

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.

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

Daniel R. Schuda State Bar #3300
Lynnette Simon Marshall State Bar #8009
Schuda & Associates, pllc
232 Capitol Street, Suite 200
Charleston, WV 25335-3425
(304) 343-8928
(304) 343-8929 facsimile

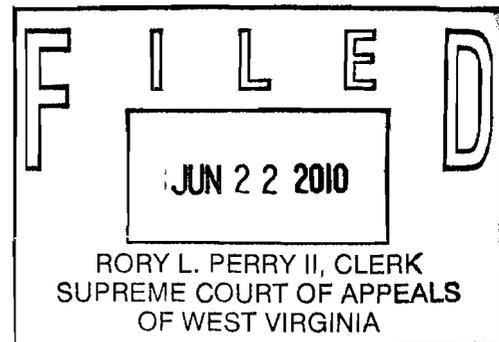


Table of Contents

I. TABLE OF AUTHORITIES	3
II. STATEMENT OF ADDITIONAL FACTS	4
III. NOTES OF ARGUMENT	7
A. In Limited, Well Purposed Instances West Virginia Code §29-1-8a Preempts The Common Law With Regard To Desecration Claims	7
B. The Common Law Elements of Desecration, Direct or Indirect, Must Provide For the Application of Fundamental Principals of Law	10
C. Next Of Kin For Purposes Of A Common Law Claim For Desecration Must Be Reasonably Limited To Avoid Creating A Windfall For Unaffected Descendants.....	18
IV. CONCLUSION.....	20

I. TABLE OF AUTHORITIES

Cases

<i>Bennett v. 3 C Coal Co.</i> , 180 W.Va. 665, 379 S.E.2d 388 (1989).....	18
<i>Concerned Loved Ones & Lot Owners Ass'n v. Pence</i> , 181 W.Va. 649, 383 S.E.2d 831 (1989).....	18
<i>Davis Memorial Hosp. v. West Virginia State Tax Com'r</i> , 222 W.Va. 677 (2008).....	11
<i>Humphreys v. Bennet Oil Corp.</i> , 195 La. 531, 197 So. 222 (1940).....	17
<i>In re Hillcrest Memorial Gardens, Inc.</i> , 146 W.Va. 337, 119 S.E.2d 753 (1961).....	16
<i>Kessel v. Monongalia County General Hosp. Co.</i> , 220 W. Va. 602, 648 S.E.2d 366 (2007).....	11
<i>Peneschi v. National Steel Corp.</i> , 170 W.Va. 511, 295 S.E.2d 1 (1982).....	12
<i>Ritter v. Couch</i> , 71 W.Va. 221, 76 S.E. 428 (1912).....	20
<i>Robertson v. LeMaster</i> , 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983).....	13
<i>Robertson v. LeMaster</i> , 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983).....	13

Statutes

West Virginia Code §37-13A-2	8
West Virginia Code §37-13A-5	8
West Virginia Code §61-8-14	8, 18
West Virginia Code §37-13-1a	16
West Virginia Code §29-1-8a	8, 9, 10, 18
West Virginia Code §35-5B-1	16
West Virginia Code §37-13-1	15
West Virginia Code §37-13A-1	8

Other Authorities

10 Am. Jur., <i>Cemeteries</i> , § 2.....	16
14 C.S.J. <i>Cemeteries</i> §1	16
H.B. 4457	8, 18

II. STATEMENT OF ADDITIONAL FACTS

In providing this Court with additional relevant facts regarding the case at bar, General Pipeline Company acknowledges that the nature of a certified question proceeding requires this Court to be aware, only generally, of the facts of the underlying litigation. This Court need not resolve any issues of fact between the parties in this case as its function in this procedural setting is to provide clarification or guidance as to the existence and/or elements of a particular tort. In the normal course of things the underlying facts are of relatively small import considering the goal of the Court in answering a certified question is to provide a basic framework within which not only the present parties, but all future and potential parties, to such an action can operate intelligently.

