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IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

CORA PHILLIPS HAIRSTON, et al,

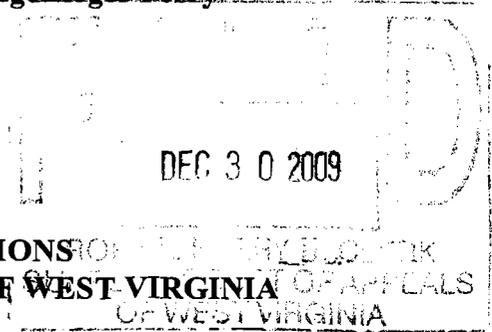
Plaintiffs,

v.

CIVIL ACTION NO. 06-C-238
(Consolidated with 06-C-239, 06-C-240, 06-C-241, and 07-C-234)
Judge Roger Perry

GENERAL PIPELINE CONSTRUCTION, INC., et al,

Defendant/Third-Party Plaintiff.



ORDER CERTIFYING QUESTIONS
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I. INTRODUCTION

This certified question arises from a suit pending in the Circuit Court of Logan County, West Virginia, alleging the desecration of certain grave sites by the defendants.

II. STATEMENT OF THE FACTS

General Pipeline Construction, Inc. was hired by Equitable Production Company to lay a gas pipeline in Logan County, West Virginia, across a large tract of wooded land. An employee drove a bulldozer down the side of the hill to a road to pull a flat-bed truck carrying additional supplies up the hillside and, in doing so, passed through an area which contained grave sites. The last known burial occurred there in 1965 but some of the grave sites are more than fifty (50) years old. The plaintiffs claim to be descendants of nine (9) of the thirty (30) to sixty (60) decedents alleged to be buried in this area, the remainder of which have no known descendants. Seven (7) grave markers of various types have been identified.

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In response to General Pipeline's Motion for Summary Judgment, the trial court held that a cause of action for "indirect desecration" is recognized in West Virginia but neither defined the nature of such desecration or its physical limits, if any, in regard to a grave site. Additionally, other issues of first impression or of unclear law have been identified in the discovery portion of this case.

III. STANDARD OF REVIEW FOR CERTIFYING LEGAL QUESTIONS

"Any question of law . . . may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back." W. Va. Code § 58-5-2. See FN3, *Smith v. Consolidated Public Retirement Board*, 222 W. Va. 345, 664 S.E.2d 686 (2008).

The Supreme Court's review of a circuit court's answer to a certified question is *de novo*. Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996); *Smith v. Consolidated Public Retirement Board*, *supra*.

IV. QUESTIONS PRESENTED

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

Answer of this Court: 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.

In a very broad sweep, West Virginia Code § 29-1-8a provides that "[a]ny person who, whether by himself or through an agent, intentionally . . . disturbs any . . . unmarked grave,

without first having been issued a valid permit . . . is guilty of a misdemeanor”¹ The recovery of civil damages for such an act is addressed later in the same statute, entirely preempting common-law claims for desecration of unmarked graves.

A key principle in statutory construction is that a statute be read in conjunction with the common law unless it clearly appears that the purpose of the statute is to change the common law. *See Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 647 S.E.2d 879 (2007). When the Legislature adopts specific limits to preexisting common law, it must first be determined whether the Legislature preempted the area of law at issue or left any room for judicial discretion. *See State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 464 S.E.2d 763 (1995).

Before the 1991 enactment of W. Va. Code § 29-1-8a, the only West Virginia statute addressing desecration, specifically the disinterment of dead bodies, was W. Va. Code § 61-8-14, a criminal statute enacted in 1882. It was amended in 1994, after the passage of § 29-1-8a, to add the offense of desecration of a burial site and to define “desecration,” which is not defined elsewhere in the Code.

On the civil side, beginning with *England v. Central Pocahontas Coal Co.*, 86 W. Va.

