

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

GENERAL PIPELINE CONSTRUCTION, INC.,

Defendant Below, Petitioner,

v.

Supreme Court No. 13-0933

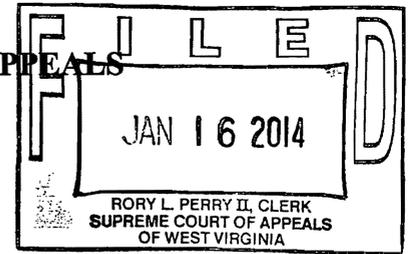
Logan Co. Civil Action No. 06-C-238
(Consolidated with 06-C-239, 06-C-240,
06-C-241 and 07-C-234)
Judge Elliott E. Maynard

CORA PHILLIPS HAIRSTON, *et al.*,

Plaintiffs Below, Respondents.

RESPONDENTS' BRIEF

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III. PETITIONER'S ASSIGNMENTS OF ERROR

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.

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

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.

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

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.

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

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.

8. And for such other and further relief from the errors which are apparent in the Appendix (referenced herein as "App." with page number) or the record to which Petitioner is justly entitled.

IV. STATEMENT OF THE CASE

Procedural History

The initial four (4) Complaints about this matter were filed in August of 2006 and another companion Complaint was filed in July of 2007.¹ Appendix I, 1892-1903 (Logan County Circuit Clerk Docket Sheet). There are fourteen (14) Plaintiffs involved in this litigation,

¹ The Complaints allege claims for negligence, gross negligence, public nuisance, private nuisance, tort of outrage-intentional infliction of emotional distress, desecration, violations of the West Virginia Oil and Gas Production Damage Act, trespass and punitive damages. The claims of public nuisance, private nuisance, tort of outrage-intentional infliction of emotional distress and violations of the West Virginia Oil and Gas Production Damage Act were dismissed. Appendix, Pgs. 101 & 1141-1143.

representing seven (7) decedents and in 2007, the trial court consolidated these Complaints as a matter of judicial economy.²

This case previously was before this Court, on certified questions, regarding the nature of a common law cause of action for grave desecration claim. In pertinent part, this Court established the elements for a common law cause of action for grave desecration. *See Hairston v. General Pipeline Const., Inc.*, Syl. Pt. 8, 226 W.Va. 663, 704 S.E.2d 669 (2010). The damages available in such a case include nominal damages; compensatory damages if actual damage has occurred; mental distress; and punitive damages if the defendant's conduct is determined to be willful, wanton, reckless, or malicious. *Hairston*, at Syl. Pt. 10. The next of kin who possess the right to recover in such a case must be the decedent's surviving spouse or, if such spouse is deceased, the person or persons of closest and equal degree of kinship in the order provided by West Virginia Code § 42-1-1, *et seq.* *Hairston*, at Syl. Pt. 8.

The underlying issues duly were tried on September 24 through October 12, 2012. Appendix 1-9 & 1908-1916. The jury found, by a preponderance of the evidence, Petitioner General Pipeline Construction, Inc. ("General Pipeline") and Equitable Production Company ("Equitable" and Petitioner in Docket No. 13-0934) liable to Respondents for the desecration of their decedents' graves in the Crystal Block Cemetery and made an award to them which included individual \$50,000.00 emotional damage awards to each Respondent and a compensatory award of \$14,000.00 to Respondent Cora Phillips Hairston as the "overseer of

² The Plaintiffs in this case are Cora Phillips Hairston and Shirley Wilder (for the Estate of Louella Phillips Wilder) (06-C-238); Jimmy Early and Edward Early (06-C-240); Carol Coles Jones, Carolyn Coles Monroe and Henry Jones Coles (06-C-241); James Olbert, Daniel Olbert, Jr., Jacqueline Olbert Washington, Jacqueline Powell-Hamlet (for the Estate of Ulysses Olbert) and Gloria Olbert (06-C-239); and Daniel Jerome Newsome and Ann Newsome Lewis (07-C-234). Michael Early was dismissed when he failed to appear for trial. Appendix, Pg. 1053.

restoration of cemetery.” In addition, the jury found, by a preponderance of the evidence, that the conduct of General Pipeline and Equitable to be reckless. The trial court set a punitive damage phase of the trial for October 18, 2012. Afterwards, the jury, by a preponderance of the evidence, returned a punitive damage award to Respondents in the sum of \$200,000.00 against Equitable.

Statement of Facts

Within Crystal Block Hollow, in Logan County, West Virginia, lies the Crystal Block Cemetery. This cemetery was established through a January 1, 1923, “Deed of Lease and Agreement” (Plaintiffs’ Exhibit 54) between Island Creek Mineral Company (lessor) and Crystal Block Coal & Coke Company (lessee). This lease provides that the surface land can be used for purposes consistent with a company town and that necessarily includes the right to burial. Appendix I, Pgs. 838-844 (8:16-13:8). Since then, the Crystal Block Cemetery also has been identified as a cemetery in adduced Death Certificates, the Register of Death and in local funeral home records. Appendix Pgs. 692-4 (83:14-85:15) & 719 (110:1-11). Several Respondents testified about a Crystal Block Burial Fund for burials at the cemetery. Appendix, Pgs. 255 (19:4-20:24); 263 (51:17-52:13) & 1106 (7:7-17). By all accounts, Crystal Block was a typical coal company town with a cemetery. Appendix Pgs. 697-699 (88:23-90:15), 1103-1106 (4:16-7:17).