Nevertheless, in this case Plaintiffs' presentation of "facts" perfectly illustrate the need for a clear pronouncement by this Court of the elements of a tort which has previously been a tangled mass of unidentifiable claims of injury based upon varying and sometimes mismatched rationale.

Plaintiffs' factual recitation attempts to stir the emotions and incite the passions of this Court, urging it to construct a liquid, non-rational framework wherein Plaintiffs are able to punish the Defendants for their alleged "heinous" acts. In doing so, Plaintiffs remind the Court of the pressing need for a clear expression of the elements of the tort of desecration which will create objective standards by which the conduct of any defendant can be measured in a setting free from passion and prejudice.

There are most always at least two sides to every story, and the fundamental elements of a tort should never be distorted to benefit one proposed or potential factual scenario over another.

This Court should remain unpersuaded by Plaintiffs' parade of horrors. For example, Plaintiffs state: "A bulldozer rumbled through the cemetery five (5) to nine (9) times in order to cut three (3) separate roads." This is absolutely false and will be proven to be false by these Defendants at trial. The bulldozer passed through the area one (1) time, blade raised, never touching the surface of the terrain. The "roads" shown on Plaintiffs' expert's map were not the creation of these Defendants, but rather are likely the result of ATV and off-road recreational traffic and certainly not acts of desecration chargeable to these Defendants. Nevertheless, this allegation illustrates the need to have the elements of the tort of desecration contain room for consideration of the nature of the conduct, what was done, how often it was done and under what circumstances.

Another example is Plaintiffs' reference to the Affidavit of Bud Baisden who avers that the construction crew uttered racial slurs; this allegation is again false. These Defendants will prove that not only were no racial slurs or disparaging remarks made in relation to the grave sites, but will present independent third-party testimony to the Jury that Bud Baisden was not even present when the event occurred. While the Plaintiffs attempt to gain some advantage or influence over the chosen elements of the tort of desecration by painting the Defendants as racists based upon the African-American heritage of the deceased occupants of the area, the law requires that the race of a decedent have no bearing upon right of a descendant to protect or otherwise recover for the disturbance of a grave. Plaintiffs' recurring reference to race is meant only to inflame the sensibilities of the reader and provides no assistance to the Court in its search for the elemental framework of the tort of desecration, direct or otherwise. The elements of the tort of desecration should not discriminate or provide any room or rationale for arguing that one grave site is more worthy of protection than another based upon the race of its occupant.

By way of a final example, the Plaintiffs present photographs of overturned headstones in support of their cause against these Defendants again seeking recovery for these “heinous” acts. The Defendants will prove at trial that the overturned headstones depicted in these photographs are not the result of any act or omission by these Defendants, but rather show the Jury an illustration of the neglected condition of this area even before a General Pipeline Company employee innocently passed through. The evidence at trial will show that *after* the equipment operator for General Pipeline was informed that he had just passed through an area containing graves, he and others scoured the area looking for evidence of graves ultimately discovering overturned and displaced grave markers hidden on the forest floor. Fortunately, just as the Plaintiffs’ expert, these gentlemen found no indication that the bulldozer had passed over any graves. This example is illustrative of the need for the Court’s framework to contain objective considerations of the condition of the area prior to the alleged act of desecration and any prior notice, visual or documentary, of the existence of the graves to the alleged desecrator.

Regardless of how the facts of this case are ultimately decided by a Jury, all of these factual characterizations by the Plaintiffs show the importance of this Court providing clear direction in the form of thoughtfully constructed elements for the tort of desecration which are capable of some objective standard application free from the type of bias, sympathy and passion Plaintiffs seek to interject into this matter.