¹Even the apparent limiting words of the statute really limit nothing. The disjunctive “or” between “historic or prehistoric” with its following listing and “unmarked grave” in West Virginia Code § 29-1-8a bars any interpretation that the “unmarked grave” must be of such character. The appearance of the phrase “of historic significance” later in that same sentence might seem to impose a limitation except that phrase follows the term “grave marker.” Certainly an “unmarked grave” cannot have a “grave marker,” whether or not “of historic significance.”

An “unmarked grave” is defined 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) (*emphasis added*).

575, 104 S. E. 46 (1920), an action for disinterment and/or desecration/disturbance was grounded in the common law, arising from the special property right accorded to human remains, and dealt with the unlawful disinterment and disposal of human remains. *Whitehair v. Highland Memory Gardens, Inc.*, 174 W. Va. 458, 327 S.E.2d 438 (1985) involved the lawful disinterment and subsequent reckless handling of remains. Importantly, both cases involved the knowing entry of a grave and the physical handling of the remains.

Both § 29-1-8a and the amendment to § 61-8-14 were passed shortly after the West Virginia Supreme Court's holdings in *Bennett v. 3C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989), and *Concerned Loved Ones and Lot Owners Association of Beverly Hills Memorial Gardens v. Pence*, 181 W. Va. 649, 383 S.E.2d 831 (1989) ("*Beverly Hills*"), and appear to be in response to *Bennett*.

In *Bennett*, the plaintiff sought recovery for surface cracks running through grave sites in a private cemetery allegedly caused by mine subsidence. While not clearly stated, it is suggested by the language used that the defendant mining company was aware that its underground mining operations were below a known cemetery.

In its analysis, the Court expanded the holdings in *Whitehair* and, primarily, *England*. Noting that *Bennett* was more analogous to *England* in that *Whitehair* arose from permissive disinterment, while *England* involved an "unlawful" disturbance, the Court ruled the same principles justified a "cause of action...for the unlawful desecration of a grave site even though no disturbance of the body interred therein can be shown." *Bennett, supra*, at 393.

The Court was faced with a different scenario in *Beverly Hills*, yet one with similarities all the same. *Beverly Hills* came to the Court as a certified question, and involved a publicly

dedicated commercial cemetery, of which 50 of the originally dedicated 70 acres were maintained and developed as burial property. The remaining 20 acres were sold to the cemetery corporation's president individually, who had commenced timbering thereon and who had leased the acreage to a mining company for strip, surface and auger operations.

Relying on *Bennett*, and many of the same authorities it cited, the Court held the plaintiffs would in fact have a cause of action for unlawful cemetery desecration if the lower court found the area at issue was deeded for cemetery purposes. *Beverly Hills, supra* at 655-666, 838.

It is a well-settled maxim of statutory construction that 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 "pertinent judgments rendered by the judicial branch." Syl. pts. 4 & 5, *Kessel v. Monongalia County General Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007).

Important to this analysis is the fact that the Legislature required that a violation of § 29-1-8a be "intentional." W. Va. Code § 29-1-8a(c)(2). This requirement of intent was mirrored later when the Legislature expanded the state criminal code to define "desecration" to require intent, which means the actor must have actual knowledge of the existence of the cemetery. W. Va. Code § 61-8-14(b).

In *Bennett*, *Beverly Hills*, *England* and *Whitehair*, there was little concern with defining specific elements of the tort of desecration of a body or burial place, but merely discussion of the right of the plaintiff to seek redress for, or to enjoin, encroachment on, damage to, or invasion of the burial site. The term "unlawful" was also used in relation to the various acts of desecration addressed but there is no discussion of the basis for that classification. Presumably, "unlawful" denoted an action taken without permission of the holder of rights to the land.