At trial, each of the fourteen (14) Respondents testified that for many years, the Crystal Block Hollow community marched up the mountain in order to honor their dead at that sacred site. Appendix I-II, Pgs. 229 (6:16-7:3); 251-5; 257-60; 267-73; 304-18; 323-5; 331-2; 334; 340-60; 430-57; 462-474; 475-85; 890-9; 907-47; 1075-96; 1075-96 & 1104-1120 (5:13-21:6). The

fourteen (14) Respondents, who are the children and grandchildren of seven (7) of the decedents, personally maintained this cemetery on a regular basis. *See Id.*; 297 (186:7-187:8). While this case pertained to seven (7) decedents interred in the Crystal Block Cemetery, dozens of other individuals are buried in the cemetery. Appendix I-II, Pgs. 229 (6:16-7:3); 306-7 (12:21-16:3); 229 (6:16-7:3) & 1106-1108 (7:18-9:21). There were visible grave markers and grave shafts in the area. Appendix I-II, Pgs. 229 (6:16-7:3); 251-5; 257-60; 267-73; 304-18; 323-5; 331-2; 334; 340-60; 430-57; 462-474; 475-85; 890-9; 907-47; 1075-96; 1075-96 & 1104-1120 (5:13-21:6). Shrubbery around the area indicated that this area was utilized as a cemetery. *See Id.* There were hand-dug steps in the hillside leading to the graves. *See Id.* By all accounts, the area was identifiable as a cemetery from the topographical outlay of the natural slopes of the mountainside which sets this area apart from the rest of the mountain. Appendix I, Pgs. 297; 707-8 (98:21-99:88) & 717-8 (108:20-109:19).

Notwithstanding, in July 2004, General Pipeline was hired by Equitable to relocate a pipeline. Appendix I, Pgs. 502-15. During the relocation project, a road was constructed through the Crystal Block Cemetery by General Pipeline bulldozer operator Vandle Keaton. Appendix I, Pgs. 215-217 (13:7-21:10); 222 (41:14-8); 225 (51:2-12); 230-237 (11:20-38:8) & 365-368 (5:7-17:17). Before starting work, Mr. Keaton alleged that he did a walk-through of the area, but other on-site employees dispute that claim. Appendix I, 224 (48:18-20). Equitable failed to supervise the project, failed to survey the area for the presence of cemeteries and failed to do a walk-through. Appendix, Pgs. 187-196; 224 (48:18-20); 246 (17:13-21). General Pipeline and Equitable, while aware of the subject cemetery, did nothing to prevent or deter the continued invasion of the cemetery by other trespassers alike using the road through the Crystal

Block Cemetery for an ATV trail and a “party spot.” Appendix, Pgs. 314-315; 1167-(164:14-165:22).

Oather Bud Baisden, a life-long Crystal Block resident, observed General Pipeline’s activities heading towards the Crystal Block Cemetery and he drove his ATV along a nearby gas well road beside the cemetery in order to warn Mr. Keaton about the cemetery before he entered it. Appendix Pgs. 228-236 (5:20-38:8) & 1274-1276 (5:22-13:24). Mr. Keaton replied to Mr. Baisden, “F- them ‘N’s.” Appendix Pgs. 230-231 (11:20-15:5); 1069-75 (9:14-15:4). Later, Mr. Baisden observed that Mr. Keaton indeed bulldozed the cemetery after his warning. Mr. Baisden also noticed missing graves and soil, including the hand-dug steps. Appendix Pgs. 231-237 (15:15-38:8). According to forester Ruffner Woody, a bulldozer rumbled through the cemetery five (5) to nine (9) times in order to cut three (3) separate roads. Appendix, Pgs. 365-368 (5:7-17:17).

On-site General Pipeline employees Michael O’Dell and Gary O’Dell testified that Mr. Keaton stopped the bulldozer once he entered the cemetery and the road-cut was not finished. Appendix I, Pgs. 215-225 (13:7-53:12) & 243-246 (5:5-17:21). They observed that the bulldozer push-pile contained numerous grave markers and some of these markers disappeared from the scene. Appendix I, Pgs. 215-7 (13:7-21:10) & 225 (51:2-12). In addition, they testified that they dug out the grave markers and did their best to reset them at the site. Afterward, Mr. Keaton finished cutting the road through the cemetery and did not contact the Logan County Sheriff. Appendix I, Pgs. 222 (41:14-18). Equitable learned of the incident the following day. Appendix I, Pgs. 402-3 (121:21-122:20). Later, Equitable sent employees to backfill, grade, seed and mulch the area and again two years later at the time of the lawsuit. Appendix, Pgs. 380-

403 (31:10-124:1). Internal Equitable memorandums indicate that the cemetery looked better after this work. However, this area became an ATV trail and “party spot.”

