

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GENERAL PIPELINE CONSTRUCTION, INC.,
and
EQUITABLE PRODUCTION COMPANY,
Defendants Below, Petitioners

v.

NO. 13-0933

Logan Co. civil Action No. 06-C-238
Consolidated with 06-C-239; 06-C-240;
06-C-241 and 07-C-234)
Judge Elliott E. Maynard

CORA PHILLIPS HAIRSTON, et al.,
Plaintiffs Below, Respondents.

REPLY BRIEF

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Pursuant to Rule 10(g) and (e) of the West Virginia Rules of Appellate Procedure, Petitioner submits this reply to Respondents' Brief.

III. Reply to Respondents' Statement of the Case.

Respondents' characterization of the earlier opinion of this Court responding to certified questions in this matter as merely "regarding the nature of a common law cause of action for grave desecration claim" is not only far too limited, it is misleading. (Respondents' Brief on page 2, hereinafter "RB 2"). The very first holding of that opinion was that if West Virginia Code § 29-1-8a applied, it absolutely and completely preempted any common law claim. Only then did this Court discuss the possibility of an un-preempted common law claim for grave desecration and identify the necessary elements of proof. *See, Syl. 2 and 8, Hairston v. General Pipeline Const., Inc.*, 226 W. Va. 663, 704 S.E.2d 663 (2010). The primary problem encountered during the trial of this action was the muddling of the two mutually exclusive causes of action by Respondents, which contains the Response.

IV. Reply to Respondents' Statement of Facts.

Despite Respondents' self-serving assertions, the area of the grave sites was not recognizable as a cemetery "from the topographical outlay of the natural slopes of the mountainside which set this area apart from the rest of the mountain." (RB 4). The area claimed as a cemetery, the area within the blue box on Respondents' expert's drawing, (App. I, 760-761, 771) was identified as unrelated to any geographic features. In fact, Respondents' expert testified he "felt that the combination of evidence of grave markers, grave shafts, plantings, the combination and cumulative nature of the graves within that area identify this as a cemetery." (App. I, 661). It was from the materials and items associated with the grave sites, not any external appearance, upon which he relied.

The grave sites in question were not established, authorized or even mentioned in any deed or other writing. Respondents' assertion in their Statement of Facts that the cemetery was "established through a January 1, 1923, 'Deed of Lease and Agreement'," a coal lease, is their interpretation that the

right to erect houses on leased property created the right to bury the people who lived in those houses, also. (RB 3). (See App. I, 841-843). Respondents' interpretation would transform this lease and any other similar lease into a deed resulting in the owner's permanent loss of that portion of the property, here unspecified as to location or extent, claimed as a cemetery.

None of the few Death Certificates, the Register of Death, or any local funeral home record identify a location of "Crystal Block Cemetery," just noting, at best, that a burial took place at a "Crystal Block Cemetery." (RB 3). (See, App. I, 690-694). Respondents do not even attempt to explain how these records could be found without already knowing the names of those buried there or how these records show any specific location.

Respondents claim continuously visiting and keeping up the grave sites. In fact, Shirley Wilder last visited in the late 1980s or early 1990s (App. 273); Ann Lewis last visited in the 1960s (App. 325); Edward Early, now in his 60's, testified he went with his children some time ago (App. 432-33); Donald Newsome last visited in 1971 (App. 895); Daniel Olbert, Jr., said he had been there four or five times (App. 922) and placed flowers there in 1968 (App. 929); Carolyn Monroe had not been to the grave site since the 1980's or 1990's (App. 257); Carolyn Coles Jones was last there in the late 1980's (App. 260, 262); Gloria Olbert had not been to the grave site since 2001 or before (App. 468-69); Jacqueline Olbert Washington has not been to the grave site since 1983 (App. 477); Harry Coles has not returned since 1984 or 1986 (App. 333); and Jacqueline Powell Hamlett stated she had not been there until after the incident giving rise to the Complaint (App. 334).

Only three had visited more recently, Cora Hairston who said she had visited in 2003 (App. 1123); Jimmy Early testified he had regularly visited the site (App. 1089-90); and James Olbert who did not give clear testimony as to his last visit but apparently was in the area more than most (App. 355-56).

Respondents' testimony about maintaining the grave sites revealed even less activity. Edward Early testified that Jimmy Early maintained the area (App. 457); Daniel Olbert, Jr., stated it was

maintained by his brother or Jimmy Early (App. 927) but he was not sure (App. 916-17); Shirley Wilder stated when she was younger the neighbors took care of it (App. 273) but she was last there in the late 1980's or early 1990's; Jacqueline Olbert Washington testified that she did no work at the graves after 1983 (App. 477); James Olbert stated he would go back from time and time (App. 317) but did not do any maintenance (App. 352-53); and Jimmy Early, who was identified by the others as taking care of the cemetery, testified that he would use his "whacker," a walking stick, to beat down weeds around his father's grave and would pick up trash and beer cans but admitted he did nothing any more than that (App. 1084, 1089-90, 1095).