III. NOTES OF ARGUMENT

A. In Limited, Well Purposed Instances West Virginia Code §29-1-8a Preempts The Common Law With Regard To Desecration Claims

During the pendency of these certified questions, the Legislature has passed a Bill to: amend and reenact West Virginia Code §29-1-8a; amend and reenact West Virginia Code §37-13A-1, §37-13A-2 and §37-13A-5; add a new section §37-13A-7; and amend and reenact §61-8-14, “all relating to the access to and protection of cemeteries; clarifying procedures for protection of graves and burial sites; clarifying requirements and procedures for access to cemeteries and grave sites located on private land; clarifying conduct subject to criminal sanctions as it relates to the crime of disinterment of a dead boy or damage to a cemetery.” *See Exhibit 1*, appended hereto. House Bill 4457, was passed March 11, 2010, becoming effective June 9, 2010, and provides further insight into the intent of the Legislature with regard to matters involving desecration.

Having had the opportunity to amend the definition of “unmarked grave” under West Virginia Code §29-1-8a, to include a wholesale reference to the actual absence of a grave marker, the Legislature did not. By definition, an “unmarked grave” under West Virginia Code §29-1-8a, remains any grave over the age of fifty (50) years old, located outside of the boundaries of a privately or publically maintained cemetery, whether commonly marked or not, and any unmarked grave over fifty (50) years old located inside a publicly or privately maintained cemetery.

Plaintiffs assert that “West Virginia Code §29-1-8a was designed to create protection for ‘unmarked’ graves or ‘grave markers’ of ‘earlier’ West Virginians where there are no next of kin

to prosecute desecration claims.” *Response* at pg. 14. However, there is a complete absence of any language in West Virginia Code §29-a-1-8a which would support this limited construction. There is no limiting or qualifying language in section “(g) *Additional provisions for enforcement; civil penalties; rewards for information. - -*” which narrows the ability of a county prosecuting attorney to bring a civil suit only in instances where there are no next of kin. There is likewise no language in the statute itself which states that it is only to be applied in situations where there are no next of kin. If this were the case, not only would one expect some language in the statute expressly stating as such, one would expect the statute to have provisions for who is responsible for attempting to locate the next of kin and some reference to the definition of ‘next of kin’ so that a county prosecuting attorney would know when his or her duty under the statute existed and when it did not.

Section “(e) *Issuance of permits*” contains extensive discussion on the convening of committees prior to the issuance of any permit for the disturbance of human skeletal remains and the like, including requirements that the committee be comprised of “presumed ‘lineal descendants’ [and] private and public organizations which have ‘cultural affiliations’ to the presumed contents of the site.” *W.Va. Code* §29-1-8a(e). This section also requires that any permit address the methods by which “lineal descendants” of the deceased are to be notified prior to any disturbance. *W.Va. Code* §29-1-8a(e)(1). The term “lineal descendants” is defined in the statute as “any individuals tracing his or her ancestry directly or by proven kinship”; “proven kinship” is defined as “the relationship among people that exists because of genetic descent, which includes racial descent.” *W.Va. Code* §29-1-8a(a)(9) and (10).

The opportunity for the Legislature to limit the application of the statute to situations where no known or ascertainable “lineal descendants” exist was readily available, but not acted

upon. There is absolutely no evidence in the plain language of the statute to suggest that the Legislature intended the application of West Virginia Code §29-1-8a be limited to only those circumstances where “next of kin” or “lineal descendants” could not be located.

Furthermore, Plaintiffs express concern that the desecration claims of family members and loved ones will “escheat” to the State. This alleged concern neglects the fact that West Virginia Code §29-1-8a only applies to “unmarked graves.” By definition, an “unmarked grave” is over fifty (50) years old and not located inside *a publically or privately maintained cemetery* or is otherwise located in a cemetery, but not commonly marked. By definition, the statute applies only to fifty (50) or more year old graves that no one is maintaining. If the grave is more than fifty (50) years old and there is no one who is so emotionally situated to make it a priority that the area be maintained in such a manner as to constitute a cemetery, then the implication is that there is no harm in the State assuming both the right to bring the desecration claim for such a grave and the right to see to the future maintenance of the grave. It is in this manner that the Legislature hopes to create “equal and adequate protection” to the graves of earlier West Virginians.