Further, there is no discussion of the intent of, or knowledge of, or notice to the alleged tortfeasor. As discussed in *Bennett* it appeared the mining company had knowledge that its operations were below the family cemetery. Likewise, in *England* it appeared the defendants had some knowledge they were acting in a cemetery or near a grave. In both *Whitehair* and *Beverly Hills* the knowledge and notice were obvious as the cases involved, respectively: (1) a permissive disinterment, and (2) the actions of a cemetery company president on adjacent land. This begs the question as to whether knowledge or notice of the presence of a grave site was a consideration in finding the acts "unlawful" or whether the issue of knowledge or notice ever came up. Regardless, the cases are silent as to any specific mention of the degree of *mens rea* required before one will be held civilly liable for desecration of a burial ground.

The enactment of § 29-1-8a, and the subsequent amendment to § 61-8-14, completes these omissions. Clearly, the two statutes, addressing the same subject matter and which must be read *in pari materia*, see, e.g., *State v. Wade*, 174 W. Va. 381, 327 S.E.2d 142 (1985), provide the elements necessary for a finding of either civil or criminal liability.² First, there must be a grave site. Next, there must be knowledge of the grave site and intent to "desecrate" or "disturb" it. Finally, the actions taken must fall within the statutory definitions of "desecrate" or "disturb."

While this Court finds that W. Va. Code § 29-1-8a preempts civil actions for desecration of grave sites outside publicly or privately maintained cemeteries, the Court cannot hold that this action is preempted absent a finding that the grave sites in question were located outside a

² In fact, for a grave site falling within the scope of § 29-1-8a, civil penalties payable to the West Virginia Endangered Historic Properties Fund are specifically set forth.

privately maintained cemetery. The Court finds it noteworthy that W.Va. Code §29-1-8a seemingly provides protection to some gravesites in certain circumstances and not others. For example, the code provides protection against intentional desecration where the grave(s) is older than fifty years and outside a public or privately maintained cemetery, but not those similarly situated graves younger than fifty years of age. Additionally, while the code provides this narrow protection to some graves, it provides protection for property owners and natural resource industries at the same time through an exemption from liability for non-intentional acts of desecration. W.Va. Code §29-1-8(a) provides: "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." This language seems to negate the intent of the law stated earlier in the same subsection and the protection it affords later in the article.

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

Answer of this Court: 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 onto 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;**

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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;**

As shown above, the only instance in which a common law action for desecration still exists is for the desecration of a grave in a publicly or privately maintained cemetery; claims for unmarked graves (or related structures) having been preempted by West Virginia Code §29-1-8a.

Determining the elements of a claim for the desecration of a grave in a publicly or privately maintained cemetery cannot be answered just by the examination of the few West Virginia decisions discussing different specific aspects of cases involving desecration but requires the consideration of cases from other jurisdictions which might influence the issue.

The basic rule for the existence of a tort claim is, as it has always been, duty, breach, and resulting damages. It is well settled that actionable negligence requires the breach of a duty owed the plaintiff. *See, e.g.,* syl. pt. 3, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000). But in addition to the existence of a duty is the necessity that it be recognized that the breach of that duty might result in harm to another. “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...[W]ould the ordinary man in the defendant’s position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?” *Aikens, supra*, at syl. pt. 8 (*quoting* syl. pt. 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988)).

“[W]hile foreseeability of risk is a primary consideration in determining the scope of duty

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an actor owes another, “[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[.]” *Aikens, supra*, at 581 (quoting *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983)). “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, supra* (quoting *Robertson, supra*). “A person is not liable for damages which result from an event which was not expected and could not reasonably have been anticipated by an ordinarily prudent person.” *Aikens, supra* (quoting *Puffer v. Hub Cigar Store*, 140 W. Va. 327, 84 S.E.2d 436 (1954), *overruled on other grounds as stated in Malet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999)). “The obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous...in other words, [duty] is measured by the scope of the risk which negligent conduct foreseeably entails.” *Aikens, supra* (quoting 2 F. Harper & F. James, *The Law of Torts* § 18.2 (1956) (footnote omitted)).

The first essential element of a desecration claim must be that a cemetery exists. *Beverly Hills, supra*, identified as crucial whether there was an actual dedication of the land to cemetery purposes to be found in the original deeds. If there is no dedication, there can be no recovery.