In the remainder of the Statement of Facts, Respondents refer extensively to the testimony and that of the witnesses they called, ignoring all other evidence, as if only what they presented were findings made by the judge or jury. In fact, no findings of any of the essential elements of Respondents' claims made by the jury can be determined from the verdict form. In fact, the jury verdict refutes much of what Respondents assert in the jury's failure to make any award for physical damage done to a grave site. (See Judgment Order, App. I, 1-9).

V. ARGUMENT

1. It was error for the trial court to allow the trial to proceed or damages to be considered or awarded by the jury as to any Plaintiff without a determination by the trial court or by the jury whether or not West Virginia Code § 29-1-8a applied

As stated in Syl. 2 of *Hairston v. General Pipeline Const., Inc.*, 226 W. Va. 663, 704 S.E.2d 669 (2010), West Virginia Code § 29-1-8a absolutely preempts any common law action for grave desecration. While it is agreed that the statute was discussed many times during the trial, most often during an objection or in arguing the jury instructions, no ruling was made by the trial court that the statute applied to this matter. Until the ruling of the statute justified an instruction on *pro se* negligence but only to reference to graves other than Respondents' decedents. (App. II, 1345-1347). If the trial court had held that West Virginia Code §29-1-8a applied to Respondents' claims, then it would have preempted their

common law claims for grave desecration (See, *Hairston, supra*, Syl. 2); would have required that the desecration claims be pursued, if at all, by the local prosecutor (See, West Virginia Code §29-1-8a(g)(1) and (2)); and that any recovery of civil damages be deposited in a state fund, not awarded to the Respondents. (See, West Virginia Code §29-1-8a(g)(2)). If preempted by the statute, any jury instructions based on common law claim (App. II, 1429/3-15; 1428/12-24; 1426/22-1427/10; 1429/3-15; 1438/7-13; 1438/14-21; etc.) were improper.

If, on the other hand, the trial court had held West Virginia Code § 29-1-8a was not applicable, then the jury instructions based on that inapplicable statute (App. II, 1427/20-21; 1435/8-12; 1435/19-1436/6; 1436/7-11; 1436/12-15; etc.) were improper.

Unfortunately, the trial court did neither, forcing Petitioner to question witnesses on both (especially after the court allowed witnesses to offer legal opinions) and offer proposed instructions based on both West Virginia Code § 29-1-8a and the common law grave desecration elements identified in *Hairston, supra*, in case the trial court did, during the final argument, make such a ruling.

Respondents argue that the trial court distinguished between the marked graves of the Respondents' decedents and the other unmarked graves in the area, applying West Virginia Code § 29-1-8a only to the latter. (RB at 9). While given at one point as a justification, such a distinction, undetectable in the instructions, Appendix II, Pg. 1345-1348 (68:18 - 71:7), still fails to justify the giving of jury instructions based on the statute if, as asserted by Respondents, none of the Respondents' claims arose under that statute (RB at 9); if Petitioners had no duty to the Respondents under that statute because the graves to which the statute applied were not those of Respondents' decedents (App. II, 1330, 1345-1347); and the penalties for violation of the statute are to be assessed by the local prosecution attorney and, rather than being awarded to the Respondents, are to be deposited in the Endangered Historic Properties Fund. See, West Virginia Code § 29-1-8a(b)(6) and *Hairston, supra*, 226 W. Va. at 670, 704 S.E.2d at 670.

2. It was error for the trial court to allow personal representatives of deceased claimants to participate as Plaintiffs.

The holding of *Hairston, supra*, Syl. 9, was that the right of recovery in a common law action for grave desecration was held by the decedent's surviving spouse or, if none, "the 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 Code §55-7-8a, entitled "Actions which survive; limitations; law governing such actions," provides in sub-paragraph (b) that:

If any such action is begun during the lifetime of the injured party, and within the period of time permissible under the applicable statute of limitations as provided by articles two and two-a of this chapter, (either against the wrongdoer or his personal representative), and such injured party dies pending the action it may be revived in favor of the personal representative of such injured party and prosecuted to judgment and execution against the wrongdoer or his personal representative.

This Court must determine whether West Virginia Code §55-7-8a(b), or Rule 25 of the West Virginia Rules of Civil Procedure cited by Respondents, effectively alters the *Hairston* holding, allowing the child of a deceased plaintiff, acting as a personal representative, to participate equally with the other plaintiffs who are of a closer relationship to the decedent, and effectively resulting in a right of recovery by a person who is not "of closest and equal degree of kinship."

3. It was error for the trial court to allow expert or lay witnesses to testify as to the application and meaning of statutes and law or to allow expert witnesses to testify as to matters outside the scope of their expertise.

"The admissibility of testimony by an expert witness is a matter within the sound discretion of the circuit court, and the circuit court's decision will not be reversed unless it is clearly wrong." Syl. Pt. 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991).

But

While the standards for allowing the testimony of one who is loosely referred to in legal parlance as an "expert witness" are very liberal, there are, nonetheless, some limitations. The rulings of

the trial court in this case, such as those concerning Respondents' witness William Updike, were based upon the court's stated belief that "to qualify as an expert you need only to know more about the subject than a person or (sic) ordinary common experience would know. That's what you need to be an expert" (App. I, 644) and a later ruling " . . . I'll allow this since he's an expert" (App. I, 690). These statements certainly ignore any limits.