In their effort to distort the application of West Virginia Code §29-1-8a, Plaintiffs thrust upon the Circuit Court and General Pipeline Company an alleged line of reasoning wherein a criminal charge for desecration would preempt a tort claim. This is a mischaracterization of both the Circuit Court and General Pipeline’s analysis, as well as the language of the statute. To the contrary, clearly criminal and civil prosecution are both available remedies for desecration of any grave subject to West Virginia Code §29-1-8a.

Finally, it is not the presumption of these Defendants, but rather a principal of statutory construction that the Legislature, when enacting statutes, is charged with the knowledge of 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). When West Virginia Code §29-1-8a was enacted, and certainly when it was amended earlier this year, the Legislature was fully aware of the prevailing case law in West Virginia discussing the tort of desecration.

As to the well purposed circumstances clearly defined in the statute, the plain language of West Virginia Code §29-1-8a preempts any common law claim for desecration.

B. The Common Law Elements of Desecration, Direct or Indirect, Must Provide For the Application of Fundamental Principals of Law

Duty, breach, causation and damages, are the fundamental elements of any tort. While Plaintiffs lobby for something more on the order of strict liability enuring to the benefits all lineal descendants for any act of alleged desecration regardless of the absence of physical injury or damage, existing West Virginia law does not support such a claim.

In this State strict liability is reserved for limited circumstances involving ultra hazardous activities. Where strict liability is applied, this Court has performed an analysis of the public policy surrounding the scope of the duty of an alleged tortfeasor and determined in those particular instances that the duty must be expanded to include non-negligent acts. *See e.g., Peneschi v. National Steel Corp.*, 170 W.Va. 511, 295 S.E.2d 1 (1982) (“[I]t is obvious that the standard of liability was a function of the degree to which the benefits that flowed from the dangerous undertaking were either public or private in nature. . . . [T]he Restatement §519(f) provides for consideration of the ‘extent to which its [the abnormally dangerous activity’s] value

to the community is outweighed by its dangerous attributes.”) While the sentiment involved in any alleged desecration claim is great, emotion is not a proper public policy justification for applying a strict liability standard.

Through these certified questions this Court is being asked to define the scope of the duty of any alleged tortfeasor in a desecration case. The breadth of that duty must be commensurate with the acts of the defendant and the likelihood or foreseeability of injury.

This basic expression of policy is a restatement of the general duty which all actors in an organized society owe to their fellow persons. However, in order to form the basis for a valid cause of action, this duty must be brought home to the particular plaintiff, for “a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance ...” T. Cooley, *Law of Torts* § 478 (4th ed. 1932).

Robertson v. LeMaster, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). “Actionable negligence necessarily includes the element of reasonable anticipation that some injury might result from the act of which complaint is made.’ *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 653, 77 S.E.2d 180, 188 (1953).” *Robertson* at 612, 301 S.E.2d 568. “[T]he foreseeability of risk is a primary consideration in establishing the element of duty in tort cases.” *Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983).

However, “[b]eyond 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 v. Debow*, 208 W.Va. 486, 541 S.E.2d 576, 581 (2000), quoting *Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983)

Plaintiffs propose to this Court that the elements of both a direct and/or indirect claim of desecration should not contain considerations of notice and intent. Plaintiffs' proposition in this regard ignores the fact that if this Court removes the requirement of notice of the existence of a particular grave it will effectively create strict liability for any alleged act of desecration. Plaintiffs maintain that "West Virginia case law has not suggested even in *dicta* that notice of a cemetery or grave or the intent of the defendant are required elements of such a claim." *Response* at pg. 27. This statement is absolutely unsupportable by virtue of the fact that West Virginia has never had a reported case of desecration in an instance where the presence of the cemetery was not immediately known to the defendant. *See General Pipeline's Brief on Certified Questions* at pg. 28. Moreover, Plaintiffs cannot cite this Court to any West Virginia case or statute which stands for the proposition that the burden of guarding against desecration of a grave should be placed solely on the defendant. There is no legal foundation for the argument that every lineal descendant should recover against a defendant for the unknowing and accidental disturbance of a burial area of which the defendant had no notice. This is especially true in an instance where the absence of notice to the defendant is the byproduct of a plaintiff descendant's failure to physically "set apart" the area containing the grave.

