the judgment here would mark a sharp detour from this path.

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[2] *See, e.g., Loram Maintenance of Way, Inc. v. Ianni*, 210 S.W.3d 593 (Tex. 2007) (holding employer that knew of employee's drug use, threats of violence, and agitated state had no duty to prevent a domestic dispute that occurred one hour after work in which the employee shot a responding police officer); *Escobar v. Madsen Constr. Co.*, 589 N.E.2d 638 (Ill. Ct. App. 1992) (finding construction company whose employee shot a coworker before work, two blocks from a job site, was not liable because the employee was not on the job site, was not doing the employer's work, and was not using the employer's gun, regardless of whether the employee was known to easily lose his temper, act abusively toward coworkers, and occasionally use cocaine).

A series of rulings that subjected those who live and do business in West Virginia to expanded liability, primarily between 1999 and 2014, contributed to concern among members of the business community that they would not receive fair treatment in West Virginia's civil justice system. In several instances, court decisions placed the state's tort law out of the mainstream.

For example, West Virginia recognized an independent cause of action for medical monitoring that allowed individuals who claimed they were exposed to hazardous substances to seek cash awards even when they had no present physical injury, the level of exposure was unlikely to cause disease, and regardless of whether there was a medical benefit to early detection of an illness. *See Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 142-43, 522 S.E.2d 424, 433-34 (1999); *see also* Victor E. Schwartz et al., *Medical Monitoring: The Right Way and The Wrong Way,* 70 Mo. L. Rev. 349, 366-68 (2005). In another case, contrary to the law of every other state, West Virginia abandoned the learned intermediary doctrine, effectively instructing manufacturers of prescription drugs that they had a duty to directly communicate warnings to patients, rather than physicians. *See State ex rel. Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 470, 647 S.E.2d 899, 906 (2007). Moreover, a departure from over a century of precedent saddled businesses and homeowners with a duty to protect guests from conditions on their property that are in plain view and are not a hidden danger, essentially to make them injury proof. *See Hersh v. E-T Enters., Ltd. P'ship*, 232 W. Va. 305, 318, 752 S.E.2d 336, 349 (2013). Eliminating the open and obvious defense made it virtually impossible for defendants to obtain dismissal of meritless premises liability cases. *See* 232 W. Va. at 324, 752 S.E.2d at 355 (Benjamin, C.J., dissenting).

West Virginia employers faced specific threats of excessive liability. Employers were subject to tort claims by employees even if they had no actual knowledge of a workplace hazard. *See McComas v. ACF Indus., LLC*, 232 W.Va. 19, 27-28, 750 S.E.2d 235, 243-44 (2013) (relaxing

the "deliberate intent" standard). In some wrongful termination lawsuits, employees were relieved of their duty to mitigate damages by seeking new employment and were permitted to seek front pay for the remainder of their working lives, even if they had found other employment. *See Burke-Parsons-Bowlby Corp. v. Rice*, 230 W.Va. 105, 115, 736 S.E.2d 338, 348 (2012); *Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 184, 680 S.E.2d 791, 815 (2009); *see also* W. Va. Code Ann. § 55-7E-2(4) (finding that "[i]n West Virginia, the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states" and "puts our state and its businesses at a competitive disadvantage").

Businesses feared other forms of excessive damage awards in West Virginia courts as well. Juries were not permitted to learn that the amounts plaintiffs' lawyers sought for medical expenses were based on inflated invoiced rates that do not reflect the true costs of treatment and were not paid by the patient or his or her insurer. *See Kenney v. Liston*, 233 W. Va. 620, 632, 760 S.E.2d 434, 446 (2014). West Virginia law, unlike many other states, did not require clear and convincing evidence of misconduct to support a punitive damages award. *See Coleman v. Sopher*, 201 W. Va. 588, 602 n.21, 499 S.E.2d 592, 606 n.21 (1997).

Over the past several years, West Virginia has addressed many of these concerns, restoring balance in the state's civil justice system. *See* Silverman & Heath, 121 W. Va. L. Rev. at 33-56 (discussing enacted legislative reforms). In addition, this Court has demonstrated a commitment to adhering to established tort law principles and commonsense constraints on liability. *See, e.g., McNair v. Johnson & Johnson*, 241 W. Va. 26, 37, 818 S.E.2d 852, 863 (2018) (declining to deviate from traditional products liability law in order to extend the duty of brand manufacturers to those allegedly injured by a competitor's product); *White v. Wyeth*, 227 W. Va. 131, 141, 705

S.E.2d 828, 838 (2010) (finding that the private cause of action provided by the Consumer Credit and Protection Act is intended to protect consumers where product safety is not already closely monitored and regulated by the government).

This case presents an opportunity for this Court to do so once again. With respect to the liability of employers for an employee's off duty conduct, West Virginia law already subjects employers to greater liability exposure than states that strictly follow the Restatement (Second) approach by recognizing the "affirmative conduct" exception announced in *Robertson*. This court should reject the invitation to expand that exception to the point of swallowing the rule.

West Virginia employers are not, and should not be, insurers for the conduct of employees that they cannot control. Courts around the country have rejected attempts to impose deep-pocket liability on employers in cases involving similar facts or more substantial employer involvement. Opening the door to liability of this kind in West Virginia would make the state an outlier and raise concern among employers that the state is reversing course in adhering to established tort law.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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Dated: June 28, 2021

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No. 21-0215

Speedway, LLC,

Defendant Below, Petitioner

v.

Deborah L. Jarrett, as the Executrix
of the Estate of Kevin M. Jarrett,

Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I, Richard R. Heath, Jr., counsel for *Amici Curiae* American Tort Reform Association, Chamber of Commerce of the United States of America, NFIB Small Business Legal Center, and American Property Casualty Insurance Association, do hereby certify that service of the foregoing *Amici Curiae* Brief of the American Tort Reform Association, Chamber of Commerce of the United States of America, NFIB Small Business Legal Center, and American Property Casualty Insurance Association in Support of Defendant/Petitioner and Reversal of the Decision Below has been made upon counsel for the following by United States Mail and via e-mail on this 28th day of June 2021:

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