Beverly Hills concerned a publicly dedicated cemetery. However, there may be private cemeteries as well. As noted by the West Virginia Attorney General, public cemeteries “...are those open to use by the general public, and, generally speaking, the grave space therein is sold.” *In re Warden M. Lane*, 51 W. Va. Op. Atty. Gen. 28, 1964 WL 72575, 1 (W. Va. A.G. 1964). Conversely, a private cemetery is one established where the property has generally been used by

a landowner, or with the landowner's permission, for purposes of interring relatives, friends, and/or a small portion of the community, but not the community at large. *Id.* at 1-2; *see also Hughes v. Cobb County*, 441 S.E.2d 406 (Ga. 1994); *Heiligman v. Chambers*, 338 P.2d 144 (Okla. 1959). As explained by the West Virginia Attorney General:

[P]rivate or family cemeteries are those...wherein only the members of a particular family and the friends of that family living in the vicinity...are interred. Usually, the graves in family cemeteries are not purchased; permission to use the cemetery is allowed merely by reason of the fact that the deceased or his family are friends or relatives of the owner of the land upon which the cemetery is located and reside in the general vicinity of the cemetery. These private type family cemeteries had their beginning as a matter of practical necessity. Where public cemeteries have not been established in an area, it is necessary for a landowner to set aside a small portion of his land, usually an acre or less, to be used by the members of his family and by persons residing in the area as a burial ground.

In re Lane, supra, at 1-2.

In West Virginia, 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." Syl. pt. 3, *In re Hillcrest Memorial Gardens, Inc.*, 146 W. Va. 337, 119 S.E.2d 753 (1961). Essential to this definition is that the "cemetery" have "limits." *Id.* at 346, 758; *see also* syl. pt. 3, *Sherrard v. Henry*, 88 W. Va. 315, 106 S. E. 705 (1921) (cemetery plots taken by adverse possession; a fence or barrier delineating the limits of the claimed cemetery are preferable but stating that "[i]f the limits of such a claim are clearly defined by improvements upon the lost and by a slight barrier or ridge extending all the way around the same, and so maintained for a period of 10 years, clearly indicating the extent and nature of the claim, it will be sufficient to confer the right of adverse possession."); *see also In re Lane, supra* ("What

creates the cemetery is the act of setting the ground apart for burial of the dead—marking and distinguishing it from adjoining ground as a place of burial.”) (emphasis added); *England, supra* (“Generally, a cemetery lot in the country is a notable object and has well-defined boundaries and is easily identified.”); *Village of Villa Park v. Wanderer’s Rest Cemetery Co.*, 147 N. E. 104, 105 (Ill. 1925) (“[W]hat creates the cemetery is the act of setting it apart for the burial of the dead, marking it, and distinguishing it from the adjoining ground as a place of burial.”); *Heiligman, supra* (must have discernible borders); *Carr v. Baldwin*, 190 S.W.2d 692 (Ky. 1945) (must possess marked borders).

A cemetery must bear the appearance and character of a cemetery and be maintained as a resting place for the dead. All jurisdictions require some maintenance and keeping-up of appearances so as to provide notice that a cemetery is present. The next of kin of those interred, particularly in a private cemetery, will lose their right of redress for desecration if the cemetery loses the appearance and character of a burial ground. *See, e.g., Sanford v. Vinal*, 552 N.E.2d 579, 585-586 (Mass. App. 1990) (“The mere passage of time does not extinguish the rights of descendants in a family burial ground; but where the family has ceased to visit the cemetery and where they have so long neglected to care for it that the ground is no longer recognizable as a cemetery, the family burial ground has been abandoned, and with it the private standing of the descendants to require that those who own the land abstain from using the land for other purposes.”); *Mayes v. Simons*, 8 S.E.2d 73 (Ga. 1940) (where “by neglect and inattention for more than fifty years the graves had ceased to bear any sign likely to attract attention to their existence...[,] the space...had lost all appearance as a cemetery[,] if interments have not been made for a long time, and can not be made therein, and in addition the public, and those

interested in its use, have failed to keep and preserve it as a resting place for the dead, and have permitted it to be thrown out to the commons, the graves to be worn away, gravestones and monuments to be destroyed, so that the graves have lost their identity, or if it has been so treated or neglected by the public as to entirely lose its identity as a graveyard, and is no longer known, recognized, and respected as such, then it has been abandoned.”) (citations omitted); *Hines v. State*, 149 S.W. 1058 (Tenn. 1911) (rights of descendants survive “...so long as the lot is kept enclosed, or, if unenclosed, so long as the monuments and gravestones, marking the graves are to be found there, or attention is given to the graves, so as to show and perpetuate the sacred object and purpose to which the land has been devoted.”).

Where there are monuments present, they must be sufficient to put a person on notice that a cemetery or burial ground is present. *See, e.g., Adams v. State*, 97 S.E.2d 711, 713-716 (Ga. App. 1957). They must be visible to a stranger prior to entering upon a cemetery or burial ground. *Id.* The simple oral history of a family or group, without more, is not sufficient to establish a cemetery or provide proper notice of its existence. *See, e.g., Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001). A person without prior notice of the presence of a cemetery when coming upon the site will not be held liable for its desecration. *See, e.g., Kenny Const. Co. v. Green*, 422 S.W.2d 423 (Ky. App. 1968); *Johnson v. Kentucky-Virginia Stone Co.*, 149 S.W.2d 496 (Ky. App. 1941); *Mayes, supra*; *McDonough v. Roland Park Co.*, 57 A.2d 279 (Md. 1948).

Exactly what acts are desecration such as will support an action have also not been addressed with specificity by the West Virginia Supreme Court of Appeals. The actions considered consist of the actual disturbance of human remains, damage to a grave site without

harming the remains, and the misuse of lands allegedly dedicated for use as a cemetery. The standard set out above as a necessary element is taken from West Virginia Code § 61-8-14, the criminal code section regarding desecration which is the only place in which the West Virginia Legislature or the West Virginia courts have provided a definition.

The remaining elements of a cause of action for desecration of a grave in a publicly or privately maintained cemetery are discussed elsewhere.

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

Answer of this Court: 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, reckless or malicious.

The recoverable damages for the desecration of a grave in a publicly or privately maintained cemetery were identified by the West Virginia Supreme Court of Appeals in *Beverly Hills, supra*, in which the Court discussed the damages which might be available to plaintiffs if the property in question was dedicated to use as a cemetery.

Citing decisions from other jurisdictions, the Court first found that "...in this type of action, nominal damages at least, are awardable, and compensatory damages may be recovered if actual damage is shown." *Id.* at 656, 839 (citations omitted).

Quoting *Bennett, supra*, the Court stated "[d]amages for mental distress may be recovered by the next of kin for the disturbance or desecration of a relative's grave." *Beverly Hills, supra* (quoting syl. pt. 3, *Bennett, supra*).

Finally, the Court found that punitive damages may be available if a plaintiff "...can prove that the defendants' conduct was willful, wanton, reckless or malicious." *Beverly Hills, supra* ("In order to secure punitive damages, a defendant must be shown to have engaged in a willful, wanton, reckless, or malicious act.") *Beverly Hills, supra* (quoting syl. pt. 5, *Bennett, supra*). No such showing was made in *Bennett*, and thus the Court reversed the award of punitive damages made in the trial court. *Bennett, supra*, at 671, 394.

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?**

Answer of this Court: A cause of action for the indirect desecration of a grave site 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 the Answer to Question 2, above, plus:

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

No West Virginia case has recognized a cause of action for "indirect desecration" of a grave, grave site, cemetery or burial ground, that is, a cause of action for a claimed injury which does not involve physical damage to the grave, grave site, cemetery or burial ground. This Court did, in its letter ruling of December 12, 2007, hold that such a cause of action exists in this State. A copy of this letter is enclosed with this Order. Inasmuch as there is no case law upon which to draw, the elements of a claim for indirect desecration or the recoverable damages are unknown at this time and can only be meaningfully addressed when this Court has made the necessary decisions regarding the preceding certified questions.

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?**

Answer of this Court: 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.*

West Virginia law holds the cause of action for desecration of a body, grave site or cemetery lies with the “next of kin.” *See Bennett, supra*, and *Beverly Hills, supra*.

Specifically, the West Virginia Supreme Court of Appeals has stated:

[T]he cause of action ordinarily belongs to the party with the right to possession of the body. This is usually the surviving spouse, provided he or she was living with the decedent at the time of death, and has not waived his or her right. 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, supra, at 463, 443-444 (citations omitted).

Intestate succession is governed in West Virginia by W. Va. Code § 42-1-1, *et seq.*, which, effective in 2002, substantially changed the simple provisions regarding descent which was in effect when the Supreme Court made its pronouncements. As changed, this chapter now provides that the percentage of the decedent’s property taken by the surviving spouse, one-half to three-fifths share, is dependent upon whether or not the decedent had any descendants. This, presumably, also applies to the cause of action for desecration of the decedent’s grave. If there is no living spouse, then that portion that did not pass to a surviving spouse at the time of the decedent’s death would, passed in intestate succession, be possessed by the decedent’s descendants; or, if none living, by the decedent’s parents; or, if none living, by the decedent’s

parent's descendants; or, if none living, by the decedent's grandparents in specified portions, etc., etc., etc.

Such a succession plan clearly creates the possibility that more than one person will be vested with a portion of the right to bring the cause of action and raises the not-insignificant question of how the intestate portion passing to those potential plaintiffs is to be divided because certainly all of them cannot have a claim for the whole but only a claim for that portion of the right which has passed to them. When the potential claimants are all of a known and of the same class or degree of relationship to the decedent, these problems can be solved, although possibly with difficulty. *See Johnson v. Kentucky-Virginia Stone Co.*, 148 S.W.2d 496, 497-498 (Ky. App. 1941). But when the potential claims are of varying degrees of relationship to the decedent, the potential problems are multiplied.

When a potential claimant or claimants of varying degrees of relationship are found to have standing pursuant to intestate succession, it has been held that those closest in degree of kinship alone hold the right of action and that only when that degree of kinship is exhausted do other potential heirs of a more distant degree of kinship gain standing to seek recovery. *Id.*

It is submitted that the only proper plaintiffs in an action for desecration of a body, grave site or cemetery is 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.* Any other provision simply injects too much complexity into an already complex matter.

**V. PROCEDURE AFTER THE COURT ENTERS ORDER
CERTIFYING THE LEGAL QUESTIONS**

The Defendant General Pipeline Company shall, within sixty days of the date of entry of the order of certification, file with the Clerk of this Court an original and nine copies of a petition which shall include the note of argument and be in the same form as provided for in Rule 3(c) of the West Virginia Rules of Appellate Procedure, one copy of the petition and note of argument shall be served on the other parties. An original and nine copies of a response by any other party may be filed with the Clerk within thirty days of the filing of the petition.

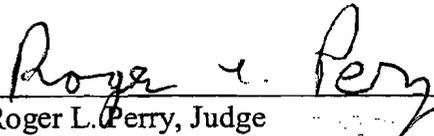
VI. CONCLUSION

Accordingly, the Court certifies the above questions and its answers to the Supreme Court of Appeals of West Virginia pursuant to the provision allowing it to certify "any question of law" as contained in West Virginia Code § 58-5-2.

The Court notes the objections and exceptions of the parties to any adverse rulings herein.

The Clerk is directed to forward a certified copy of this Order to counsel of record.

Date: November 16, 2009



Roger L. Perry, Judge

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CLERK OF COURT

ENTERED IN CIVIL ORDER BOOK
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DATE _____

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