An examination of the law of desecration, both in and out of West Virginia, reveals that notice of the existence of the grave site is an absolute requirement of any desecration claim and that claims for indirect desecration are normally not permitted in the absence of intentional conduct.

Plaintiffs spend an estimated four (4) pages of their Response brief addressing the issue of dedication or right of burial, an issue that Plaintiffs allege the Circuit Court has ruled General Pipeline has waived. Incidentally, as non-landowners in this case, the standing of General

Pipeline to dispute Plaintiffs' decedents' right of burial is somewhat questionable. Nevertheless, in addressing the proposed universal elements of desecration, General Pipeline acknowledges that there may be factual circumstances wherein the right of burial will have some meaningful application to the determination of the existence of desecration. However, in light of Article 13 of Chapter 37 of the West Virginia Code , *Removal, Transfer And Disposition Of Remains In Graves Located Upon Privately Owned Lands*, and the existence of very particular statutorily mandated procedures for removing graves from privately owned lands, it is highly unlikely that the presence or the absence of a right of burial would be an independently pivotal factor to the inquiry regarding whether desecration has occurred. This is especially likely given the fact that West Virginia Code §37-13-1, *et seq.* does not apply "to any grave or grave area where title or color of title to the same exists as a matter of public record in any person or persons not a plaintiff or plaintiffs instituting an action pursuant to this article" except when a plaintiff holding color of title or deed of public record seeks to use the article, in addition to other rights, for the removal, transfer or disposition of remains in graves or grave areas. It is questionable, following a review of those articles and sections of the West Virginia Code which deal with graves and cemeteries, that the Legislature intended that the absence of dedication or right of burial be an absolute defense to one accused of desecration.

Furthermore, the issue of dedication does not completely address the question of whether or not a defendant had notice of the graves. While an area may be deemed to have been legally dedicated to the burial of human remains at one time, in the absence of any public record of this dedication and the absence of a physical "setting apart" of the area, the defendant may still not have actual or constructive notice of the existence of the graves. The fact that the area has been

dedicated may or may not provide a defendant with notice that human remains are located in the area and should therefore not be completely determinative of a claim for desecration.

The other area of law to which a large portion of Plaintiffs' Response brief is dedicated is the definition of a cemetery. Of primary importance is the fact that Plaintiffs' citations regarding the definition of a cemetery fail to acknowledge one undeniable truth: a collection of graves, without more, does not create a "cemetery." Here again there are insights available in the West Virginia Legislature's multiple pronouncements of law concerning different aspects of the protection of graves and cemeteries.

The parties appear to agree that a "cemetery" must be "*set apart* for the burial of the dead." *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 (emphasis added). However, this setting apart that is necessary to the existence of a cemetery is something more than just the fact that human remains have been deposited in a particular area.

West Virginia Code §35-5B-1, the Chapter dealing with *Property of Religious, Educational and Charitable Organizations*, the Article dealing with *Preneed Cemetery Company Property, Goods and Services; Related Contracts*, defines "cemetery" as follows:

"Cemetery" means and includes all land and appurtenances including roadways, office buildings, outbuildings and other structures used or intended to be used for or in connection with the interment of human remains. The sprinkling of ashes or their burial in a biodegradable container on church grounds or their placement in a columbarium on church property does not constitute the creation of a cemetery.