On August 7, 2004, Plaintiff James Olbert, visited the Crystal Block Cemetery in order to pay respects to his deceased father, Daniel Olbert, Sr. Appendix, Pgs. 304-318. However, upon arriving at the scene, Mr. Olbert, observed that a road had been cut through the middle of the cemetery. The constructed steps at the bottom of the mountain, leading to the cemetery, were destroyed and several gravestones had been bulldozed aside and some were missing. Numerous witnesses testified that a lot of graves, along with the hand-dug steps, unfortunately were removed from the area and simply disappeared from the scene. Appendix I-II, Pgs. 229 (6:16-7:3); 251-5; 257-60; 267-73; 300-301 (201:22-202:13); 304-18; 323-5; 331-2; 334; 340-60; 430-57; 462-474; 475-85; 890-9; 907-47; 1075-96; 1075-96 & 1104-1120 (5:13-21:6). All of the Respondents testified that their decedents’ graves had been moved or removed from the cemetery thereby causing them emotional distress. Appendix, Pgs. 255-7, 260-2, 270-1, 307-8, 312, 325, 332, 336-7, 357-60 (72:13-79:7); 431-457 (5:22-31:22), 466-474 (40:3-48:9); 477-485 (51:1-59:3); 891-9; 907-947; 1088-96 (28:15-36:24); 1108-1120 (9:22-21:6). The overwhelming evidence at trial was that, at the time of the bulldozing, the Crystal Block Cemetery clearly was identifiable as a cemetery and General Pipeline and Equitable, despite having notice of it, were reckless in their conduct toward it.

V. SUMMARY OF ARGUMENT

Throughout the trial, the circuit court diligently sought to follow the road map provided by this Court in the *Hairston* decision and it did not abuse its discretion. The trial court made specific findings about the applicability of West Virginia Code § 29-1-8a to the case and those

findings were not an abuse of discretion. The trial court made a clear and concise rulings that the statute applied because there were two classes of graves in the Crystal Block Cemetery; one class was the graves of Respondents' decedents to which the statute did not apply and the other was the unmarked graves in the cemetery whose decedents were unknown to which the statute did apply. The trial court did not abuse its discretion in allowing the personal representative of deceased claimants Louella Wilder and Ulysses Olbert to participate as Plaintiffs. The personal representatives were substituted properly as parties pursuant to Rule 25 and Syllabus Point 10 of the *Hairston* decision. The trial court did not abuse its discretion in allowing expert witness testimony because that testimony was about standards of care and the expert witnesses testified about matters within their fields of expertise. There was no expert testimony from lay witnesses. The trial court did not abuse its discretion in denying a jury view because it was too problematic and not probative. The trial did not abuse its discretion in denying General Pipeline's Motion for Judgment as a Matter of Law and allowing the case to go to the jury because there was admissible evidence presented proving or tending to prove the elements of a common law cause of action. The trial court did not abuse its discretion in giving the adverse inference jury instruction because General Pipeline had a specific plan to spoliage the evidence from the Crystal Block Cemetery after its employee, Vandle Keaton, bulldozed the area, despite being put on notice about it by local resident Oather Bud Baisden. The trial court did not abuse its discretion in accepting the jury verdict for emotional distress because there was overwhelming evidence of physical damage to the graves of Respondents' decedents and to the common area of the Crystal Block Cemetery. The trial court did not abuse its discretion in its rulings and General Pipeline fails to raise any reviewable issue regarding any apparent error.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Based upon the abuse of discretion assignments of error set forth by General Pipeline, counsel for Respondents believe that oral argument is unnecessary under Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure because the facts and legal arguments are presented adequately in the briefs and record on appeal and the decisional process would not be aided significantly by oral argument. However, if this Court determines that oral argument is appropriate, in accordance with Rules 19 and 20 of the West Virginia Rules of Appellate Procedure, then oral argument should be limited to twenty (20) minutes.

VII. ARGUMENT

1. The trial court made specific findings about the applicability of West Virginia Code § 29-1-8a to the case, those findings were not an abuse of discretion and it did not abuse its discretion in allowing the case to proceed to the jury.

General Pipeline's first assignment of error is predicated upon a **false** factual premise – that the trial court made no rulings about the applicability of West Virginia Code § 29-1-8a. That assertion simply is not true. General Pipeline ignores the fact that the trial court made specific findings about the applicability of West Virginia Code § 29-1-8a on several occasions in this case. Initially, the trial court, in pertinent part, denied both Defendants' renewed Motions for Judgment as a matter of law on the applicability of the statute to the grave of decedent Fannie Mae Coles. Appendix II, Pgs. 1235-1245. Afterwards, the trial court remarked that a further decision had to be made with respect to jury instructions. *See Id.*

During the charge conference, the trial court, in discussing instructions about West Virginia Code § 29-1-8a (and West Virginia Code § 61-8-14, the criminal desecration statute), stated:

I'm going to get down in the weeds on it. I'm going to rule that the statutes do apply. So that will put that part of it to bed. Appendix II, Pg. 1330 (53:20-21).

* * *

This statute [West Virginia Code § 29-1-8a] clearly applies to the unmarked graves in that cemetery. Appendix II, Pg. 1345 (68:1-2).

The trial court explained that there were two classes of graves in the Crystal Block Cemetery. Appendix II, Pg. 1345-1348 (68:18-71:7). There were the marked graves of the Respondents' decedents and then other unmarked graves which were not the decedents of the Respondents. West Virginia Code § 29-1-8a applied to the other unmarked graves and triggered the duty to report under sub-section (d) of the statute. *See Hairston*, at Syl. Pt. 2. Thus, the trial court, over the objections, specifically ruled on the applicability of West Virginia Code § 29-1-8a and gave Respondents' requested instruction about West Virginia Code § 29-1-8a. So, there is no factual basis for General Pipeline's assignment of error.

