IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CORA PHILLIPS HAIRSTON, et al,

Plaintiffs,

v.

GENERAL PIPELINE CONSTRUCTION, INC., et al,

Defendants.

Supreme Court No. 35525
LOGAN COUNTY CIRCUIT COURT
CIVIL ACTION NO. 06-C-238
(Consolidated with Civil Action Nos. 06-C-239, 06-C-240, 06-C-241 & 07-C-234)

And

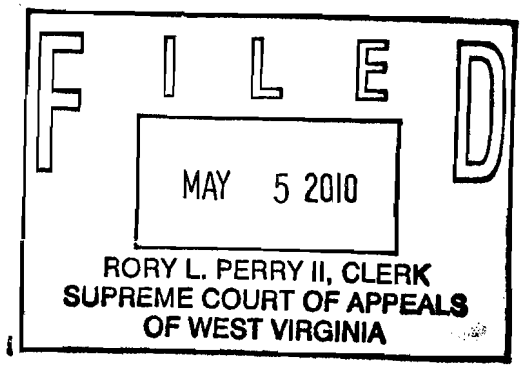
GENERAL PIPELINE CONSTRUCTION, INC.,

Defendant/Third-Party Plaintiff,

v.

MOUNTAIN STATE INSURANCE COMPANY,

Third-Party Defendant.



BRIEF OF GENERAL PIPELINE CONSTRUCTION, INC. REGARDING CERTIFIED QUESTIONS PRESENTED

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II. PROCEDURAL HISTORY AND NATURE OF THE CASE.

In the Fall of 2004, Equitable Gas Company hired General Pipeline Company to relocate a gas pipeline along a mountainside in Crystal Block Hollow, near Sara Ann in Logan County, West Virginia. At different locations along the pipeline, General Pipeline used a small bulldozer to pull a truck loaded with pipe from a road in the hollow through the woods on the mountainside to the pipeline. At the location made the subject of this litigation, the bulldozer was driven though the woods down the hillside to hook up to the pipe truck. Before that was done, a local resident told the operator that there were graves on the hillside and, after searching, the operator found some grave markers and sunken areas that appeared to be graves. The bulldozer had, in fact, passed through a collection of graves. That this wooded area contained graves was not indicated on any map; was not reserved or otherwise identified in the property deed; was not identified by any sign; was not included on any list of grave sites maintained by any State agency; and was not otherwise reasonably identifiable as an area containing graves. The area was overgrown with vegetation and contained mostly unmarked grave sites. The few actual grave markers were not standing, but lay buried in the forest debris. The operator immediately blocked off the area and went elsewhere to carry supplies to the jobsite.

Plaintiffs to these consolidated actions filed Complaints in the Circuit Court of Logan County, Civil Action Nos. 06-C-238; 06-C-239; 06-C-240; 06-C-241, (consolidated under Civil Action No. 06-6-238) seeking the recovery of damages alleging that the Defendants desecrated grave sites located in Crystal Block Hollow, by the design, placement and construction of a road during the construction of a gas pipeline. (*Amended Complaint* at ¶s 5-6, 20). Plaintiffs prayed that Defendants be ordered to take action to prevent further desecration of the area by ATV traffic; pay damages to compensate the Plaintiffs for their losses; pay punitive damages for

alleged intentional, reprehensible conduct; and cease operation of the gas pipeline until such time as it is moved to a location at least 500 feet from the area of the grave sites. (*Id.*)

Throughout this litigation, the Defendant General Pipeline has filed various dispositive motions challenging the existence of a tort in West Virginia when there has been no injury to the grave site itself, described by the lower court as *indirect* desecration, of an unmarked grave or a grave site not located in an identifiable cemetery; challenging the Plaintiffs' standing to sue for and collect damages with regard to many of the decedents allegedly buried in the area; and challenging the Plaintiffs' ability to prove any claim for desecration without identifying the alleged decedents and their burial sites.[1]

The absence of guiding law in this area came to a head in the continuing discovery dispute as to the relevance of identifying the burial sites of the alleged decedents and their heirs or next of kin.[2] Thereafter, the Circuit Court of Logan County entered an Order on November 16, 2009, certifying five (5) questions to this Court.

1. Does W.Va. Code § 29-1-8a preempt a common law cause of action for direct or indirect desecration of a grave?

2. What are the elements of a common law action for desecration of a grave, grave site, cemetery or burial ground?

3. What are the recoverable damages in a common law action for desecration of a grave, grave site, cemetery or burial ground?

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[1] *See generally, Defendant General Pipeline Construction, Inc.'s Motion for Summary Judgment; General Pipeline Construction, Inc.'s Response to Plaintiffs' Motion for Protective Order and Motion to Compel or in the Alternative Motion to Dismiss; Defendant General Pipeline Construction, Inc.'s Renewed and Restated Motion for Summary Judgment and Motion to Certify Questions to the West Virginia Supreme Court of Appeals.*

[2] *See generally, General Pipeline Construction, Inc.'s Second Renewed Motion to Compel*; and *Report of John W. Bennett as Discovery Commissioner.*

4. Does West Virginia recognize a common law cause of action for indirect desecration of a grave, grave site, cemetery or burial ground? If so, what are the elements of such a cause of action and what are the recoverable damages?

5. Who are the "next of kin" who possess the right to recover in a common law cause of action for direct or indirect desecration of a grave?

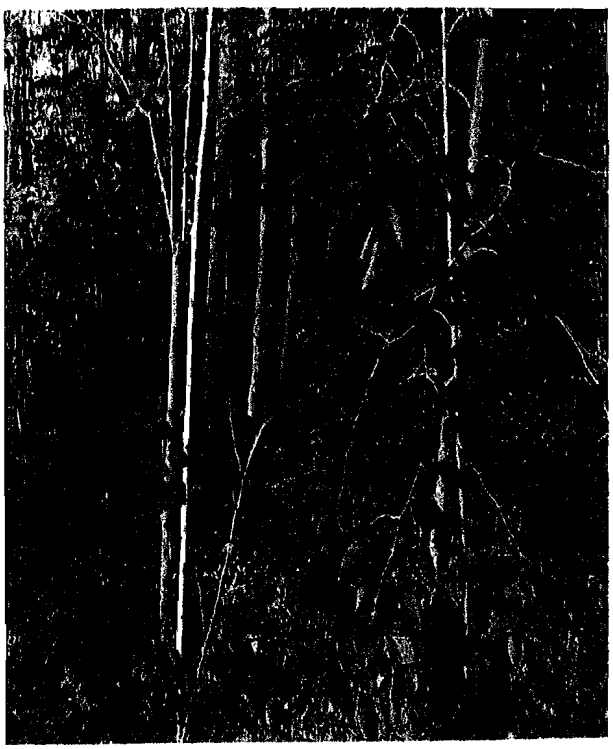
III. STATEMENT OF RELEVANT FACTS.

These cases all arise from an incident which occurred on August 7, 2004. General Pipeline Company was hired by Equitable Gas Company to lay a gas pipeline across a large tract of wooded, unimproved land in Logan County. During the course of this work, an employee of General Pipeline drove a bulldozer down the side of a wooded hill to a road with the intention of attaching the bulldozer to a flat-bed truck carrying pipe and pulling it up the hillside. On the way down the hill the bulldozer, with its blade raised off the ground, passed through an area containing grave sites. The Defendants ***did not*** build a road through the area.

Collectively, the Plaintiffs have identified thirty (30) decedents allegedly buried at this site. (*See Exhibit 1.*) Of these thirty (30) decedents, Plaintiffs claim relationships to seventeen (17), including that of grandfather, grandmother, father, mother, aunt, uncle, sister, brother, nephew, "friend," "distant relative," and mother's first husband. (*See Exhibit 2.*) The graves are alleged to have been 'marked' in various manners:

from a granite or marble headstone,

to a field stone or sandstone rock,



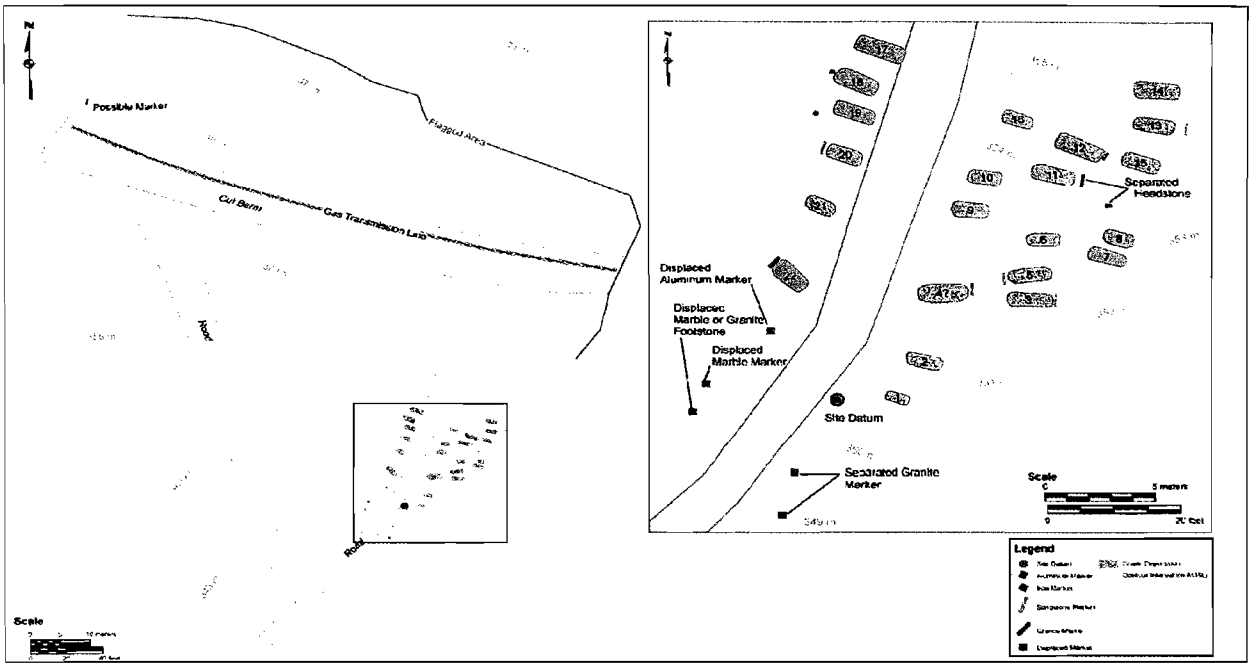
to aluminum markers or no marker at all.[4]

Six (6) of the Plaintiffs claim in Affidavits that the decedent through which they are claiming a right to collect damages is buried directly beneath the path of the bulldozer; an additional two (2) Plaintiffs have signed Affidavits stating they believe their decedent "could be" located under the path of the bulldozer.[6] Despite these allegations, Plaintiffs' expert was unable

[4] See report of Plaintiffs' expert, Updike, attached to Plaintiffs' Expert Witness Disclosure.