W.Va. Code §35-5B-1(2). In this instance the Legislature has chosen to specifically exempt from the definition of a cemetery even an organized collection of human remains, ashes, located on church property.

In further support of the legal distinction between a cemetery and a collection of graves, there is the Legislative pronouncement addressing the *Improvement, construction or development upon privately owned lands containing graves*, which states:

[n]o improvement, construction or development shall commence upon privately owned lands on which *a cemetery or graves* are located if such improvement, construction or development would destroy or otherwise physically disturb *the cemetery or graves* located on the land unless the owner first files a petition in accordance with the provisions of this Article.

W.Va. Code §37-13-1a (emphasis added). Clearly, in the collective mind of the Legislature there is a distinction between a cemetery and a group of graves. This distinction and the need for reference to a cemetery within the elements of the tort of desecration are inherently tied to the requirement that an alleged tortfeasor must have notice of the character of the area he or she is occupying or otherwise passing through.

Citing the Louisiana case of *Humphreys v. Bennet Oil Corp.*, 195 La. 531, 197 So. 222 (1940), the Plaintiffs champion a common law desecration claim where all that is necessary is for “plaintiff to prove that any grave in a cemetery has been desecrated.” *Response* at pg. 24. The Circuit Court relied upon *Humphreys* in support of its finding of the existence of a cause of action for indirect desecration. However, *Humphreys* involved a clearly defined cemetery; “[i]t was enclosed by wire fence, and tombs and slabs were erected to mark the graves.” *Humphreys* at 546, 197 So. 227. In reading *Humphreys* there is absolutely no indication that the defendants therein were unaware of the existence of the subject graves. The “invasion was deliberate. The parties to the lease contract seem to have proceeded upon the theory that the right to explore the cemetery for oil was superior to the right of interested living persons to have the remains of their dead left where they were deposited.” *Humphreys* at 552, 197 So. 229.

Plaintiffs cite *Humphreys* in support of an expansive very liberal cause of action allowing recovery by any next of kin for desecration, direct or otherwise, of any kind. Plaintiffs state that *Humphreys* should be adopted by this Court as “a bright line rule” which “provides a standard [that] leaves little or no room for varying interpretation about what constitutes desecration of a cemetery.” Contrary to Plaintiffs’ interpretation, the only bright line rule provided by *Humphreys* would be the creation of a cause of action for indirect desecration which necessarily involved an element of intent. *Id.*

Likewise, West Virginia’s pseudo indirect desecration case *Concerned Loved Ones & Lot Owners Ass’n v. Pence*, 181 W.Va. 649, 383 S.E.2d 831 (1989) dealt with knowing and intentional conduct within the clearly defined boundaries of a known cemetery. Even *Bennett v. 3 C Coal Co.*, 180 W.Va. 665, 379 S.E.2d 388 (1989), evolves in a setting involving a known clearly delineated and maintained cemetery and intentional conduct (mining) resulting in alleged injury.

Obviously, intent is further down the scale from a simple requirement of notice. The Legislature’s recent statutory amendments as set forth in H.B. 4457, discussed above, provide further support for General Pipeline’s assertion that the elements of a desecration claim should at the very minimum include the requirement of notice.

Among the amendments to West Virginia Code §29-1-8a, was the addition of the following language:

It is a complete defense in a prosecution under this section if the defendant can prove by a preponderance of evidence that the alleged acts were accidental or inadvertent and that reasonable efforts were made to preserve the remains accidentally disturbed or discovered, and that the accidental discovery or disturbance was properly reported.

W.Va. Code §29-1-8a(c)(7).

In amending West Virginia Code §61-8-14, the Legislature added the word “intentionally” to the section which discusses the disinterment or displacement of human remains. Where the statute previously only required intentional conduct as to desecration of a tomb or artifact, it now requires intent as to the disturbance of human remains. *W.Va. Code* §61-8-14(a). The opening sentence of the statute now reads: “Any person who unlawfully and intentionally disinters or displaces a dead human body, or any part of a dead human body, placed or deposited in any vault, mausoleum or any temporary or permanent burial place. . .” is guilty of a crime. *Id.*

When addressing desecration claims the West Virginia Legislature has chosen to require knowing and intentional conduct. It is therefore 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.