William Updike was qualified as an archeologist but was permitted to express his opinions as to the applicable law, testifying as to the existence of West Virginia statutes dealing with the desecration of cemeteries, specifically opining as to the reasons for, the meaning of, and the requirements of West Virginia Code §29-1-8a, (App. I, 710), the court ruling that "this man is an archeologist. . . . He can testify to what he thinks is required [by the law] if he comes upon a cemetery" (App. I, 709). Mr. Updike, in response to questions by Respondents' counsel, proceeded to do exactly that - testify as to the requirements of the law.

As a general rule, an expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute . . . or case law . . . or the meaning of terms in a statute . . . or the legality of conduct.

32 C.J.S. Evidence § 634, at 503-04 (1996) (footnotes omitted). See also John W. Strong, McCormick On Evidence, Vol. 1 § 12, p. 53 (1999) (stating that "regardless of the rule concerning admissibility of opinion upon ultimate facts, at common law[,] courts do not allow opinion on a question of law, unless the issue concerns foreign law." (Footnotes omitted.).

Jackson v. State Farm Mut. Auto. Ins. Co., 215 W. Va. 634 , 600 S.E.2d 346 (W. Va. 2004).

Petitioner will make no further submission on this point in addition to the arguments in its brief but does not intend this to mean it agrees with Respondents' arguments.

4. It was error for the trial court to deny a jury view.

It is clear that under the law of this state, the granting of a jury view is left to the discretion of the trial court and “unless the denial of such view works probable injury to the moving party, the ruling will not be disturbed.” *Collar v. McMullin*, Syl 1, 107 W.Va. 440, 148 S.E. (1929); *State v. Brown*, 210 W.Va. 14, 26 S.E.2d 390 (2001); West Virginia Code §56-6-17.

In this case, a jury view was not only requested by the parties, it was requested several times by the jury. See, App. I, 165-167, 247 - 249, 957-964. It was not denied until late in the trial process. (App II, 1143).

If West Virginia Code §29-1-8a had ever been held to apply to this action, the trial should have then ended and obviously no jury view would have been needed. But if the elements of a common law desecration claim were being considered, then a jury view was essential to the defense of this action because so many of those elements involve the appearance of the area - the grave must be in a maintained cemetery, it must be clearly marked, it must have identifiable boundaries and limits, it must be identifiable as a cemetery by its appearance prior to entry, there must be damage to the physical area of the grave site or the common areas. Pictures were extensively used during this trial but, even the court itself, having been to the site, commented on the inability of the photographs to accurately depict the area. (App. I, 766-767, 956-964, App. II, 1054).

The denial of the jury view under these facts was an abuse of discretion.

5. It was error for the Court to deny this Defendant’s Motion for Judgment as a Matter of Law and allow the case to go to the jury without admissible evidence having been presented proving or tending to prove the elements of a common law cause of action.

Petitioner will make no further submission on this point in addition to the arguments in its brief but does not intend this to mean it agrees with Respondents’ arguments.

6. It was error for the trial court to instruct the jury that the single act which allegedly caused physical damage to the grave sites also justified an adverse inference against the Defendant as spoliation.

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7. It was error for the trial court to accept from the jury a verdict for emotional distress without a finding of physical damage to a grave or to the common area.

In its verdict, the jury awarded damages for mental distress to each of the fourteen (14) Respondents but did not make any finding, despite the fact that the verdict form provided a clear opportunity to do so as to each Respondent, that there had been any property damage. (App 1-9)

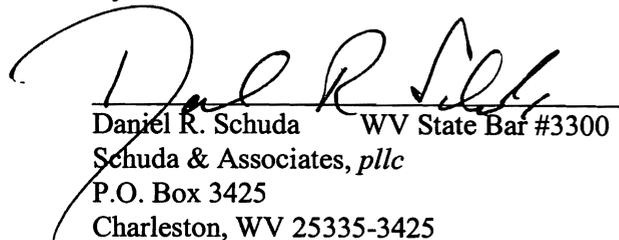
In Footnote 10 of *Hairston, supra*, this Court anticipated this very situation:

A question will inevitably arise concerning whether mental distress damages are available in the absence of damage to the grave site. The answer lies in the elements of the common law action of grave desecration, as enumerated above. No action may be brought if there is no defacement, damage, or other mistreatment of the physical area of the decedent's grave site or common areas of the cemetery in a manner that a reasonable person knows will outrage the sensibilities of others.

8. And for such other and further relief from the errors which are apparent in the Appendix or the record to which Petitioner is justly entitled.

Petitioner will make no further submission on this point in addition to the arguments in its brief but does not intend this to mean it agrees with Respondents' arguments.

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CERTIFICATE OF SERVICE

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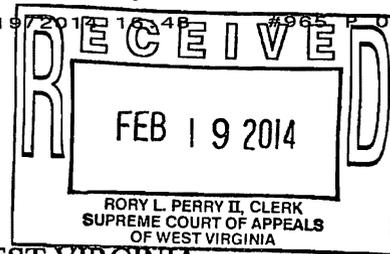
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