[6] *See* Affidavits, attached to *General Pipeline Construction, Inc.'s Second Renewed Motion to Compel* as *Exhibit 9*.

to locate any grave shaft in the path taken by the bulldozer.[7]



IV. STANDARD OF REVIEW.

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." *Robinson v. Pack*, 223 W.Va. 828, 831, 679 S.E.2d 660, 663 (2009), quoting Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

V. NOTES OF ARGUMENT.

A. CERTIFIED QUESTION NO. 1.

West Virginia Code §29-1-8a states the following purpose and Legislative findings:

[7] See report of Plaintiffs' expert, Updike, attached to Plaintiffs' Expert Witness Disclosure. The map herein represents Mr. Updike's survey of the grave shafts in the area and is Figure 5 to his report.

> The Legislature finds that there is a real and growing threat to the safety and sanctity of unmarked human graves in West Virginia and the existing laws of the state do not provide equal or adequate protection for all such graves. As evident by the numerous incidents in West Virginia which have resulted in the desecration of human remains and vandalism to grave markers, there is an immediate need to protect the graves of earlier West Virginians from such desecration. Therefore, the purpose of this article is to assure that all human burials be accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations.

W.Va. Code §29-1-8a. [1]

Set forth in the section of the statute titled *Acts prohibited; penalties*, the statute states that:

> [n]o person may excavate, remove, destroy, or otherwise disturb any historic or prehistoric ruins, burial grounds, archaeological site, or human skeletal remains, unmarked grave, grave artifact or grave marker of historical significance unless such person has a valid permit issued to him or her by the director of the historic preservation section. . . .

W.Va. Code §29-1-8a.

The statute defines "unmarked grave" as

> any grave or location where a human body or bodies have been buried or deposited for at least fifty years and the grave or location is not in a publicly or privately maintained cemetery or in the care of a cemetery association, or is located within such cemetery or in such care and is not commonly marked[.]

W.Va. Code §29-1-8a(b)(2). A "grave marker" is defined as "any tomb, monument, stone, ornament, mound, or other item of human manufacture that is associated with a grave[.]" *W.Va. Code* §29-1-8a(b)(4).

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[1] Plaintiffs suggest that something in the language of this preamble "means that the West Virginia Legislature explicitly was aware of the *Bennett* and *Pence* decisions." While the Legislature is charged with knowledge of all existing statutes and case law, it is unclear how the language of this statute references either the *Bennett* or *Pence i.e. Concerned Loved Ones* decisions directly

No specific penalty is imposed for the generalized prohibition against disturbing an "unmarked grave or grave marker of historic significance" without a permit. However, specific criminal penalties are later attached to four categories of conduct:

> [1.] A person who . . . intentionally excavates, removes, destroys or otherwise disturbs any historic or prehistoric ruins, burial grounds or archaeological site, or unmarked grave, grave artifact or grave marker of historical significance without first having been issued a valid permit by the director of the historic preservation section, or who fails to comply with the terms and conditions of such permit, is guilty of a misdemeanor. . . .
>
> [2.] A person who. . . intentionally excavates, removes, destroys or otherwise disturbs human skeletal remains of historical significance without first having been issued a valid permit . . . or who fails to comply with the terms and conditions . . . of such permit, is guilty of the felony of disinterment or displacement of a dead human body or parts thereof under . . . [§61-8-14] . . . and, upon conviction, shall be confined in the state penitentiary . . . [for 2-5 years.]
>
> [3.] A person who intentionally withholds information about the excavation, removal, destruction, or other disturbance of any historic or prehistoric ruins, burial grounds, archaeological site, or human skeletal remains, unmarked grave, grave artifact or grave marker of historical significance is guilty of a misdemeanor and, upon conviction, shall be fined not more than one hundred dollars, and may be imprisoned in the county jail not more than ten days.
>
> [4.] A person who . . . offers for sale or exchange any human skeletal remains, grave artifact or grave marker obtained in violation of this section is guilty of a misdemeanor and, upon conviction, shall be fined not less than one thousand dollars nor more than five thousand dollars, and may be imprisoned in the county jail not less than six months nor more than one year.

W.Va. Code §29-1-8a(c)(1) and (2).

In addition to the prescribed criminal penalties, the statute specifically addresses the issue of civil damages. "Persons convicted of any prohibited act . . . shall also be liable for civil damages to be assessed by the prosecuting attorney in consultation with the director of the historic preservation section." *W.Va. Code* §29-1-8a(g)(2).

1. PREEMPTION OF COMMON LAW ACTION FOR DIRECT OR INDIRECT DESECRATION OF CERTAIN GRAVES BY W.VA. CODE §29-1-8a.

It has long been held that

> [i]n determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the Legislature did not intend to innovate upon, unsettle, disregard, alter or violate (1) the common law; (2) a general statute or system of statutory provisions, the entire subject-matter of which is not directly or necessarily involved in the act; (3) a right or exception based upon settled public policy; (4) the Constitution of the state; nor (5) the Constitution of the United States.

Coal & Coke Ry. Co. v. Conley, et al, 67 W.Va. 129, 67 S.E.2d 613, 615 (1910); *Accord, Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 647 S.E.2d 879 (2007)(Statutes must be read with the common law unless it clearly appears that the purpose is to change the common law.)

In this statute, the Legislature very clearly sets forth its intent to change the existing law which it states is inadequate. "[T]here is a real and growing threat to the safety and sanctity of unmarked human graves in West Virginia and the existing laws of the state do not provide equal or adequate protection . . ." *W.Va. Code* §29-1-8a(a). It thereafter specifically defined an "unmarked grave" as one at least fifty (50) years old and, if located in a public or privately maintained cemetery, not commonly marked. *W.Va. Code* §29-1-8a(b)(2). The express language of the statute does not make the absence of a "grave marker" a condition of being an "unmarked grave" unless the grave site is located within the bounds of a publicly or privately maintained cemetery or graveyard. *Id.* By definition, even a grave with a "grave marker" is an "unmarked grave" if the grave is more than fifty (50) years old and is not located within the bounds of a publicly or privately maintained cemetery or graveyard. *Id.*

"[T]he correct approach to any statutory construction issue after the Legislature adopts explicit limitations to a preexisting common law rule must be to decide initially whether the

Legislature preempted the field and thereby left any room for judicial discretion." *State ex rel. Riffle v. Ranson,* 195 W. Va. 121, 125, 464 S.E.2d 763, 767 (1995).

West Virginia Code § 29-1-8a was first enacted in 1991. At that time there existed only one other statute which addressed the disinterment of dead bodies, West Virginia Code § 61-8-14, a criminal statute enacted in 1882. Although § 61-8-14 has since been amended, in 1991 the statute read as follows:

> [i]f any person unlawfully disinter or displace a dead human body, or any part of a dead human body, which shall have been placed or deposited in any vault, mausoleum, or any temporary or permanent burial place, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than two nor more than five years.

State v. Duncan, 179 W.Va. 391, 393, 369 S.E.2d 464, 466 (1988). In 1994, West Virginia Code § 61-8-14 was amended and reenacted adding language prohibiting desecration of a burial site and defining "desecration," which is not defined elsewhere in the Code.

The Legislature is presumed, when passing statutes, to be familiar with all existing law pertinent to the subject matter, including the common law and all judgments by the judiciary. *See e.g., Davis Memorial Hosp. v. West Virginia State Tax Com'r*, 222 W.Va. 677 (2008); *Kessel v. Monongalia County General Hosp. Co.,* 220 W. Va. 602, 648 S.E.2d 366 (2007). "[Alt]hough it does sometimes occur, unless necessary, statutes should not be construed so that two enactments in effect cover the same subject matter, wholly or in part." *Beatty v. Union Trust & Deposit Co.*,123 W.Va. 144, 13 S.E.2d 760, 762 (1941), citing *Reeves v. Ross*, 62 W.Va. 7, 57 S.E. 284 (1907); *First Nat. Bank, etc. v. De Berriz*, 87 W.Va. 477, 105 S.E. 900 (1921). "It is always presumed that the legislature will not enact a meaningless or useless statute." Syllabus point 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, Veterans of Foreign Wars of*

the United States, 147 W.Va. 645, 129 S.E.2d 921 (1963). Syl. Pt.. 3, *State v. Penwell*, 199 W.Va. 111, 483 S.E.2d 240 (1996).