Furthermore, to the extent that this Court believes that a cause of action for indirect desecration is necessary and/or exists in West Virginia law, it must be in some manner distinguishable from a claim for “direct desecration.” General Pipeline respectfully submits that in order to justify an award to any one descendant in the absence of any physical or pecuniary damage to the grave site of the descendant’s decedent, the conduct of the defendant must be intentional.

C. Next Of Kin For Purposes Of A Common Law Claim For Desecration Must Be Reasonably Limited To Avoid Creating A Windfall For Unaffected Descendants

There is every justification for this Court to draw a distinction between those persons who may have standing to prohibit the wrongful disinterment of a decedent and those persons who may collect purely emotional damages for the wrongful disturbance of a decedent’s grave or surroundings. Likewise, there is ample justification for this Court to provide appropriate limitations for the award of purely emotional damages.

When faced with the question of who may bring suit to either prohibit the wrongful disinterment or request the orderly disinterment of human remains, the words of the Court in *Ritter v. Couch*, 71 W.Va. 221, 76 S.E. 428 (1912) bear considerable weight. If lineal descendants, as that term is used without generational limitation, are not given standing to either oppose or request the disinterment of their ancestors, then to whom would such a right and duty fall? *Id.* However, providing unlimited generational access to the courts over the burial rights of an ancestor presents an altogether separate set of considerations than providing the same unlimited generational access to the courts for recovery of purely emotional damages for the

disturbance of the grave of an ancestor. While most would agree that an individual should have legal standing to bring suit to prohibit the disinterment of his or her great, great, great maternal grandfather, whom he or she has never even met, very few would follow in agreement that the same person should be allowed to collect purely emotional damages for the disturbance of the same grave.

This Court has yet to allow for an award of purely emotional damages in the absence of any physical injury without the additional interjection of intentional or reckless conduct by the defendant. Here, Plaintiffs are proposing that this Court grant a cause of action to an unlimited pool of lineal descendants for alleged desecration of any kind or character which would allow for the recovery of purely emotional damages even in the absence of physical injury or intentional conduct. Not only does such a proposition create a huge potential for spurious claims and frivolous lawsuits, but it would also considerably dilute the cause of action and available recovery of any close relative of a decedent whose grave has been desecrated. The brother of a decedent whose grave has been disturbed would likely find himself in court standing in line with the great niece the decedent has never met, both claiming emotional upset and entitlement to a recovery from the same defendant with finite resources.

The problem of how to justly limit access to the emotional damages recoverable in a cause of action such as desecration has no one perfect solution. However, the complexity of the solution is likewise no justification for the failure to try. In its Response Brief, Mountain State Insurance Company offers one very workable solution. Purely emotional damages should not be available to any descendant who was not living during the life of the decedent. The failure of a person to even occupy this Earth at the same time as the decedent brings considerable weight to the denial of an award to that person for purely emotional damages for the disturbance of the

decedent's grave. Following this objective bright-line rule, the number of potential plaintiffs who have injury claims independent of any claim for physical damage to the grave site or its surroundings, would at least be both rationally based and reasonably ascertainable.

Such an approach would allow for a single cause of action to be brought by multiple lineal descendants for the protection of the grave of an ancestor and would provide for reasonable and meaningful compensation of those truly emotionally aggrieved by an alleged act of desecration by a defendant.

IV. CONCLUSION

In line with the law discussed in its original submission to this Court, General Pipeline submits that this Court should issue a ruling finding that a single cause of action exists as to any claim for desecration for the injury or damage to any (and all) property; requiring that any claim for emotional damages be brought in the same cause of action with that of the property damage claim; limiting claims for emotional distress to those instances where physical damage has occurred either to the interred body or the grave site; allowing 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; limiting purely emotional damages to those persons who were alive during the lifetime of the decedent; and finding that in 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.