Moreover, General Pipeline, in its brief, sets out several skeletal arguments or mentions issues in passing about the applicability of West Virginia Code § 29-1-8a. *See* General Pipeline's brief at Pgs. 7 & 8. Furthermore, as this Court previously found, a skeletal argument, really nothing more than an assertion, does not preserve a claim. *State v. Kaufman*, 227 W.Va. 537, 555 n.39, 711 S.E.2d 607, 625 n.39 (2011) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

“An appellant must carry the burden of showing error in the judgment of which he complains. This Court has explained that it will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.” *Morgan v. Price*, Syllabus Point 5, 151 W.Va. 158, 150

S.E.2d 897 (1966); *WV Dept. of Health & Human Res. Employees Fed. Credit Union v. Tennant*, Syl. Pt. 2, 215 W.Va. 387, 599 S.E.2d 810 (2004)(*per curiam*); *Sale ex rel. Sale v. Goldman*, 208 W.Va. 186, 199-200 n. 22, 539 S.E.2d 446, 459-60 n. 22 (2000) (*per curiam*) (deeming assignment of error that “is terse and lacks any authority to support it” to have been waived); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) (“Issues not raised on appeal or merely mentioned in passing are deemed waived.” (citation omitted)); *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n. 16 (1995) (“[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.” (internal quotations and citation omitted)).

To the extent this Court does not find General Pipeline’s failure to state this assignment of error with specificity or particularity, Respondents reassert and reallege their previous arguments and the rulings of the trial court. As such, there was no abuse of discretion by the trial court which would warrant relief to General Pipeline. This case concerned the desecration of the Crystal Block Cemetery. The graves of the Respondents’ decedents were only a small portion of the graves in the cemetery. Numerous witnesses testified that there were other visible graves in the cemetery, whose decedents are unknown, which also were desecrated and removed. Appendix I-II, Pgs. 229 (6:16-7:3); 251-5; 257-60; 267-73; 300-301 (201:22-202:13); 304-18; 323-5; 331-2; 334; 340-60; 430-57; 462-474; 475-85; 890-9; 907-47; 1075-96; 1075-96 & 1104-1120 (5:13-21:6). Under these circumstances and in accordance with Syllabus Point 2 of the *Hairston* opinion, West Virginia Code §29-1-8a applied to those graves, marked and unmarked, for whom their decedents are unknown. West Virginia Code §29-1-8a(d) imposed a duty on General Pipeline, upon discovering these graves, especially after being put on notice of the cemetery by local resident

Oather Bud Baisden, to cease all activity and contact the Sheriff. *See* foot note 5. General Pipeline did neither, rather it completed the project despite full knowledge of the cemetery before entering it. Thus, the trial court properly instructed the jury as to both a common law claim of desecration pursuant to case law and the applicability of West Virginia Code §29-1-8a. Likewise, the trial court properly instructed the jury on *prima facie* negligence. Consequently, there is no abuse of discretion which would warrant General Pipeline relief in this assignment of error and this Court should not disturb the jury verdict.

2. The trial court did not abuse its discretion in allowing the personal representatives of deceased Plaintiffs Louella Wilder and Ulysses Olbert to participate as Plaintiffs.

Pursuant to Syllabus Point 9 of the *Hairston* decision, the next of kin who possess the right to recover in a common law cause of action for grave desecration shall be the decedent's surviving spouse or, if such spouse is deceased, the person or persons of closest and equal degree of kinship in the order provided by West Virginia Code § 42-1-1, *et seq. Id.*; *see also Ritter v. Couch*, 71 W.Va. 221, 227, 228, 76 S.E. 428, 430 (1912)(If relatives of blood may not defend the graves of their departed[,] who may?).

When the Complaints were filed, Plaintiffs Louella Wilder and Ulysses Olbert were alive, but died during the pendency of the action. Under these circumstances, Rule 25 of the West Virginia Rules of Civil Procedure dictated how these cases were to proceed. Suggestions of Death were filed on behalf of Ms. Wilder and Mr. Olbert. Appendix II, Pgs. 1892-1903 (Logan County Circuit Clerk Docket Sheet). Then, timely Motions to substitute the personal representatives of the respective Estates as parties were made in accordance with Rule 25. As such, the personal

representative for Estate of Louella Wilder, Shirley J. Wilder and the personal representative for the Estate of Ulysses Olbert, Jacqueline Powell Hamlett, were substituted properly as parties pursuant to Rule 25. *See Id.* Under Rule 25, these personal representatives were the proper parties and it allows the cases to proceed through these representatives.

At trial, Ms. Wilder and Ms. Hamlett, the respective personal representatives for the Estate of Louella Wilder and Ulysses Olbert, participated on behalf of the Estates, not individually and, in accordance with the *Hairston* decision, were persons of closest and equal degree of kinship in the order provided by West Virginia Code § 42-1-1, *et seq.* Appendix I-II, Pgs. 1-9 (Judgment on jury verdict); 268 (70:21-71:4); 334-7; 334-7 (51:24-62:3) & 1908-1916 (verdict form). Allowing these claims to proceed to the jury was the proper decision and in accordance with West Virginia law. Consequently, the trial court did not abuse its discretion in allowing the claims of the Estates of deceased Plaintiffs Louella Wilder and Ulysses Olbert to proceed to the jury.

3. The trial court did not abuse its discretion in allowing expert witness or lay witness testimony.

General Pipeline's assignment of error, in pertinent part, must be denied because its arguments directly contradict the purposes of Rule 702 of the West Virginia Rules of Evidence and pertinent decisions of the West Virginia Supreme Court of Appeals. According to Rule 702, there are three major requirements for the admission of expert witness testimony: (1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact. *See Dolen v. St. Mary's Hosp. of Huntington, Inc.*, 203 W.Va. 181, 506 S.E.2d 624 (1998); *Perrine v. E.I. Du Pont De Nemours & Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010). Rule 702 states that a broad range of knowledge,

skills and training qualify an expert as such and in *Gentry v. Mangum*, this Court rejected any notion of imposing overly rigorous requirements of expertise. *See Id.*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

“This standard is very generous and follows the general framework of the federal rules which favors the admissibility of all relevant evidence.” II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A), at 24; *See also Watson v. Inco Alloys Intern., Inc.*, 209 W.Va. 234, 246, 545 S.E.2d 294, 306 (2001). The use of the disjunctive “or” in Rule 702 allows an expert to be qualified by any of the methods listed.³ *See* II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A)(1), at 24 (1994)(“[I]nasmuch as the rule is disjunctive, a person may qualify to render expert testimony in any one of the five ways listed.”). *See Watson*, 209 W.Va. at 246, 545 S.E.2d at 306. The governing principle is whether the proffered testimony can assist the trier of fact. Necessarily the ‘helpfulness’ standard calls for decisions that are very much *ad hoc*, for the question is always whether a particular expert can help resolve the particular issue at hand. *See Perrine*, 225 W.Va. at 533-538, 694 S.E.2d at 866-871.

In *Gentry*, this Court expressed the concern that there is no “best expert” rule, and “[n]either a degree nor a title is essential and a person with knowledge or skill borne of practical experience may qualify as an expert.” *See Id.*, 195 W.Va. at 525 and n. 18, 466 S.E.2d at 184 and n. 18. Therefore, “[b]ecause of the ‘liberal thrust’ of the rules pertaining to experts, circuit courts should err on the side of admissibility.” *See Id.* The *Gentry* Court stated plainly that

³ Rule 702 of the West Virginia Rules of Evidence states: “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

“[d]isputes as to the strength of an expert’s credentials . . . go to weight and not to the admissibility of their testimony.” *See Id.*, 195 W.Va. at 527, 466 S.E.2d at 186, *citing Daubert*, 509 U.S. at 594 (“[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). *See also Walker v. Sharma*, Syl. Pt. 3, 221 W. Va. 559, 655 S.E.2d 775 (2007)(“[I]ssues that arise as to the physician’s personal use of a specific technique or procedure to which he or she seeks to offer expert testimony go only to the weight to be attached to that testimony and not to its admissibility.”); *see also State ex rel. Jones v. Recht*, Syl. Pt. 5, 221 W.Va. 380, 655 S.E.2d 126 (2008)(“[P]ursuant to West Virginia Rules of Evidence 702 an expert’s opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. The jury, and not the trial judge, determines the weight to be given to the expert’s opinion.”) and *see also San Francisco v. Wendy’s Int., Inc.*, 221 W.Va. 734, 656 S.E.2d 485 (2007). This Court made very clear that issues about the strength of expert witness testimony are to be evaluated by the jury, not judges. *See Walker, supra*; *See State ex rel. Jones, supra* and *See San Francisco, supra*; *See also In re Flood Litigation Coal River Watershed*, 222 W.Va. 574, 668 S.E.2d 203 (2008). “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.” *See Helmick v. Potomac Edison Co.*, Syl. Pt. 6, 185 W.Va. 269, 406 S.E.2d 700 (1991).

Moreover, the alleged failure of an expert to be able to explain all aspects of a case or a controlling principle in a satisfactory manner is relevant only to the witness’s credibility. Should the expert witness later fail to adequately explain, define, or describe the relevant standard of

care, opposing counsel is free to explore that weakness in the testimony. *See Friendship Heights Assoc. v. Vlastmil Koubek*, 785 F.2d 1154, 1163 (4th Cir. 1986); *see also Dobson v. Eastern Associated Coal Corp.*, 188 W.Va. 17, 22, 422 S.E.2d 494, 499 (1992)(suggests that “[t]he fact that a proffered expert may be unfamiliar with pertinent statutory definitions or standards is not grounds for disqualification ...[; s]uch lack of familiarity” affects credibility, not qualification to testify).

While the general rule provides that an expert witness is not permitted to state a legal conclusion, that rule is modified somewhat if the legal issue is raised in such a way as to become a necessary operative fact. *See Jackson v. State Farm Mut. Auto Ins. Co.*, 215 W.Va. 634, 643, 600 S.E.2d 346, 355 (2004). Furthermore, an expert witness “may properly state an opinion on an issue of fact, and may be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms.” *See Id.* (citing 32 C.J.S. Evidence § 634, at 506). Once a circuit court establishes the particular standard of care under a given set of facts, the jury then determines whether a defendant’s conduct falls short of this standard. *See Gentry*, at n. 20. Expert testimony may be useful to assist the jury in making this determination, especially where the subject matter is outside the knowledge and experience of lay people. *See Id.*

a. Archeologist William Dale Updike

With respect to archeologist William Updike, he was proffered to testify in the field of archeology, including the searching of land for cemeteries in conjunction with relocating a gas pipeline. Appendix I, Pgs. 642-645 (33:22-36:16). Prior to being qualified by the trial court to

provide expert archeology testimony in this case, Mr. Updike testified as to his qualifications.⁴ Mr. Updike has a bachelor's degree in anthropology and a master's degree in historic preservation, both from the University of Kentucky. In addition, Mr. Updike is a registered professional archeologist, has taught college-level archeology, has conducted scientific research in archeology and published articles about the concept of company towns (an area he describes as "industrial archeology"). Appendix I, Pgs. 613-638 (4:16-32-13). In fact, Mr. Updike has studied the West Virginia coal company towns Sovereign and Sharples. He has years of archeological field experience, including pipeline relocation projects for gas industry clients, which pertained to research in county record rooms, surveying fieldwork searching for cemeteries, identifying and locating graves or cemeteries, doing cemetery registry nominations and the standard of care with respect to the discovery of graves or cemeteries. Mr. Updike also testified that he had discovered at least 100 cemeteries.

In addition, to this experience, Mr. Updike conducted an extensive investigation of the Crystal Block Cemetery. Mr. Updike conducted two site inspections, reviewed literature, mapped the area, prepared two reports, talked with witnesses, reviewed death certificates, funeral home records, register of death records and reviewed aerial images between 2003 (before the desecration) and 2011 (after the desecration). Appendix I, Pgs. 649-659 (40:21-50:6); 683-687 (74:7-78:22); 688-707 (79:2-98:20). Based upon Mr. Updike's experience and work on the case, Crystal Block Hollow appeared to be a typical coal company town with a cemetery. Appendix I, Pgs. 697-679 (88:23-90:15).

⁴ General Pipeline describes Mr. Updike as an "unemployed anthropologist." This assertion is not true. See General Pipeline's Brief at Pg. 9. Mr. Updike currently is employed with Vantage Engineering in Harrisburg, Kentucky, where he does land surveying, title researches and works on land development projects. Appendix, Pg. 613 (4:16-22).

Reviewing the specific expert testimony of Mr. Updike, in light of his testimony regarding his knowledge, skill, experience, training, and education, his expert testimony was within his demonstrated expertise. Mr. Updike plainly detailed his background as it related to the concept of a company town, identifying graves or cemeteries and caring for cemeteries. Not only did he demonstrate his knowledge about these issues, but he explained the standard of care with respect to discovering a grave or cemetery. Thus, there was no abuse of discretion on the part of the trial court in allowing Mr. Updike's testimony.

As an expert in the field of archeology with experience researching company towns and archeological work in conjunction with relocating pipelines, Mr. Updike was free to comment on this testimony and express his opinions on the aforementioned subjects. Mr. Updike knew what to expect in the field because, in his career, he had discovered over 100 cemeteries, researched company towns and been involved in similar pipeline relocation projects. The trial court, because of the 'liberal thrust' of the rules pertaining to experts, properly ruled on the side of admissibility.

In this case, the jury was entitled to know what standards to apply and facts General Pipeline knew at the time of the desecration. *See Gentry*, 195 W.Va. at 526, 466 S.E.2d at 185. The applicability of the duty owed pursuant to West Virginia Code §29-1-8a was raised in such a way as to become a necessary operative fact and was intertwined in legal terms.⁵ Mr. Updike

⁵ West Virginia Code §29-1-8a(d) - Notification of discovery of human skeletal remains in unmarked locations.

Upon the discovery of human skeletal remains, grave artifact or grave marker in an unmarked grave on any publicly or privately owned property, the person making such discovery shall immediately cease any activity which may cause further disturbance, make a reasonable effort to protect the area from further disturbance and notify the county sheriff within forty-eight hours of the discovery and its location. If the human remains, grave artifact or grave marker appear to be from an unmarked grave, the sheriff shall promptly, and prior to any further disturbance or removal of the remains, notify the Director of the Historic Preservation Section. The director shall cause an on-site inspection of the disturbance to be made to determine the potential for archaeological significance of the site:

opined that General Pipeline, in accordance with West Virginia Code § 29-1-8a, had a duty to stop work at the site and contact the Logan County Sheriff once the cemetery was discovered. Appendix I, Pgs. 709-713 (100:3-104:3). General Pipeline mischaracterizes the nature of this expert testimony as purely legal in nature and misrepresents the actual factual context of the testimony.⁶ The argument is directed at the weight, not the admissibility, of the evidence. General Pipeline, in part, desecrated the Crystal Block Cemetery and did nothing about it, despite the duty imposed by the statute and with foreknowledge about the cemetery's existence from Mr. Baisden.

According to Mr. Updike, General Pipeline should have surveyed and walked the area because, based upon his observation and the observations of others, the graves were clearly visible. Appendix I, Pgs. 716-717 (107:8-108:16). Mr. Updike observed that dirt had been roved from the original contour of the land. Appendix I, Pg. 687 (78:18-22). Similarly, Mr. Updike indicated that he would not advise alteration of the scene. Appendix I, Pg. 716 (107:4-7). Mr. Updike believed that there were graves in the bulldozer's path. Appendix I, Pgs. 664-665 (55:5-56:12). Graves at the scene were not set properly set, misplaced or moved and were by the bulldozer's path. Appendix I, Pgs. 671-681 (62:11-72:24); 810-13 (66:19-69:3). Like other witnesses, Mr. Updike observed that excavation opened an ATV trail through the cemetery. The restoration of the cemetery will be difficult because portions of it are gone. Appendix I, Pg. 821 (77:15-22). Finally, Mr. Updike opined about all of the factors for a common law

Provided, That when the discovery is made by an archaeological investigation permitted under state or federal law, the supervising archaeologist shall notify the Director of the Historic Preservation Section directly. . . .

⁶ In fact, General Pipeline asserts that expert archeologist William Updike was allowed to opine that federal statutes were applicable to Equitable. *See* General Pipeline's Brief at Pg. 10 (first paragraph). However, Mr. Updike never gave such testimony. Appendix I, Pg. 800 (56:4-6). Assuming *arguendo* that Mr. Updike did give such testimony, it did not relate or pertain to General Pipeline, so there would be no prejudice to it. Thus, had Mr. Updike actually testified about this matter, it would be harmless as to General Pipeline.

desecration claim, as established in the *Hairston* decision. Appendix I, Pgs. 665-684 (56:20-75:9); 707-708 (98:21-99:8); 716-719 (107:8-128:4).

Moreover, General Pipeline acknowledges that Mr. Updike has archeological knowledge, skill, experience, training, and education in the gas industry, but instead argues that he does not have what it considers to be the appropriate amount of or the correct archeological experience in the gas industry. That is not an appropriate ground to strike the testimony. Mr. Updike's alleged failure to be able to explain all aspects of archeological work in the gas industry, in a satisfactory manner, was relevant only to his credibility. Counsel explored this alleged weakness in cross-examination and the jury rejected the argument. The trial court did not abuse its discretion in allowing this testimony. There is no reason to disturb this verdict based upon the testimony of expert archeologist William Updike.

b. Real estate lawyer Marc Lazenby

With respect to lawyer Marc Lazenby, he was proffered to testify within the field of real estate law, including coal leases. Prior to being qualified by the trial court to provide expert real estate testimony in this case, Mr. Lazenby testified as to his qualifications. Mr. Lazenby is a West Virginia lawyer with years of experience in property and real estate work, including coal leases. Appendix I, Pgs. 834-837 (4:22-7:15). Mr. Lazenby also performed a title search of the subject property at the Logan County Courthouse which was admitted into evidence. Appendix I, Pgs. 838-843 (8:16-13:23); 849 (19:9-12); 862-863 (32:13-33:5)(title report).

Reviewing the specific expert testimony of Mr. Lazenby, in light of his testimony regarding his knowledge, skill, experience, training, and education, his expert testimony was within his demonstrated expertise. Mr. Lazenby was able to authenticate the subject January 1,

1923, “Deed of Lease and Agreement,” (Plaintiffs’ Exhibit 54) between Island Creek Mineral Company (lessor) and Crystal Block Coal & Coke Company (lessee), by his examination of records in the Logan County Courthouse and opine that the cemetery is located within the tract described in the lease. Appendix I, Pgs. 858-859 (28:1-29:24). The pertinent language of the lease stated:

It is provided that the leasee shall have the right to use so much of the surface of the said land of the lessor as may be reasonably necessary for the enjoyment of the rights and privileges hereby granted and the right to construct and maintain thereon during the continuance of this lease tipples, miners’ houses, tran roads, stores, coke ovens, power plants, blacksmith shops and such other structures and equipment as may be necessary and convenient to such purpose; that no such use of the surface shall unreasonable interfere with the surface rights herein before reserved by the lessor. Appendix I, Pg. 840-841 (10:17-11:18).

Mr. Lazenby explained that, while there was no Deed that specifically reserved a portion of land for a cemetery, the language of the lease conveyed broad rights to Crystal Block Coal & Coke Company to use the land for various purposes, including the creation of a company town with the right to burial. Appendix I, Pgs. 838-844 (8:16-13:8). In particular, the lease specifically did not prohibit burial or a cemetery. Mr. Lazenby further explained that this language appears in a lot of Deeds in Mingo and Logan Counties where very broad rights are leased to coal companies for the operation of company towns, including cemeteries. As such, Mr. Lazenby was able to opine that the Respondents’ decedents had a right of burial that existed by “mere license” and it had not been lawfully revoked or destroyed. *See England v. Central Pocahontas Coal Co.*, Syl. Pt. 2, in pertinent part, 86 W.Va. 575, 104 S.E. 46 (1920); *See also Hairston*, at Syl. Pt. 4.

General Pipeline also improperly interjects the applicability of the parole evidence rule with respect to the expert testimony of Mr. Lazenby. The parole evidence rule does not apply here

because the plain and unambiguous language of the “Deed of Lease and Agreement” was explained, not contradicted, by Mr. Lazenby. *See Clint Hurt & Associates, Inc. v. Rare Earth Energy, Inc.*, Syllabus Point 2, 198 W.Va. 320, 480 S.E.2d 529 (1996). Notwithstanding, assuming *arguendo* that the parole evidence rule does apply, the trial court, in its discretion, properly allowed Mr. Lazenby’s testimony about what is conveyed in these documents. *See Thomas v. Gray Lumber Co.*, 199 W.Va. 556, 561-2, 486 S.E.2d 142, 147-88 (1997)(holding that, pursuant to the parole evidence rule, an agreement would not bar assertions of express warranties against nonparties to the agreement or parties not privy to the agreement and that evidence is allowed to show additional independent or collateral agreements or to prove a new or distinct agreement).