> "'It is a fundamental rule of construction that, in accordance with the maxim *noscitur a sociis,* the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language, although apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.' Syllabus point 4, *Wolfe v. Forbes,* 159 W.Va. 34, 217 S.E.2d 899 (1975)." Syllabus point 1, *Banner Printing Co. v. Bykota Corp.,* 182 W.Va. 488, 388 S.E.2d 844 (1989).

Syl. Pt. 1, *Darlington v. Mangum*, 192 W.Va. 112, 450 S.E.2d 809 (1994.)

By the plain language of West Virginia Code §29-1-8a, it was intended to apply only to "unmarked graves" which is by express definition any grave at least fifty years old that is not located in a publicly or privately maintained cemetery or in the care of a cemetery association, or if said grave is located within a cemetery or graveyard, it is not commonly marked. *W.Va. Code* §29-1-8a(b)(2). With regard to "grave markers" the statue speaks only to "grave markers" *of historical significance*. *W.Va. Code* §29-1-8a(a) and (c)(1) and (2).

For this narrowly defined category of graves and grave markers, West Virginia Code §29-1-8a, sets forth the exclusive criminal and civil penalties. Plaintiffs misinterpret these arguments by suggesting that preemption under West Virginia Code §29-1-8a makes criminal and civil prosecution for desecration mutually exclusive, when in fact, the statute specifically addresses them both, but only as to "unmarked graves." The Court "'must presume that a legislature says in a statute what it means and means in a statute what it says there.' *Martin v. Randolph Co. Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E.2d 399, 419 (1995)." *Burkes v. Fas-Check Food Mart, Inc.*, 217 W.Va. 291, 296, 617 S.E.2d 838, 843 (2005).

2. NON APPLICATION TO ANY GRAVE LESS THAN 50 YEARS OLD OR MARKED GRAVES OVER FIFTY YEARS OLD WITHIN A PUBLICALLY OR PRIVATELY MAINTAINED CEMETERY OR GRAVEYARD.

> " 'In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety.' Syl. pt. 1, *Parkins v. Londeree*, 146 W.Va. 1051, 124 S.E.2d 471 (1962)." Syl. Pt. 3, *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990).

Syl. Pt. 1, *Central West Virginia Regional Airport Authority v. West Virginia*, 204 W.Va. 514, 513 S.E.2d 921 (1999). "[T]he Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." *State ex rel. Johnson v. Robinson,* 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979)." *Evans v. Evans*, 219 W.Va. 736, 740-741, 639 S.E.2d 828, 832-833 (2006). Where the legislature "declare[s] what a particular term 'means,' such definition is ordinarily binding upon the courts and excludes any meaning that is not stated." *In re Greg H.*, 208 W.Va. 756, 760-761, 542 S.E.2d 919, 923-924 (2000), citing *Colautti v. Franklin,* 439 U.S. 379, 393 n. 10, 99 S.Ct. 675, 684 n. 10, 58 L.Ed.2d 596, 607 n. 10 (1979); *see also Pittsburgh Nat. Bank v. United States,* 771 F.2d 73, 75 (3rd Cir.1985). *See also, Burgess v. U.S.*, 553 U.S. 124, 128 S.Ct. 1572 (2008).

The Legislature began its discussion with the need to protect the graves of "earlier West Virginians." *W.Va. Code* §29-1-8a(a). The definition of an "unmarked grave" requires that the body has been buried "for at least fifty years." *W.Va. Code* §29-1-8a(b)(2). The statute itself is organized among those in an article dealing with the Division of Culture and History. The definition of "unmarked graves" includes a prerequisite of fifty years and each time the term "grave marker" is used outside of the definition section of the statute it is followed by the words "of historical significance." *W.Va. Code* §29-1-8a.

With its amendment in 1994, West Virginia Code § 61-8-14, now sets forth criminal penalties not only for the unlawful disinterment or displacement "of a dead human body, or any part of a dead human body," but also intentional desecration to "any cemetery, graveyard, mausoleum or other designated human burial site[.]" *W.Va. Code* § 61-8-14(a) and (b). However, in 1991 when West Virginia Code § 29-1-8a was enacted, § 61-8-14 did not criminalize damage to the property of a cemetery or graveyard, nor did it cover damage or displacement of grave markers or ornaments in the absence of some disturbance of the dead human body. *W.Va. Code* § 61-8-14 (1882).

This is further evidence of the fact that West Virginia Code § 29-1-8a does not apply to grave sites under fifty (50) years old or "grave markers" without 'historic significance,' otherwise, the 1994, amendment to § 61-8-14 would have been completely unnecessary. "It is always presumed that the legislature will not enact a meaningless or useless statute." *T. Weston, Inc. v. Mineral County*, 219 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006), quoting Syl. Pt. 3, *United Steelworkers of America, AFL-CIO, CLC v. Tri-State Greyhound Park*, 178 W.Va. 729, 364 S.E.2d 257 (1987)(citing Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, V.F.W.*, 147 W.Va. 645, 129 S.E.2d 921 (1963)).

The Legislature did in fact preempt the common law under very specific and limited circumstances. This statute clearly preempts any action for desecration of a grave more than fifty (50) years old unless it is located within a cemetery. Plaintiffs' concerns over "the graves essentially escheat[ing] to the State and loved ones forever los[ing] any opportunity to protect these graves is misplaced. If a grave is being cared for, is properly marked within the

identifiable confines of a cemetery[2], if a decedent's grave is truly being protected by his/her loved ones, there is no need for State protection and this statute does not apply.

B. CERTIFIED QUESTION NO. 2.

As discussed above, to the extent that a "deficient" common law cause of action for desecration of the grave sites of "earlier West Virginians" may have existed, it has been preempted by West Virginia Code § 29-1-8a. What remains of a common law cause of action after the preemption by West Virginia Code § 29-1-8a only concerns graves less than fifty (50) years old, and "commonly marked" graves inside a publicly or privately maintained cemetery, regardless of age. *W. Va. Code* § 29-1-8a.

Fundamental principles of West Virginia law require that to prove negligence, it must be shown that the defendant acted or failed to act in violation of a duty owed to that plaintiff. *See e.g. Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000); *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981). "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. 2, *Honaker v. Mahon*, 210 W.Va. 53, 552 S.E.2d 788 (2001), quoting, Syl. Pt. 1, *Dicken v. Liverpool Salt & Coal Co.,* 41 W.Va. 511, 23 S.E. 582 (1895). "[Negligence] must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances, would be gross negligence with different knowledge and changed circumstances." *The Nitro-Glycerine Case*, 82 U.S. 524, 1872 WL 15368 (U.S. 1872).

[2] The question of "what is a cemetery?" is addressed later.

"The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if the required care is not exercised." Syl. pt. 8, in part, *Aikens v. Debow,* 208 W. Va. 486, 541 S.E.2d 576 (2000), quoting Syl. Pt. 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988). "'Beyond the question of foreseeability, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection[.]' 'Such considerations include the likelihood of injury, the magnitude of the burden guarding against it, and the consequences of placing that burden on the defendant.'" *Aikens* at 581, quoting *Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983).

1. COMMON LAW ELEMENTS OF [DIRECT] DESECRATION.

Black's Law Dictionary defines the term "desecrate" as follows:

> [t]o violate sanctity of, to profane, or to put to unworthy use. . . . Offense consists of defacing, damaging, pollution or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discovery his action.

Black's Law Dictionary 401 (5th ed. 1979).

While sparse, West Virginia case law involving aspects of a desecration claim -- limited to the disturbance or mishandling of a dead body, the desecration of a grave site, and the unlawful occupancy and/or other interference with a property right in a grave site -- provides some guidance as to the elements of such a claim.

"The old common law did not recognize the rights of relatives" to bring a claim for damages for desecration of a grave. *Ritter v. Couch*, 71 W.Va. 221, 76 S.E. 428 (1912). There being no property right to a dead body, in the absence of proper title to the burial site, no claim could be maintained. *Id.* However, the West Virginia Supreme Court of Appeals observed that:

> [t]he dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious ought not to need any judicial precedent. Our courts of justice should place it, at once, where it would fundamentally rest forever, on the deepest and most unerring instincts of human nature, and hold it to be a self-evident right of humanity, entitled to legal protection by every consideration of feeling, decency, and Christian duty.

Ritter at 430. Thereafter the Court held that strictly speaking "there is no right of property in a dead body, nevertheless the right to bury a corpse and preserve the remains is a legal right . . . regarded as a quasi right in property[.]" Syllabus, in part, *England v. Pocahontas Coal Co.*, 86 W.Va. 575, 104 S.E. 46 (1920). The right of redress was vested with "near relatives" and so long as "such right of burial exists by deed or by mere license . . .and is not lawfully revoked or destroyed, it may be so redressed and protected in our courts[.]" *Id.*

Not much later, the Court then clarified or expanded this quasi-property right to include the protection of not just occupied graves, but also unoccupied or wrongfully occupied grave sites. Finding that "the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement," the Court ruled that this right could be acquired through adverse possession. Syllabus, in part, *Sherrard v. Henry*, 88 W.Va. 315, 106 S.E. 705 (1921).

The Court next addressed a civil claim for desecration some sixty (60) years later in a case where the next of kin had given consent to have the body disinterred and then reinterred in an alternative location, but sought recovery for damage to the remains during the process of disinterment. Under these factual circumstances the Court found that "[a] cause of action exists for negligently or intentionally mishandling or losing a dead body, even when its disinterment

and reinterment are authorized." Syl. Pt. 2, *Whitehair v. Highland Memory Gardens*, 174 W.Va. 458, 327 S.E.2d 438 (1985).

Reiterating the requirements of a rightful burial by deed or license not having been destroyed or revoked, the Court next held that "[a] cause of action will lie for the unlawful desecration of a grave site even though no disturbance of the body interred therein can be shown." Syl. Pt. 2, *Bennett v. 3 C Coal Co.*, 180 W.Va. 665, 379 S.E.2d 388 (1989). Although the bodies interred in the grave sites at issue in *Bennett* did not suffer physical injury or disturbance, the plaintiff therein observed "cracks and holes in the graves," allegedly caused by underground mining which were to the *Bennett* Court sufficient to sustain a cause of action for desecration. *Bennett* at 668, 379 S.E.2d 391.

West Virginia jurisprudence on civil desecration, for now, culminated in *Concerned Loved Ones & Lot Owners Ass'n v. Pence*, 181 W.Va. 649, 383 S.E.2d 831 (1989), involving the logging and strip mining of a portion of land, not containing graves, but which was alleged to have been previously dedicated for cemetery purposes. The Court found that "[w]hen land has been dedicated to cemetery purposes, the next of kin of those buried in the cemetery, as well as those who own land for burial in the cemetery, have a cause of action to prevent, or recover damages resulting from, the unlawful desecration of such cemetery." *Concerned Loved Ones* at Syl. Pt. 2.

The West Virginia Supreme Court of Appeals has, in these cases, specifically recognized a civil desecration claim for: unlawful disinterment of a dead human body; mishandling of a dead human body in its disinterment, even when the disinterment was lawful; physical damage to a grave site, even without damage to the interred human body; wrongful occupation of a grave site; and damage to areas within a cemetery not containing graves. By category there are claims

for physical invasion of the grave through either wrongful occupation or physical damage to a grave site or the corpus therein, but there are also claims for damage to the area surrounding a grave site located within a cemetery, as well as claims for physical damage to tombstones and other grave artifacts.

Based upon the Court's prior treatment of civil claims for desecration, and the categories of claims historically recognized based on specific factual circumstance, there exists both a claim for desecration of a grave site (including the interred remains and/or the associated marker or artifacts) and a claim for desecration of the non-grave site areas contained within the bounds of a designated cemetery.

It is respectfully suggested that the following elements of a cause of action for direct desecration are required by the law of this State:

1. The right of burial exists, either by deed or mere license, and has not been lawfully destroyed or revoked;

2. The Defendant knew or should have known of the location of the grave site either by virtue of its notation on a tax or other agency issued map, or its notation within a deed or other document located within the chain of title, or by virtue of its location within a clearly marked, bounded or otherwise delineated area set apart for the burial of dead human bodies; and

3. The Defendant thereafter, without the necessary consent, disinterred human skeletal remains, including bones, teeth, hair or tissue of a deceased human body; or engaged in harmful physical contact or disturbance of: the earth directly above human skeletal remains, a tombstone, monument, ornament, stone, mound or other item of human manufacture that is associated with a grave, or any grave artifact; or

4. The Defendant, having received the necessary consent for disinterment, negligently or intentionally mishandled the human skeletal remains, tombstone, monument, ornament, stone, mound or other item of human manufacture associated with a grave, or any grave artifact; and

5. Proximately caused injury or damage.

2. THE TORT OF DIRECT DESECRATION SHOULD NECESSARILY CONTAIN THE ELEMENTS OF KNOWLEDGE AND/OR NOTICE.

The existing desecration case law in West Virginia discusses the existence of a duty of care only in factual circumstances where the graves are either contained within a traditional or otherwise delineated "cemetery" or where the defendant appears to have known, or should have known, of the existence of the graves through the examination of the title to the property. *See e.g., Bennet v. 3 C Coal Co.* 180 W.Va. 665, 669, 379 S.E.2d 388, 392 (1989)(Factual recitation repeatedly states that the mining maps indicated a block of coal had been left under the cemetery as mandated by state mining requirements); *Concerned Loved Ones and Lot Owners Association of Beverly Hills Memorial Gardens v. Pence*, 181 W.Va. 649, 654, 383 S.E.2d 831, 836 (1989)(Claims were brought against cemetery association and president); *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 327 S.E.2d 438 (1985)(Individual brought action seeking damages for alleged mishandling and loss of several bodies during exhumation and reburial during a process of relocating a cemetery due to highway construction); *England v. Central Pocahontas Coal Co.*, 104 S.E. 46 (1920)(Description of location as in McDowell County, 100 yards from the mouth of Upper Shannon Branch, a tributary of Tug River, 30 or 40 yards back from the bank of said branch, and a part of a tract of land owned in 1880 by Thomas M. Lester, was sufficiently certain for identification of cemetery.); *Ritter v. Couch*, 71 W.Va. 221, 76 S.E. 428 (1912)(Plaintiff brought action to stop defendant from removing remains so that land could be put to alternative use.)

"Under principles of ordinary negligence, people are not required to guarantee, 'ensure' or otherwise take extraordinary caution to make certain that their actions will be accomplished

safely. Instead, each person is required to act only as an ordinary, prudent person." *Honaker v. Mahon* 210 W.Va. 53, 58, 552 S.E.2d 788, 793 (2001). There is no basis in West Virginia tort law generally or in the cases discussing desecration specifically to find an absolute duty to discover hidden or concealed graves, graves located outside of the delineated area of a graveyard, or to otherwise discover unmarked graves of which the defendant had no actual or constructive knowledge.

In the only West Virginia case in this area of law which touches on the sufficiency of a cemetery description, the *England* Court noted that "[g]enerally, a cemetery lot in the country is a notable object and has well-defined boundaries, and is easily identified." *England* at 48. In the cases of *Ritter*, *Sherrard*, *Whitehair*, *Bennett* and *Concerned Loved Ones*, there was never any question regarding the ability of the defendant to locate the area containing graves.

West Virginia case law has never imposed liability for desecration where knowledge of the grave(s) was not had by the alleged torfeasor *before* the disturbance occurred. There is likewise ample authority throughout the country for requiring notice of the existence of the burial grounds before imposing liability for desecration. *See e.g., O'Neal v. Veazey*, 143 Ga. 291, 84 S.E. 962 (1915)(Finding for plaintiff the court noted that defendant purchased property surrounding burial ground with full notice of the lot's reservation.); *Frost v Columbia Clay Co.*, 130 SC 72, 124 SE 767 (1924)(court held that plaintiff might not be entitled to recover where it was alleged that defendant did not know that a graveyard was present, the graveyard had not been used for over 20 years, was unenclosed, contained no markers or monuments, had been allowed to grow up in weeds and bushes, and defendants immediately stopped digging when they discovered bones.); *Michaels v. Crouch*, 122 S.W.2d 211 (Tex. Civ. App., 1938)(Although defendant purchased land containing graves without any reservation in his deed or chain of title,

area was fenced and some graves were marked with tombstones providing defendant adequate notice.); *Mayes v. Simons*,189 Ga 845, 8 S.E.2d 73 (1939)(Finding that burial lot had lost its appearance as a place of burial before land was purchased and that plaintiffs were not entitled to recover against individuals who cultivated the private burial ground, where the land was acquired in good faith and without notice of the cemetery.); *Johnson v. Kentucky-Virginia Stone Co.,* 286 Ky 1, 149 S.W.2d 496 (1941)(Defendant contractor would not be liable for injuries to the grave containing the plaintiffs' child, which resulted from the defendant's construction of a highway, if the right of way passed through a cultivated field, there was nothing to indicate that graves were in the ground, and the defendant was without notice that such graves existed.)

It is respectfully suggested that the equitable elements of the tort of direct desecration must include the right of burial; prior knowledge by the alleged tortfeasor; harmful physical contact or damage to the interred remains, grave site or other grave artifact; and resulting damage.

C. CERTIFIED QUESTION NO. 3.

The burden of proving damages by a preponderance of the evidence is always upon the plaintiff. *See e.g., Taylor v. Elkins Home Show, Inc.*, 210 W.Va. 612, 558 S.E.2d 611 (2001). There is no legally sustainable reason why the damages available in a desecration claim should be otherwise.

"A breach of duty, without an injury is legally referred to as a *damnum absque injuria* and is not actionable." *Absure, Inc. v. Huffman*, 213 W.Va. 651, 655, 584 S.E.2d 507, 511 (2003), citing *Guyan Motors v. Williams*, 133 W.Va. 630, 57 S.E.2d 529 (1950). However, our Court has noted as a general public policy the "fundamental theory of the common law that for every wrong there should be a remedy." *Rohrbaugh v. Wal-Mart*, 212 W.Va. 358, 365, 572

S.E.2d 881, 888 (2002), quoting *Lambert v. Brewster,* 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924). Consequently, in limited factual circumstances the Court has allowed an award of nominal damages.

> Where a mere breach of contract is shown, without actual damage calling for compensation, nominal damages may be recovered from the mere fact of such breach of contract; but, if compensatory damages are demanded for actual damage, the plaintiff must in some way show by evidence facts and data affording means by which a jury can safely ascertain and fix the amount of damages. A jury cannot go by mere arbitrary conjecture or estimate.

Syl. Pt. 6, *Douglass v. Ohio River R. Co.*, 51 W.Va. 523, 41 S.E. 911 (1902)(internal citations omitted.)

And yet "[i]n order to warrant a substantial recovery in a tort action, the plaintiff must show a legal injury and a perceptible resultant damage [and 't]he wrong done and the injury sustained must bear to each other the relation of cause and effect.' " Syl. Pt. 11, *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 W.Va. (1961), quoting Syl. Pt. 2, *Chafin v. Gay Coal & Coke Company*, 113 W.Va. 823, 169 S.E. 485 (1933).

1. ELEMENTS OF DAMAGE IN COMMON LAW ACTION FOR DIRECT DESECRATION.

West Virginia desecration cases contain little analysis of recoverable damages. The complaint in *Ritter* sought the right "to enjoin the unlawful removal of the remains" of their "blood relatives - fathers, mothers, sisters and brothers." *Ritter* at 428-429. The plaintiffs in *England* alleged "great anguish, mortification, humiliation, insult and injury" and damages for the unlawful disinterment of their mother and son, respectively. *England* at 46.[8] The plaintiff in

[8]The defendant in *England* was alleged to have performed the disinterment without the knowledge or consent of the plaintiffs, causing physical damage to the caskets holding the bodies, exposing the bodies to the public gaze and thereafter reinterring the remains in an undisclosed location. *Id.*

Sherrard sought an injunction to stop the removal of her uncle's body from a burial lot claimed by the defendant. *Sherrard* at 705. The plaintiff in *Whitehair* sought to recover damages for mental anguish allegedly caused by defendants' actions in losing or misplacing the remains of her sister and two aunts, failing to remove all of the remains of her cousin, and refusing to remove the remains of her uncle and father, after having received consent to disinter the bodies to make way for a highway project. *Whitehair* at 459-460. The plaintiff in *Bennett* sought damages for mental distress caused by disturbance of a family cemetery due to alleged mining subsidence, not resulting in any damage to the bodies interred therein. *Bennett* at 667-668. The plaintiffs in *Concerned Loved Ones* brought an action against the cemetery association and its president alleging breach of contract, tort and violations of public policy relating to the sale and subsequent timbering and strip mining of 20 acres of alleged cemetery land which had yet to be developed, sold or otherwise physically prepared to inter bodies. *Concerned Loved Ones* 649-651.

2. DAMAGES MUST BE PROVEN WITH REASONABLE CERTAINTY.

"[W]ithout proper proof of damages no recovery can be had in any case." *Konchesky v. S.J. Groves and Sons Co.*, 148 W.Va. 411, 417, 135 S.E.2d 299, 303 (1964). It is not the defendant's job to try and ascertain the value of plaintiff's alleged damages; the burden of proof regarding the particular amount of damages always lies with the Plaintiffs. *Stone v. Gilbert*, 133 W.Va. 365, 56 S.E.2d 201 (1949). With regard to a claim for compensatory damages in a desecration case, the burden is on the plaintiff to prove actual damages with reasonable certainty. *Stone* at 373-374, 56 S.E.2d 205. The Court has even held that in the absence of actual damage, some award of nominal damages may be warranted. *Concern Loved Ones* at 656. The

genuinely, unworkable issues presented in the instant case arise from the Court's previous language regarding mental distress claims coupled with the seemingly endless line of 'next of kin' who can make a claim.

The Court has recognized that "a cause of action for negligent or intentional mishandling of a dead body does not require a showing of physical injury or pecuniary loss. Mental anguish is a sufficient basis for recovery of damages." *Whitehair* at 462-463. It is the Plaintiffs' attempt to expand this to encompass not only desecration of a grave site without injury to an interred body, but to allow a recovery for mental anguish alone for desecration of cemetery property not containing graves that stretches the limits of justice and defies general tort principals regarding damages.

The *Bennett* Court was the first to hold that a claim for mental distress may be recovered for "disturbance or desecration" of a grave without injury to the body therein interred. In doing so it held that:

> [d]espite some conceptual differences in theories underlying a cause of action for negligent disturbance or mishandling of a dead body and the desecration of a grave site, there is a unifying rationale for both causes of action . . . . Implicit in this belief is the recognition that family members will suffer mental distress if either the bodies or the grave sites of their loved ones are disturbed or desecrated. The reasons for recognizing a claim for mental distress for negligent handling of dead bodies. . . obviously apply to desecration of graves: "What all these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." Prosser & Keeton . . . .

Bennett at 670-671.

Initially, it is important to note that *Bennett*'s quote of Prosser & Keeton was taken out of context, for it originally applied only to "the negligent mishandling of corpses." *Whitehair* at 465. Additionally, *Bennett*'s "guarantee the claim is not spurious" is prefaced by a belief that

"family members will suffer mental distress if . . . the grave sites *of their loved ones* are disturbed[.]" *Bennett* at 671 (emphasis added.) It is here that *Bennett*'s reliance on *Whitehair* as analytic rationale or precedent for its ruling fails, causing even more problems when *Bennett* is cited as precedent by the Court in *Concerned Loved Ones.*

If Ms. Whitehair's allegations are taken as true, she endured the mishandling and loss of her sister and aunts' remains; the exhumation of only a portion of her cousin's remains; and having the defendant refuse to disinter her father and uncle whose grave sites were then presumably left under the new highway constructed through the cemetery. *Whitehair* at 459-460. Without question, the *Whitehair* Court's reliance and citation of Prosser & Keeton with regard to the likelihood of genuine and serious mental distress serving as a guarantee for the validity of Ms. Whitehair's claim for the mishandling of dead bodies is appropriate.

However, to equate an experience such as Ms. Whitehair's with that of a *Bennett* family member observing physical disturbance of the earth around the family's graves, without injury to or exposure of their remains, is dramatic at best. The "fundamental theory of the common law that for every wrong there should be a remedy" must be balanced against the necessity of proof of injury for every wrong. *Rohrbaugh,* 365, 572 S.E.2d 888.

The undeniable truth is that with or without a proper 'property' right in a dead body, there can be no justifiable computation of damages for the physical injury to or loss of some part or whole of the corpus. Compensatory damages can be calculated for reinterment costs, damage to vaults, coffins, monuments or grave artifacts, but there is no standard to measure the emotional disturbance.

On the other hand are those damages caused by disturbance to grave sites without injury or exposure to decedent's remains. These are, for better or worse, physical damages capable of

objective computation: i.e. the cost of restoring the terrain, replacing or reseeding the ground cover, or in the most extreme cases, the cost of relocating the grave sites. These are, by necessity, property damages, subject to the principals of repair, replacement and diminution of value. Unlike damage to a dead human body, there is no permanent injury which cannot be remedied. The need and justification for an award of damages for mental distress is lost.

This practical truth is unintentionally highlighted in the *Bennett* holding allowing mental distress damages for disturbance of a grave site. In relying on *Whitehair*, the *Bennett* Court acknowledges that the case differs factually, and states that "[h]ere, the facts are more analogous to *England*, where the bodies in a private cemetery were unlawfully disturbed." *Bennett* at 670. However, *Bennett* is clearly distinguishable from *England* because the bodies were not disturbed as they were in *England*. The *Bennett* Court also states:

> courts have allowed similar suits for damages for disturbing a graveyard even though the bodies are not disturbed. At least one court has recognized such right of recovery where the surface of the grave was cracked because of the coal being removed under the surface. *Nichols v. Woodward Iron Co.*, 267 Ala. 401, 103 So.2d 319 (1958).

Bennett at 670. However, when one actually reads the *Nichols* case it barely stands for such a proposition at all.

The issue in *Nichols* was the duty of the mining company to provide lateral support to the land wherein Ms. Nichols' husband was buried. *Nichols* at 402, 103 So.2d 320. Although Ms. Nichols sued for disturbance of her husband's grave and sought mental anguish damages, the issue in that case was not one of desecration, but of subsidence. *Id.* The *Nichols* Court did not discuss any aspect of the case other than the appropriateness of the jury instructions regarding

duty of adjoining land owners to provide lateral support and is certainly not a similar suit which provides weight to the *Bennett* Court's ultimate ruling. [9]

Thereafter, *Bennett* cites, among others, *Robinson v. Providence Mausoleum, Inc.*, 359 So.2d 1317 (La. App. 1978), stating that "[i]t would seem more fitting to recognize the mental distress exception arising from disturbance or desecration of dead bodies and grave sites." *Bennett* at 671. *Robinson* appealed, as insufficient, an award of damages for the defendant burying her husband in the wrong grave and then exhuming and reinterring his body. *Robinson* at 1318.

> The cemetery realized its mistake the next morning and, without consulting plaintiff, exhumed the casket to reinter it in plaintiff's plot. Meanwhile plaintiff, who had "noticed" at the original interment that the grave was not her own plot, returned for an explanation and learned of the error and of the casket's having already been exhumed for reinterment. Plaintiff saw the casket, in the condition one must expect from interment in New Orleans: wet and muddied, with its top cracked from the weight of the earth and part of its cloth covering loosened by moisture and movement. Plaintiff waited almost an hour while her own plot was prepared and reinterment was accomplished.

Robinson at 1318. The Court noted that the plaintiff was "most naturally, 'shocked' and upset" but that she "had no medical expenses and no loss of earnings as a result of her shock" and "appears to have borne the shock of his necessary disinterment and reburial admirably well." *Id.* The *Robinson* Court stated "[t]his is not a case of outrage" and in affirming only a nominal award to the plaintiff, distinguished the case from others involving "deliberate profanation of graves for profit," "autopsy over the widow's expressed objection," "refusal by a mortician to return a corpse to the family," and "accidental destruction of the body, preventing a normal funeral." *Id.* "We concede that the award of $100 may be minimal but, because there were no aggravating circumstances and no dire consequences to the widow, we conclude that the award is

[9] Incidentally, *Nichols, supra* has not been cited by any other jurisdiction as a grave desecration case, but only as to issues involving the duty of adjoining land owners to provide lateral support.

within the trial judge's [discretion.]" *Id.* *Robinson* did not *assume* some great mental distress to the plaintiff by reason of her husband being disinterred without her permission or even by reason of her witnessing the condition of his casket. *Id.* To the contrary, the *Robinson* Court declined to increase her nominal award in the absence of true injury or distress to the plaintiff. *Id.*

If anything, *Robinson* stands for distinguishing as less severe cases which do not involve intentional conduct or physical damage to a body rather than that claims for desecration of dead bodies and disturbance of grave sites should be treated equally.

The remaining cases cited by *Bennett* in support of the mental distress exception for disturbance of a graves site, *Dennis v. Keillor*, 105 Mich.App. 463, 306 N.W.2d 324 (1981), *Perry v. Cullipher*, 69 N.C. 761, 318 S.E.2d 354 (1984) and *Matthews v. Forest*, 235 N.C. 281, 69 S.E.2d 553 (1951), vary in their actual support of such a proposition.

Dennis, supra, is of no support as it involves a cause of action for physical injury to a tombstone and does not discuss emotional damages. *Dennis* at 464, 306 N.W.2d 325.

Perry, supra, largely involves the issue of class certification of claims for desecration of a cemetery, the facts of which do not detail the exact nature of the desecration. However, the *Perry* Court does acknowledge that "[i]n this case, the damages consist largely of mental suffering by those who have had the graves of loved ones desecrated." *Perry* at 763, 318 S.E.2d 356.

Only the case of *Matthews, supra,* stands firmly for the proposition of allowing mental distress damages, without a showing of physical injury to the plaintiff or disturbance of the interred body. Finding the intentional destruction and carrying away of flowers from his wife's grave to create a cause of action for trespass, the *Matthews* Court held that "compensatory damages may be awarded to a plaintiff *for mental suffering actually endured by him* as the

natural and probable consequence of a trespass to his burial lot, even though his mental suffering may not be accompanied by any physical injury." *Matthews* at 285, 69 S.E.2d 556 (emphasis added.)

Nevertheless, even if this Court were to accept the rationale of the *Bennett* Court as to the allowance of damages for mental distress in the absence of any physical injury to the plaintiff or to the body of the decedent through which the claim is made, the facts of *Bennett* still show that there was *actual physical damage to the grave sites* and not just the cemetery area. *Bennett* 668, 379 S.E.2d 391. Additionally, one of the errors identified by the *Bennett* Court was that "the entire damage award was predicated on the plaintiff's mental distress," suggesting the court recognized a need for interjecting some reasonable limitation on mental distress damage awards in these types of cases. *Bennett* at 674, 379 S.E.2d 397.

However, the court in *Concerned Loved Ones* held that:

> when land has been dedicated to cemetery purposes, the next of kin of those buried in the cemetery, as well as those who own land for burial in the cemetery, have a cause of action to prevent, or recover damages resulting from, the unlawful desecration of such cemetery.
>
> . . .
>
> The damages that the plaintiffs would be entitled to in this case may be compensatory or only nominal depending upon the nature of the harmful acts as the evidence at trial demonstrates. It has been held that in this type of action, nominal damages at least are awardable, and compensatory damages may be recovered if actual damage is shown . . . The principal that "[d]amages for mental distress may be recovered by the next of kin for the disturbance or desecration of a relative's grave[.]" syl. Pt. 3, *Bennett v. 3 C Coal Co.*, . . . is equally applicable here.

Concerned Loved Ones at 656, 383 S.E.2d 838. The reader is then left with the impression that a cause of action for mental distress damages exists for the next of kin of those buried in the cemetery *and* those who own land for burial in the cemetery, without the necessity of actual physical injury to any remains interred in the cemetery, without the necessity of actual physical

injury to any occupied or unoccupied grave site, and without the necessity of actual physical damage to any monument, tombstone or the like. *Id.* The factual circumstances and holding of *Concerned Loved Ones* would justify at least nominal damages for mental distress which is presumed as a matter of law to have been suffered by all next of kin of <u>any</u> decedent buried <u>anywhere</u> in the other fifty (50) acres of the cemetery for disturbance of an area that does not even contain grave sites. *Id.* This could not possibly have been the intention of the court; but requires attention and/or clarification by this Court, which must clearly define and segregate the multitude of claims falling under the desecration umbrella and provide some logical basis for both the general right to a remedy in these cases and an actual award of damages, be it for property damage or mental distress.

D. CERTIFIED QUESTION NO. 4.

The term "indirect desecration" adopted by the lower court and held to justify an awared of damages, has not yet appeared in West Virginia jurisprudence. Consequently, to the extent that such a cause of action exists, it must be in some manner distinguishable from a claim for "direct desecration." Presumably, an "indirect desecration" claim must be something on the order of that cause of action allowed in *Concerned Loved Ones* where no physical damage occurred to the interred body, vault, casket, tombstone, monument or earth above or surrounding the actual grave site or grave shaft. However, if it is to exist, such acts falling within the purview of the claim must still constitute "desecration," i.e. a violation of sanctity, an unworthy use, or pollution of the area. *Black's, supra.* Additionally, being necessarily further removed from the vicinity of the interred loved one, or grave site, the damages in a claim for "indirect desecration" would not carry with them this presumption of mental distress "guaranteeing that the claim was not spurious."

1. COMMON LAW CAUSE OF ACTION FOR INDIRECT DESECRATION IN WEST VIRGINIA.

Assuming this Court perceives a need for the creation of a cause of action for "indirect desecration," General Pipeline proposes the following elements:

1. The right of burial in the grave site exists, either by deed or mere license, and has not been lawfully destroyed or revoked;

2. The Defendant has knowledge or the grave site because it is located within a publicly or privately maintained cemetery or in the care of a cemetery association;

3. The Defendant thereafter, without the consent of the next of kin, unlawfully entered into the area set apart for the burial of dead human bodies and violated its sanctity; put the area to unworthy use; defaced, damaged, polluted or otherwise mistreated the area in a way in a manner in which proximately caused damage to the avenues, walks and/or grounds of the cemetery, including any tree, plant, shrubbery or ornamental item that the defendant knew or should have known would outrage the sensibilities of persons likely to observe or discover his or her actions; and

4. Even in the absence of property damage, if the desecration was intentional, damages may be awarded.

2. THE TORT OF INDIRECT DESECRATION MUST NECESSARILY BE LIMITED TO CLEARLY BOUNDED CEMETERIES.

Claims involving interred bodies, grave sites, tombstones and/or monuments are direct desecration. If this Court creates or acknowledges a cause of action in West Virginia for "indirect desecration" (i.e. an act of desecration other than that involving physical contact with interred bodies, grave sites, tombstones and/or monuments), because that same act may be desecration when performed to a grave but not when performed elsewhere, some reasonable notice of the limits of potential liability must be drawn. The area within which a tortfeasor can be held liable for conduct in violation of the sanctity of the grave site (other than directly

involving the grave site itself) must be identifiable so as to provide notice to a potential defendant and impose reasonable limitations to the making of such a claim. Absent such a limitation, a cause of action for indirect desecration not involving damage to a grave site or contents or markers (which if involved makes the act one of direct desecration) would be completely unworkable in a rural state such as West Virginia.

Setting aside for a moment the identity of the individual(s) who should have the right to prosecute a claim for "indirect desecration," practical application of the tort would not be difficult in circumstances involving traditional cemeteries. Those responsible for the care and maintenance of the cemetery have identified it (with a physical barrier - such as a fence, embankment or plantings - or by some clearly identifiable differences in the land itself - mowed grass in the middle of a woodland or meadow - or clearly visible monuments, markers or signs) as an area of land to be held sacred so that it is reasonable to hold that any insult or injury to the cemetery is an indirect insult to the grave sites themselves. The problem arises with unmarked and unmaintained grave sites to which application of an "indirect desecration" claim becomes completely unworkable. Plaintiffs' assertion that "Crystal Block Cemetery has been identified as a cemetery in the adduced death certificates of the Plaintiffs' decedents" does nothing to establish any notice by the Defendants of an area which was not located on any map or deed, or otherwise reasonably set apart from its surroundings.

Most would agree that, however distasteful an activity outside of a cemetery may be, absent encroachment into a cemetery, the site has not been desecrated (although there may be other claims). Most would agree that an ATV operator riding around inside a cemetery is engaged in at least questionable behavior even if he does not physically run over the grave sites; however, if the same ATV rider is riding outside of a dividing fence, he is not likely to be seen as

being engaged in desecration regardless of how close any grave site may be to the other side of the fence.

If that same collection of graves is located in the woods or fields of rural West Virginia, without a fence or barrier and without, either by choice or the passage of time, any physical indications, such as grass or landscaping which might mark the confines of a burial area, is that ATV operator who rides through the area without passing over a grave desecrating any of the grave sites in the area? Does it matter if he is without prior knowledge of the existence of the graves, or if the graves have or do not have markers, or if the area is not designated on any deed or map as containing graves? If he passes outside the area of the graves, how far away must he stay to avoid liability and from what must he keep his distance - any grave or some line connecting the outer edges of the graves? Is three feet far enough or is five feet too close? Does he desecrate them all or just those few closest to his path?

It is impossible for an individual to show proper deference to a cemetery, graveyard or collection of graves without knowing the boundaries within which he must modify what might otherwise be considered normal non-tortious behavior; he or she must know or have reason to know of the existence of the cemetery. Our Court has held that:

> [a] cemetery is a place where dead bodies of human beings are buried; an area of ground set apart for the burial of the dead, either by public authority or private enterprise. It includes not only lots for depositing the bodies of the dead, but also such avenues, walks and grounds as may be necessary for its use, or for shrubbery and ornamental purposes.

In re Hillcrest Memorial Gardens, Inc., 146 W.Va. 337, 119 S.E.2d 753 (1961), citing 14 C.S.J. *Cemeteries* §1, page 63 and 10 Am. Jur., *Cemeteries*, §2, page 487. The definition of a cemetery necessarily requires that the area of ground be "set apart." There is no West Virginia case

approving or allowing a claim for desecration of a grave, indirect or otherwise, in which the prior knowledge of the defendant of the existence of the grave or the associated cemetery is not clear.

The allowance of a claim for indirect desecration to an undelineated area containing unmarked graves is an extension of liability well beyond any reasonable interpretation or application of tort law. There must be some reasonable limit to such a claim which this Court, in the absence of any previous guidance, must now provide.

E. CERTIFIED QUESTION NO. 5.

This Court has previously held that "[k]indred of the dead may maintain a suit in equity to enjoin the unlawful removal of the remains of such dead from their graves." *Ritter* at 428. Plaintiff Ritter and others had brought suit to enjoin the defendants from "attempting to remove, transfer, or obliterate in any way the graves" of their "blood-relatives - fathers, mothers, sisters and brothers." *Ritter* at 428-429. *England* allowed "near relatives" to bring an action to collect damages for the desecration of the graves and remains of a mother and a son of the plaintiffs. *England* at 46. The action in *Sherrard* was brought by a niece to restrain the removal of her uncle's body from the grave site claimed by another; the cross-complaint sought and was granted relief as against "one who buries the body of his dead relative." *Sherrard* at 705.

The cause of action for mishandling, during disinterment, a dead body in *Whitehair* was said to lie with "the party with the right to possession of the body" "usually the surviving spouse" assuming that "he or she was living with the decedent at the time of death." *Whitehair* at 465. In the event "the spouse is deceased, the cause of action passes to the next of kin, in order of relation established by the statute governing intestate succession." *Id.* However, as noted by the court in *Whitehair,* the issue of the proper party was not made an issue by the parties, making *Whitehair* dicta on this point.

The plaintiff in *Bennett* "lived near the cemetery and had maintained it throughout the years"; "about seventeen family members and relatives," "including his father, mother, a brother, two sisters, and one son," were buried in the area "at sites selected by the plaintiff." *Bennett* at 667-668. The court held that "[d]amages for mental distress may be recovered by the next of kin for the disturbance or desecration of a relative's grave." *Bennett* at Syl. Pt. 3. The cause of action in *Concerned Loved Ones* was extended to cemetery lot owners and next of kin of those buried in the cemetery. *Concerned Loved Ones* at Syl. Pt. 2.

"Cemetery lot owners" is a clear identification of a class of individuals who may bring suit and collect damages. Unfortunately, decedent's "next of kin" does not provide such a clear identification. Further, it is clear that there either is or should be a distinction in the law between those who could enjoin disinterment and/or collect for property damages and those who can collect damages for emotional distress.

1. NEXT OF KIN TO BE DEFINED AS PROVIDED BY W.VA. CODE §42-1-1, et seq.

The court in *Whitehair v Highland Memorial Gardens, Inc.*, 174 W.Va. 458, 327 S.E.2d 438 (1985) at FN2, stated that:

> we believe it is important to note that the cause of action ordinarily belongs to the party with the right to possession of the body . . . . usually the surviving spouse . . . . [or] if the spouse is deceased, the cause of action passes to the next of kin, in order of relation established by the statute governing intestate succession. . . .

Whitehair at 463, 327 S.E.2d 443-444 (internal citations omitted.)

This simple statement by the court in *Whitehair* meant nothing in that decision because the plaintiff apparently was the only claimant. If, however, there had been other descendants of the decedents, problems would have arisen in identification and in allocating the claims which would probably have resulted in a different resolution by the court.

Passing the cause of action in order of descent and distribution as provided for in West Virginia Code §42-1-1 *et. seq.*, requires the identification of the decedent's descendants. "'Descendant' of an individual means all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this code." *W.Va. Code* §42-1-1(5).[10] Based upon intestate succession, the entire cause of action would pass to the surviving spouse, as long as the decedent either does not have any living descendants, or "all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent[.]" *W.Va. Code* §42-1-3.

Translation - if the spouse is living, as long as the surviving spouse does not have any children which are not also those of the decedent, then the entire cause of action would pass to the surviving spouse. However, if the surviving spouse has children which are not children of the decedent, but the decedent only has children that belong to the surviving spouse, then the surviving spouse is entitled to three fifths. *W.Va. Code* §42-1-3(b). If the decedent has children who do not belong to the surviving spouse, then the surviving spouse is entitled to one half. *W.Va. Code* §42-1-3(c).

With regard to any portion of the cause of action which does not pass to the surviving spouse, or if there is no surviving spouse, the cause of action would pass "[t]o the decedent's descendants by representation[.]" *W.Va. Code* §42-1-3a(a). "If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent[.]" *W.Va. Code* §42-1-

[10] West Virginia Code §42-1-1, does not define "child." A "'[p]arent includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent or grandparent." *W.Va. Code* §42-1-1(26).

3a(b). "If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation[.]" *W.Va. Code* §42-1-3a(c).

"Representation" would divide the cause of action "into as many equal shares as there are: (i) Surviving descendants in the generation nearest to the decedent... ; and (ii) deceased descendants in the same generation who left surviving descendants, if any." *W.Va. Code* §42-1-3d(2)(b). "Each surviving descendant in the nearest generation is allocated one share." *Id.* "The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent." *Id.* Translation - if the decedent (who has no surviving spouse) had three children and each child has two children (grandchildren), if all of the decedent's children are living, then each of them would get 1/3 (one third) of the cause of action. If, however, two of the children predeceased the decedent, then the surviving child would get 1/3 (one third), the other 2/3 (two third) would be combined and divided equally between the decedent's grandchildren, but only the children (grandchildren) of the deceased children.

Translation - in order to identify the person(s) with the right of action in a desecration case, it is necessary to identify all of the decedent's descendants, and if any of the decedent's descendants have predeceased the descendant, then their date of death must also be identified. This could prove in certain factual circumstances to be an insurmountable task. The question then becomes what portion or share of the cause of action for desecration must a person have before he or she can bring the claim, or alternatively how much of the total cause of action do the descendants have to combine in order to bring the action.

2. RIGHT OF RECOVERY LIMITED TO PERSON OR PERSONS OF CLOSEST AND EQUAL DEGREE OF KINSHIP.

> 'Whether a single wrongful act causing different injuries, or *injuries to different rights*, gives rise to more than one cause of action, depends upon whether a cause of action is considered to be the act *causing the injury* or the *injury inflicted.* If the cause of action is considered to be the wrongful act, then all of the damages sustained thereby, whether to person or property, are properly sought in one suit[.]'
>
> . . .
>
> This well established single cause of action rule is supported by logic and is well founded in reason. It accurately manifests the principle that a cause of action inheres in the causative aspect of a breach of legal duty, the wrongful act itself, and not in the various forms of injury which flow therefrom.
>
> . . .
>
> It is authoritatively said. . . that the existence of only one cause of action benefits both plaintiff and defendant. It frees the plaintiff of delay and burdensome expense and relieves the defendant of the injustice of being subjected to more than one suit for a single tort. Furthermore, the rule is in harmony with public policy and the tendency toward simplicity and directness in the determination of controversial rights and the elimination of multiplicity of suits.

Warner v. Hedrick, 147 W.Va. 262, 267-268, 126 S.E.2d 371, 374-375 (1962)(emphasis in original)(internal citations omitted.) Although our court has not had the appropriate opportunity to apply this logic to a claim for desecration, other courts have held similarly in desecration cases.

"It is universally agreed that the right of action of the 'next of kin' is a family right, and daughters and sons or brothers and sisters may maintain one action and not a separate action by each of them." *North East Coal Co. v. Pickelsimer*, 253 Ky. 11, 68 S.W.2d 760, 763 (1934); *Accord, Louisville Cemetery Asso. v. Shauntee*, 376 S.W.2d 533, 534 (Ky., 1964).

As previously discussed, this Court has over the years melded the tort or cause of action for injury to an interred body with the cause of action for injury to a grave site with the cause of action for injury to the area 'near' a grave site with a cause of action for mental distress arising

from disturbance or desecration of an interred body, grave site or area 'near' grave sites. The court has then identified the individuals who may assert this patchwork of torts or rights as the next of kin in accordance with descent and distribution.

Rule 17 of the West Virginia Rules of Civil Procedure requires that every action be prosecuted in the name of the real party in interest. "[T]he purpose of *W.Va.R.Civ.P.* Rule 17(a) is to ensure that the party who asserts a cause of action possesses, under substantive law, the right sought to be enforced." *Keesecker v. Bird*, 200 W.Va. 667, 677, 490 S.E.2d 754, 764 (1997). "The requirement that claims be prosecuted only by a real party in interest enables a responding party to avail himself of evidence and defenses that he has against the real party in interest, *to assure him of finality of judgment, and to protect him from another suit later brought by the real party in interest on the same matter.*" *Keesecker* at 677, 490 S.E.2d 764 (internal citations omitted)(emphasis added.)