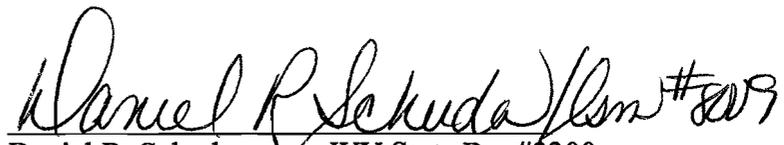
Claims for direct desecration should require physical injury to the body or to the grave site by a defendant with prior notice of the existence of the grave site. Claims for indirect desecration would require clear delineation of the area containing graves but would not be accompanied by claims for emotional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

General Pipeline respectfully requests that this Court provide a clear expression of the scope of the duty of a defendant in a desecration action and to whom such a duty is owed, as well as instruction regarding the limits of liability or of recovery.

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

June 22, 2010.

GENERAL PIPELINE CONSTRUCTION, INC.



Daniel R. Schuda WV State Bar #3300

Schuda & Associates, *pllc*

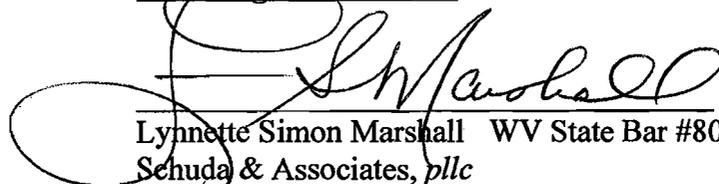
P.O. Box 3425

Charleston, WV 25335-3425

(304) 343-8928 - Telephone

(304) 343-8929 - Fax

dsehuda@schudalaw.net



Lynnette Simon Marshall WV State Bar #8009

Schuda & Associates, *pllc*

P.O. Box 3425

Charleston, WV 25335-3425

(304) 343-8928 - Telephone

(304) 343-8929 - Fax

lsmarshall@schudalaw.net

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.

LOGAN COUNTY CIRCUIT COURT
CIVIL ACTION NO. 06-C-238

Defendants.

(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

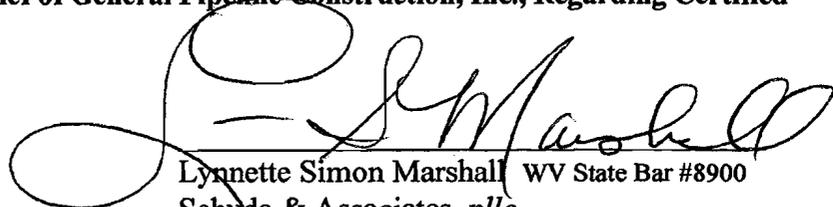
I HEREBY CERTIFY that on the 22nd day of June 2010 I sent by U.S. Mail, postage prepaid, to:

Kevin W. Thompson (WVSB #5062)
David R. Barney, Jr. (WVSB #7958)
THOMPSON BARNEY
31 E. Second Street
Williamson, WV 25661
Counsel for Plaintiffs

Brian R. Swiger (WVSB #5872)
Suzanne M. Persinger (WVSB #10558)
JACKSON KELLY, PLLC
P.O. Box 553
Charleston, WV 25322-0553
Counsel for Equitable Production Company

Kevin A. Nelson (WVSB #2715)
HUDDLESTON BOLEN LLP
P.O. Box 3786
Charleston, WV 25337-3786
Counsel for Mountain State Insurance Company

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



Lynnette Simon Marshall WV State Bar #8900
Schuda & Associates, *pllc*
P.O. Box 3425
Charleston, WV 25335-3425
(304) 343-8928 - Telephone
(304) 343-8929 - Fax
lmarshall@schudalaw.net

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE