

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CORA PHILLIPS HAIRSTON, et al.,

Plaintiffs,

v.

Supreme Court No. ³⁵⁵²⁵~~091903~~

Logan County Circuit Court Civil
Action No.06-C-238
(Consolidated with Civil Action
Nos. 06-C-239, 06-C-240, 06-C-
241, and 06-C-234)

GENERAL PIPELINE CONSTRUCTION, INC.,
et al.,

Defendants.

and

GENERAL PIPELINE CONSTRUCTION, INC.,
a West Virginia company,

Defendant/Third-Party Plaintiff,

v.

MOUNTAIN STATE INSURANCE COMPANY,

Third-Party Defendant.

**BRIEF OF MOUNTAIN STATE INSURANCE AGENCY, INC.,
IN RESPONSE TO GENERAL PIPELINE CONSTRUCTION, INC.'S,
BRIEF REGARDING CERTIFIED QUESTIONS PRESENTED**

Kevin A. Nelson, Esquire (WVSB #2715)
Patrick T. White, Esquire (WVSB #9992)
HUDDLESTON BOLEN LLP
707 Virginia Street East, Suite 1300
P.O. Box 3786
Charleston, WV 25337-3786
p: (304) 344-9869
f: (304) 344-4309

*Counsel for Third Party Defendant,
Mountain State Insurance Agency, Inc.*

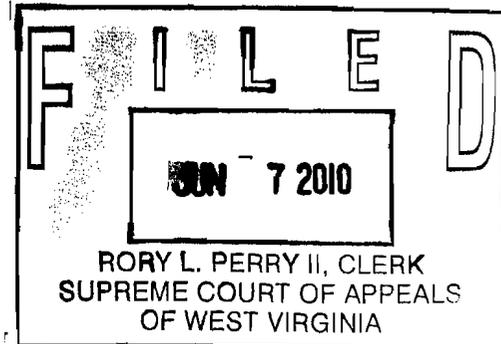


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I. AUTHORITIES RELIED UPON

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II. PROCEDURAL HISTORY AND NATURE OF CASE

In 2006, Plaintiffs filed complaints alleging that General Pipeline Construction, Inc., and Equitable Gas Company desecrated gravesites in Logan County. Three years later, General Pipeline filed a third-party complaint against Mountain State Insurance Agency, Inc., asserting negligence in the procurement of General Pipeline Construction's insurance policy, which it asserts should provide coverage for the alleged occurrence.

Several legal issues arose during the litigation of the instant matter. The culmination of the parties' attempts to resolve said issues resulted in the Circuit Court certifying the same to this Court for resolution. The certified questions and the Circuit Court's corresponding answers are as follows:

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

Answer One: Yes, except as to claims for the desecration of graves and related items in a publicly or privately maintained cemetery or of graves less than fifty years old.

Question Two: What are the elements of a common law action for desecration of a grave, gravesite, cemetery or burial ground?

Answer Two: The elements of a common law cause of action for the desecration of a grave in a publicly or privately maintained cemetery are:

1. that it is shown that a cemetery, with identifiable boundaries and limits, exists at the place alleged;
2. that it is shown that the area was dedicated to the purpose of providing a place of burial by the owner of the property or that the owner acquiesced in its use for burial;
3. that it is shown that the area was identifiable as a cemetery by its appearance prior to the defendant's entry on to the area or it is shown that the defendant had prior knowledge of the existence of the cemetery;
4. that it is shown that the decedent in question is interred in the area;

5. that it is shown that the decedent in question was interred by license or right;
6. that it is shown that the plaintiff is the next of kin of the decedent in question with the right to assert a claim for desecration;
7. that it is shown that the person charged with the desecration defaced, damaged or otherwise mistreated the physical area or the contents of the cemetery in a way that a reasonable person knows will outrage the sensibilities of others.

Question Three: What are the recoverable damages in a common law action for desecration of a grave, gravesite, cemetery or burial ground.

Answer Three: Nominal damages at least, are awardable, and compensatory damages may be recovered if actual damage is shown; damages for mental distress may be awarded; and punitive damages may be awarded if a plaintiff can prove that the defendants' conduct was willful, wanton or malicious.

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

Answer Four: A cause of action for the indirect desecration of a gravesite located in a publicly or privately maintained cemetery is permitted in West Virginia. The elements of such a cause of action are the same as those identified in Question 2, above, plus:

It must be shown that the indirect desecration has, in some manner, affected the specific gravesite made the subject of the claim in such a manner as to outrage the sensibilities of others.

Question Five: 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?

Answer Five: The decedent's surviving spouse or, if not now living, then the now living person or persons of closest and equal degree of kinship in the order provided by West Virginia Code § 42-1-1, *et seq.*

III. RELEVANT FACTS

This action concerns the alleged desecration of gravesites in Logan County. Defendant Equitable Gas hired Defendant General Pipeline to build a gas pipeline. During the construction process, General Pipeline built an access road to haul in additional supplies for the pipeline. In the process of clearing wooded land to build the access road, a bulldozer operator for General Pipeline drove the bulldozer near an area containing gravesites. The condition and upkeep of the area in the immediate vicinity of gravesites is disputed, as is the number of gravesites (if any) affected.

It is alleged that between thirty and sixty people are buried near the path constructed by General Pipeline. Plaintiffs claim they are related to nine of those decedents. The descendants of the other decedents are unknown.

IV. STANDARD OF REVIEW

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W. Va. 1996).

V. ARGUMENT

The Circuit Court certified five questions to this Court. Mountain State Insurance Agency, Inc.’s, position on each question is set forth separately below.

A. CERTIFIED QUESTION NO. 1

West Virginia Code § 29-1-8a preempts some common law claims for the desecration of graves. This statute provides, in relevant part:

A person who, either by himself or through an agent, 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 . . . , or

who fails to comply with the terms and conditions of such permit, is guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the county jail for not less than ten days nor more than six months or both fined and imprisoned.

W. Va. Code § 29-1-8a(c)(1). In addition to the criminal penalties imposed under this section, the Legislature also provided civil damages as an available remedy. W. Va. Code § 29-1-8a(g)(2).

It is clear that the Legislature intended to preempt desecration claims to the extent they are covered under West Virginia Code § 29-1-8a. *See Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879 (W. Va. 2007); *State ex rel. Riffle v. Ranson*, 464 S.E.2d 763 (W. Va. 1995).

The first paragraph of the section, titled “Legislative findings and purpose,” provides:

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.

* * *

Finally, this legislation is not intended to interfere with the normal activities of private property owners, farmers, or those engaged in the development, mining or improvement of real property.

W. Va. Code § 29-1-8a(a) (emphasis added). This statement of purpose indicates that the Legislature intended West Virginia Code § 29-1-8a to preempt the common law with respect to the matters addressed therein, or otherwise fill a void where no law existed.

Section 29-1-8a preempts all claims involving “historic or prehistoric ruins, burial grounds, archaeological site, or human skeletal remains, unmarked grave, grave artifact or grave

marker of historical significance.” W. Va. Code § 29-1-8a(c)(1). “[U]nmarked grave,” “grave artifact,” and “grave marker” are all defined in the statute. *Id.* at (b)(2-4).

The definition of “unmarked grave” requires that the human body deposited therein have been there for at least fifty years. *Id.* at (b)(2). In addition, the “unmarked grave” must not be within a cemetery, or if it is within a cemetery, the grave must not be marked. *Id.* Furthermore, the definition requires that the cemetery be cared for and maintained. *Id.*

Plaintiff is expected to argue that the use of “historic or prehistoric” or “historical significance” in the statute modifies “unmarked graves” and limits the application of this section. This argument fails, however, because those terms do not modify “unmarked grave.” *See* W. Va. Code § 29-1-8a(c)(1). The phrase “historic or prehistoric” only modifies “ruins.” *Id.* Further, “historical significance” only modifies “grave marker.” Had the Legislature intend “historical significance” to modify more than just “grave marker”, it could have done so.

Not all claims are preempted by West Virginia Code § 29-1-8a, regardless of whether they were intentionally or unintentionally omitted by the statute. For instance, “unmarked graves” by definition must be fifty years old or older. *Id.* at (b)(2). Accordingly, desecration claims concerning what would otherwise be an “unmarked grave,” except for the fact that it is less than fifty years old, is not be preempted by the statute. Additionally, the statute does not, to Mountain State Insurance’s reading, preempt desecration claims concerning “grave markers” that are not of historical significance.

Therefore, with some exceptions, West Virginia Code § 29-1-8a preempts claims for the desecration of graves. More importantly, and with respect to this case, it preempts all claims concerning graves over fifty years old, which are not in a well-maintained cemetery or are in a

cemetery but not marked. As a result, Mountain State Insurance submits that the Circuit Court correctly answered this question.

B. CERTIFIED QUESTION NO. 2

Claims for desecration under West Virginia law have many attributes. Prior West Virginia cases only recognized claims where the alleged desecration occurred in a cemetery. *Concerned Loved Ones v. Pence*, 383 S.E.2d 831 (W. Va. 1989). A cemetery is land that is specifically set aside and dedicated for the purpose of serving as a cemetery. *See id.* Cemeteries are required to have boundaries or limits so as to advise that it is “a place where dead bodies of human beings are buried.” Syl. Pt. 3, *In re Hillcrest Memorial Gardens*, 119 S.E.2d 753 (W. Va. 1961).

Some level of upkeep is required so that the burial ground continues to maintain the appearance of cemetery. *See Sanford v. Vinal*, 552 N.E.2d 579 (Mass. App. 1990). If the cemetery is not kept up as appears to be a cemetery, the “next of kin” are deemed to have abandoned their interest in the property. *Id.* The overarching purpose of these provisions is to advise visitors they have entered a cemetery. If the land that is asserted to be a cemetery fails to put a reasonable person on notice that it is a cemetery and he acts without such knowledge, then he is not liable for any acts deemed to desecrate the graves. *See Johnson v. Kentucky-Virginia Stone Co.*, 149 S.W.2d 496 (Ky. App. 1941).

Not anyone can bring a desecration claim. A plaintiff must show that he is the decedent’s “next of kin.” *Whitehair v. Highland Mem’l Gardens, Inc.*, 327 S.E.2d 443 (W. Va. 1985); *see also* Answer to Question Five herein (defining “next of kin”). To prevent the uneven administration of justice, all of the decedent’s “next of kin” with the right to assert a claim are

necessary parties and must join in the claim. *See Rule 19, West Virginia Rules of Civil Procedure.*

Under certain circumstances, however, requiring all of the “next of kin” to join in a claim may prove to be overwhelming for the courts. Given a decedent’s heirs’ ability to multiply exponentially over generations, with each generation becoming further removed of personal knowledge of and relationship to the decedent, it appears useful to limit the extent to which such claims can pass through intestate succession. Accordingly, Mountain State submits that this Court should adopt a rule limiting claims to those of closest and equal degree of kinship.¹

Finally, there must be an act of desecration. A plaintiff must show that the defendant intentionally defaced, damaged, or otherwise mistreated the grave or the contents of the grave in a way that a reasonable person knows will outrage the sensibilities of others. *See W. Va. Code § 61-8-14.*

In summary, Mountain State suggests that the elements of a cause of action for direct desecration should include:

1. That it is shown that a cemetery, identifiable by boundary and appearance, exists at the place alleged and has not been abandoned;
2. That it is shown that the cemetery was dedicated to the purpose of providing a place of burial by the owner of the property;
3. That it is shown that the plaintiff is the “next of kin” of the decedent in question with the right to assert a claim for desecration and all the “next of kin” are a party to the claim; and,
4. That it is shown that the person charged with the desecration intentionally defaced, damaged or otherwise mistreated the grave or the contents of the grave in a way that a reasonable person knows will outrage the sensibilities of others.

C. CERTIFIED QUESTION NO. 3

West Virginia case law establishes that a wide variety of damages are recoverable for direct desecration claims, depending upon the facts of each particular case. Nominal damages

are always available. *Concerned Loved Ones*, 383 S.E.2d 831 (W. Va. 1989). Compensatory damages may be recovered if the plaintiff can show actual damage. *Id.* A plaintiff may also recover for mental distress if the same can be shown and the circumstances peculiar to that plaintiff warrant such a recovery. *See* Syl. Pt. 3, *Bennett v. 3C Coal Co.*, 379 S.E.2d 388 (W. Va. 1989). Further, punitive damages are allowed if the defendant engaged in a willful, wanton, reckless, or malicious act. *Id.* at Syl. Pt. 5.

D. CERTIFIED QUESTION NO. 4

Mountain State Insurance does not believe that West Virginia law supports claims for indirect desecration. No precedent for such a claim can be found in West Virginia jurisprudence.

If this Court should conclude that West Virginia law does support a claim for indirect desecration, the elements of such a claim would likely be similar to those for a claim for direct desecration. The elements of a claim for indirect desecration, however, must address the major difference between it and a claim for direct desecration, namely the proximity of the desecrating act to the subject grave which was not directly desecrated.

Indirect desecration cannot involve desecration to the grave or grave contents, or else the desecration would constitute direct desecration. Instead, an indirect desecration claim is based upon the concept that a disturbance inside the cemetery and within proximity of the claimant's decedent's grave caused an injury. As a result, Mountain State submits that the disturbance to the cemetery must be of such a nature and within such a proximity to the undisturbed grave that the desecration still outrages the sensibilities of men with respect to the undisturbed grave upon which the indirect desecration claim is based.

Mountain State also believes that this Court should also require of litigants, should it choose to recognize a claim for indirect desecration, that they prove that said desecration must

¹ This Court should also set a generational cut-off after which damages are limited to repairs.

occur within the bounds of a readily identifiable cemetery. To hold otherwise would create uncertainty with respect to all types of actions. People have a better understanding of the acts inside a cemetery that may outrage the sensibilities of others as opposed to the same or similar acts that may occur outside the bounds of the cemetery. Many types of behavior found acceptable just outside the bounds of a cemetery are generally not acceptable once one enters a cemetery, even if said behavior does not rise to the level of outrage. Thus, any finding by this court recognizing a claim for indirect desecration that does not limit such claim to activity occurring with the cemetery will create too much uncertainty.

Similarly, this Court should also provide guidance on the proximity of alleged desecration to the decedent's gravesite whose heir is asserting an indirect desecration claim. Must the alleged desecration occur within a certain radius of a gravesite for a claim to exist outside of which a claim may not be maintained? Or, at the very least, within view of the gravesite? What happens if the gravesite at issue is separated from the alleged desecration by physical barriers, like a mountain top, which shelters the gravesite from alleged desecration? Surely, in this instance a claim cannot be maintained.

While the general rule proposed above requires only that the desecration be of a nature and within such a proximity to the undisturbed grave so as to outrage the sensibilities of men with respect to the undisturbed grave, Mountain State also submits that this Court should declare a maximum threshold within which the alleged desecration must occur. Such a threshold could be based purely on distance or some other criteria. Mountain State proposes that, at a minimum, this Court should adopt a rule prohibiting indirect desecration claims by heirs of decedents in undisturbed graves if the alleged desecration cannot be seen from the undisturbed grave.

Mountain State submits that there is no precedent in West Virginia for an indirect desecration claim. Should this Court choose to recognize such a claim, then it should find that alleged desecration must be of such a nature and within such proximity to the undisturbed grave that it offends the sensibilities of men with respect to the undisturbed grave. It should further define a boundary within which the alleged desecration must occur relative to the undisturbed grave in order for a claim to exist.

E. CERTIFIED QUESTION NO.5

West Virginia law provides that the “next of kin” may assert claims for desecration of graves. *Bennett*, 379 S.E.2d 388; *Concerned Loved Ones*, 383 S.E.2d 831. In *Whitehair*, the Supreme Court of Appeals of West Virginia explained that claims for desecration of graves belong to the decedent or decedents with the right to possession of the body. 327 S.E.2d at 443. “This is usually the surviving spouse, provided that he or she was living with the decedent at the time of death and has not waived his or her right.” *Id.* (internal citations omitted). West Virginia laws of intestate succession govern when the right of possession does not transfer to the decedent’s spouse. *Id.*; see W. Va. Code § 42-1-1.

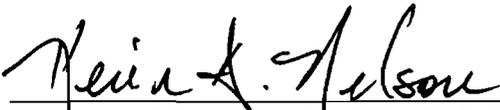
When a claim passes to a decedent’s heirs other than his or her spouse, West Virginia law requires that all heirs with claims join in the lawsuit. W. Va. R. Civ. P. Rule 19. See Syl. Pt. 3, *State ex rel. One-Gateway Associates v. Johnson*, 542 S.E.2d 894 (W. Va. 2000). Relying on *Johnson v. Kentucky-Virginia Stone Co.*, the Circuit Court found that claims should vest in those of the same and closest generational level to the decedent. See Order at 16 (relying on *Johnson v. Kentucky-Virginia Stone Co.*, 149 S.W.2d 496 (Ky. App. 1941)). This finding is both reasonable and practical. A different finding would create a hurdle difficult for both plaintiffs and defendants to overcome.

Claims for damages other than repair of the gravesite should also be precluded after a certain passage of time. No heir who was not alive during the life of the decedent, with the exception of an *in utero* offspring, should be able to recover damages for emotional distress or punitive damages arising from the alleged desecration of the grave of a relative. The heir would not have had a relationship with the decedent sufficient to justify an award of either. Further, limiting the damages to repair costs promotes the fast resolution of claims and the repair of the grave site(s).

VI. CONCLUSION

WHEREFORE the Third-Party Defendant, Mountain State Insurance Agency, Inc., respectfully requests that this Court answer the certified the questions in accordance with its responses above.

**MOUNTAIN STATE INSURANCE
AGENCY, INC.**
By counsel



Kevin A. Nelson, Esquire (WVSB #2715)

Patrick T. White, Esquire (WVSB #9992)

HUDDLESTON BOLEN LLP

707 Virginia Street East, Suite 1300

P.O. Box 3786

Charleston, WV 25337

p: (304) 344-9869

f: (304) 344-4309

knelson@huddlestonbolen.com

pwhite@huddlestonbolen.com

Counsel for Third-Party Defendant,

Mountain State Insurance Agency, Inc.

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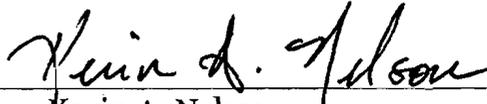
CERTIFICATE OF SERVICE

I, Kevin A. Nelson, one of counsel for Defendant, Mountain State Insurance Agency, Inc., do hereby certify that a true and exact copy of the attached *Brief of Mountain State Insurance Agency, Inc., In Response to General Pipeline Construction, Inc.'s, Brief Regarding Certified Questions Presented* was served upon the counsel as indicated below by United States mail, postage prepaid, this 7th day of June 2010 addressed as follows:

Kevin Thompson, Esquire
THOMPSON BARNEY
31 E. Second Street
Williamson, WV 25661
Counsel for Plaintiff

Daniel R. Schuda, Esquire
Schuda & Associates, PLLC
P.O. Box 3425
Charleston, WV 25335-3425
Counsel for General Pipeline Construction, Inc.

Brian R. Swiger, Esquire
Ben M. McFarland, Esquire
Jackson Kelly PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322
Counsel for Equitable Production Company



Kevin A. Nelson