"In its modern formulation, Rule 17(a) protects a responding party against the harassment of lawsuits by persons who do not have the power to make final and binding decisions concerning the prosecution, compromise, and settlement of a claim." *Keesecker* at 677, 490 S.E.2d 764, citing *Campus Sweater and Sportswear Co. v. M.B. Kahn Const. Co.,* 515 F.Supp. 64, 81 (D.S.C.1979), *aff'd,* 644 F.2d 877 (4th Cir.1981). Under Rule 17, plaintiffs must show that they possess the right to enforce these claim and have a significant interest in this litigation. *Id.*

Additionally, Rule 19 of the West Virginia Rules of Civil Procedure requires the joinder as parties (1) persons in whose absence complete relief cannot be accorded among the current parties, or (2) persons who claim an interest relating to the subject of the action and are so situated that the disposition of the action in the person's absence may (I) impair or impede the

person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. *W.Va.R.Civ.P.*, Rule 19(a). When a person who fits the above description as set forth in Rule 19(a)(1) and (2) cannot be joined "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." *W.Va.R.Civ.P.*, Rule 19(b).

"'[T]here is no precise or universal test to determine when a person's interest is such as to make him an 'indispensable party'.' *Dixon v. American Industrial Leasing Co.*, 157 W.Va. 735, 740, 205 S.E.2d 4, 7 (1974)." *State ex rel. One Gateway v. Johnson*, 208 W.Va. 731, 735, 542 S.E.2d 894, 898 (2000). However, as a general rule,

> . . .all persons who are materially interested in the subject-matter involved in a suit, and who will be affected by the result of the proceedings, should be made parties thereto, and when the attention of the court is called to the absence of any of such interested persons, it should see that they are made parties before entering a decree affecting their interests. Syllabus, *Manufacturers' Light & Heat Co. v. Lemasters,* 91 W.Va. 1, 112 S.E. 201 (1922).

Syl. Pt. 3, in part, *State ex rel. One Gateway v. Johnson*, 208 W.Va. 731, 735-736, 542 S.E.2d 894, 898 (2000).

Allowing a cause of action for every heir or descendant of a decedent without limitation is problematic, not only for a defendant seeking finality, but also for a plaintiff seeking redress of a *whole* injury to a grave site or marker. "[I]t is inconceivable that each member of the family could maintain a separate action to recover for mental pain and anguish. In the multitude of such actions there is injustice." *Rhodes Mut. Life Ins. Co., Inc. v. Moore*, 586 So.2d 866, 868 (Ala., 1991), quoting *Gostkowski v. Roman Catholic Church*, 262 N.Y. 320, 325, 186 N.E. 789 (1933)

Although our court has yet to discuss this issue, courts of other jurisdictions have. Finding that all persons who occupy the same degree of kinship to the decedent should join in any suit, the court in *Holleman v. Elmwood Cemetery Corp.*, 295 Ala. 267, 327 So. 2d 716 (1976), observed that to hold otherwise "would subject the defendant to numerous suits by different parties for the same cause of action which should be settled in one suit." *Holleman* at 273, 327 So. 2d 720. Affirming the dismissal of the son's suit for damages, the New York Court held that:

> [t]he surviving spouse has the sole right to sue, during his or her lifetime, for damages due to interference with the dead body, unless he neglects to exercise the right, in which event others may act. Each member of a family may not, however, maintain a separate action for mental pain and anguish, and where the surviving husband has brought suit, a son has no cause of action and the complaint, in a separate action by him to recover for interference with his mother's body, was properly dismissed.

Gostkowski at Syl. Pt. 3. Likewise in affirming dismissal of a daughter's action for injuries to her father's burial plot, the court in *Hogan v. Woodward Iron Co.*, 263 Ala. 513, 83 So.2d 243 (1995), held that "[i]n the event of damage to the grave of a deceased person, the right of action, if any, accrues first to the surviving spouse, unless, of course, there are special circumstances. . . . If there is no surviving spouse, the right is in the next of kin in the order of their relation to the deceased." *Hogan* at 515, 83 So.2d 249. The *Hogan* Court went on to adopt the well stated logic of *Grostkowski* as to the prohibition on multiple suits.

As it stands now, Rule 17 and Rule 19 of the West Virginia Rules of Civil Procedure might defeat any and all claims for desecration which were not brought jointly by all "surviving descendants" "by representation." *W.Va. Code* §42-1-1 *et seq.* In recognition of this problem, the court in *Rhodes Mutual Life Ins. Co., Inc. v. Moore*, 586 So.2d 866 (Ala., 1991), following a review nationally of rulings on this issue, held that:

> when there is no surviving spouse . . . the right to bring an action for the desecration of a grave vests in the next of kin in the order of their relation to the deceased; and that all individuals occupying the same degree of kin should join the action so as not to subject the defendant to the risk of multitude of different actions. . . . However, we do not think that this rule should be applied so narrowly as to automatically preclude a more distant relative of the deceased, who had had a very close and intimate relationship with the deceased, from joining in an action with a member of the deceased's family closer in relation to the deceased.

Rhodes at 868.

Balancing the rights of the surviving descendants with the needs of the defendant for finality in resolution, this Court could, with well reasoned support, hold that the cause of action vests in the surviving spouse solely if all of the descendants of the decedent are also descendants of the surviving spouse; or to the surviving spouse and children of the decedent who are not descendants of the surviving spouse, jointly; or to the next of kin of the decedent who are closest in degree of blood relation, if there be no surviving spouse; and to next of kin beyond the closest degree of kinship to the decedent in circumstances where there has been a special intimacy or association between the plaintiff and the decedent. In this way there can be a distinction between who *may* attempt to join a suit prosecuting a claim for desecration, if a special intimacy can be proven, and who *must* either join or waive their right to join the suit in order bring the matter to finality.

The Supreme Court of North Carolina has held that the right initially vests with the surviving spouse alone; if there is no surviving spouse then the right passes to the "next of kin," but not to the "sole next of kin." *King v. Smith*, 236 N.C. 170, 171-172, 72 S.E.2d 425, 426-427 (1952).

> If the graves of the ancestors of plaintiffs were desecrated as alleged, then the cause of action thereby vested in the next of kin of the Kings who were then living, but, in ascertaining who are the next of kin, it must be determined: first, who were the nearest of kin in equal degree; second, were there others who, if living, would be kin in equal

> degree; and third, did those who, if living, would be kin in equal degree and that they left children surviving, then such children are deemed next of kin by representation and vested with the same right which would have accrued to the parent had he or she been living at the time the right accrued.

Id.

"[T]he term 'next of kin' means those who would take under the statute of descent or distribution, and are to be ascertained as of the date of the cause of action arose. However, the next of kin may not each maintain a separate action, but are limited to a single action with all the party plaintiffs joining therein[.]" *Rodman v. Mish*, 269 N.C. 613, 614, 153 S.E.2d 136, 137 (1976).

It must be recognized that for desecration, like any tort, there is a single injury to the grave or monument which should result in a single recovery. The number of Plaintiffs, counts in the Complaint or legal theories cannot create a right to a double recovery. "[T]he law confers only one recovery, irrespective of the multiplicity of parties whom or theories which the plaintiff pursues." *Board of Education of McDowell Co. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 608, 390 S.E.2d 796, 807 (1990) (internal citations omitted.)

VI. CONCLUSION.

In line with the above discussed cases, General Pipeline submits that the better rule in these matters would be to allow a single cause of action to be brought for the injury or damage to any (and all) property; to require that any claim for emotional damages be brought in the same cause of action with that of the property damage claim; to limit claims for emotional distress to those instances where physical damage occurred either to the interred body or the grave site; to allow the cause of action to be prosecuted in order of priority, first solely by the surviving spouse, next to that individual descendant or group of descendants closest in degree of blood relation to the decedent or to that individual descendent beyond the closest degree of kinship to the decedent in circumstances where there has been a special intimacy or association between the plaintiff and the decedent. In slight distinction to causes of action for physical property damages or emotional distress damages, an action to enjoin disinterment (absent permission by a closer descendant) can be brought by a single descendant who is willing to take up the cause on behalf of all descendants.

Claims for direct desecration would require physical injury to the body or to the grave site by a defendant with prior notice of the existence of the grave site. Claims for indirect desecration would require clear delineation of the area containing graves but would not be accompanied by claims for emotional damage.

Otherwise, as in this case, neither plaintiffs nor defendants could be sure of the limits of liability or of recovery and there must be exhaustive exploration of the decedent's and the

descendants' family history to locate all possible claimants or, if not, the potential that absent parties might prevent a claim from being prosecuted or defended in one suit.

The Court's guidance on these issues is respectfully requested.

May 5, 2010.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CORA PHILLIPS HAIRSTON, et al,
Plaintiffs,

v.

Supreme Court No. 35525

GENERAL PIPELINE CONSTRUCTION, INC. et al.

Defendants.

LOGAN COUNTY CIRCUIT COURT
CIVIL ACTION NO. 06-C-238
(Consolidated with Civil Action Nos. 06-C-239, 06-C-240, 06-C-241 & 07-C-234)

And

GENERAL PIPELINE CONSTRUCTION, INC.,
Defendant/Third-Party Plaintiff,

v.

MOUNTAIN STATE INSURANCE COMPANY,
Third-Party Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May 2010 I sent by U.S. Mail, postage prepaid, to:

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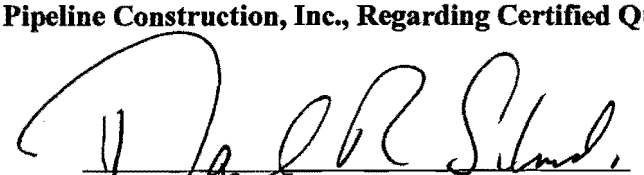
a copy of the foregoing **Brief of General Pipeline Construction, Inc., Regarding Certified Questions Presented.**



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