Moreover, General Pipeline asserts the opinions of Mr. Lazenby were “aided by improper comments by the trial court,” in violation of Rule 605 of the West Virginia Rules of Evidence which prohibits the presiding judge from testifying in the trial as a witness. *See* General Pipeline’s brief at Pg. 12. However, General Pipeline neglects to mention that at the time of the comments, the jury was not present in the courtroom. Appendix I, Pgs. 850-857 (20:9-27:8). So, in terms of Rule 605, the trial court was not a witness in the trial. In fact, the comments of the trial court were its ruling on General Pipeline’s Motion to strike testimony. Once the Motion was made, the trial court stated: “[o]kay. Take the jury to its room” and after the trial court made its ruling, the trial court stated: “[o]kay, bring the jury back in.” Thus, the opinions of Mr. Lazenby were not aided by the trial court’s comments, actually a ruling, as alleged, nor were they a violation of Rule 605 in spirit or in fact.

Mr. Lazenby, in light of his knowledge, skill, experience, training, and education, as a

real estate lawyer plainly detailed the rights conveyed by the subject lease. This testimony, from a duly qualified expert witness, assisted and helped the jury understand this document. Again, General Pipeline's argument goes to the weight of the evidence, not its admissibility. Thus, there was no abuse of discretion by the trial court in allowing Mr. Lazenby's testimony.

General Pipeline acknowledges that Mr. Lazenby has knowledge, skill, experience, training, and education in real estate law, but instead disputes his opinions. That is not an appropriate ground to strike the testimony. Mr. Lazenby's alleged failure to be able to explain all aspects of real estate law, in a satisfactory manner, was relevant only to his credibility. Counsel explored this alleged weakness in cross-examination and the jury rejected the argument. The trial court did not abuse its discretion in allowing this testimony. There is no reason to disturb this verdict based upon the testimony of real estate expert Marc Lazenby.

c. Death care industry expert Lyle John Fairless

With respect to funeral service provider Lyle John Fairless, he was proffered to testify about the field of the death care industry. Prior to being qualified by the trial court to provide death care industry expert testimony in this case, Mr. Fairless testified as to his qualifications. Mr. Fairless has been a funeral service provider for the past 26 years which includes a familiarity with cemeteries, death records and funeral monument pricing. Appendix I, Pgs. 865-868. Mr. Fairless also conducted a site visit of the cemetery. Appendix I, Pg. 870. Reviewing the specific expert testimony of Mr. Fairless, in light of his testimony regarding his knowledge, skill, experience, training, and education, his expert testimony was within his demonstrated expertise.

During the site visit, Mr. Fairless, through his experience with cemeteries, immediately recognized a cemetery and observed grave spacing differentials which indicated that there were

graves in the path of the bulldozer. Appendix I, Pgs. 878-881. He also noticed that grave markers were not set properly. In addition, Mr. Fairless reviewed death certificates and funeral home records of Plaintiffs' decedents to confirm they actually were buried in the Crystal Block Cemetery. Appendix I, Pg. 867. Mr. Fairless also opined about the cost of replacing the grave markers of the Respondents' decedents whose graves were out of place or damaged and for a monument for the Respondents' decedents whose graves now are gone.⁷ Appendix I, Pg. 876-877. Reviewing the specific expert testimony of Mr. Fairless, in light of his testimony regarding his knowledge, skill, experience, training, and education, his expert testimony was within his demonstrated expertise. Mr. Fairless plainly detailed his background as it related to the death care industry. The trial court did not abuse its discretion in allowing this testimony. There is no reason to disturb this verdict based upon the testimony of death care industry expert Lyle John Fairless.

d. Lay witness James Olbert.

General Pipeline claims that Respondent James Olbert provided expert testimony. However, Mr. Olbert provided no such testimony. In pertinent part, Mr. Olbert merely was asked if he reported the incident to the Logan County Sheriff and if he knew of any reporting requirements after someone desecrates a cemetery. Appendix I, Pgs. 316-317 (51:23-54:14). As a lay person, Mr. Olbert explained that he did not know the law concerning about such reporting. Thus, there were no opinions expressed by Mr. Olbert and there was no abuse of discretion of the trial court in allowing this lay testimony.

⁷ In fact, before trial, Respondents decided not to relocate their loved ones from the Crystal Block Cemetery because they did not want to leave anyone behind. Appendix I, Pgs. 719-736 (110:12-127:24) and 869. The effect of this decision lowered the amount of claimed damages claimed by the Respondents in this case.

4. The trial court did not abuse its discretion in denying a jury view:

In regard to the standard of review for the denial of a jury view, this Court has held that “[a] motion for a jury view lies peculiarly within 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. Pt. 1, 107 W.Va. 440, 148 S.E. 496 (1929); *State v. Brown*, 210 W.Va. 14, 26, 552 S.E.2d 390, 402 (2001); *see also* West Virginia Code §56-6-17.

In this case, the trial court took up the issue of a jury view on several occasions and gave the matter serious consideration. Before opening statements plans were discussed for a jury view. Appendix I, Pgs. 165-167 (126:9-135:7). Later, during another discussion about a jury view, the trial court raised its concern about the terrain of the area and indicated that it wanted to inspect the area personally. Appendix I, Pgs. 247-249 (19:19-26:17). Afterward, the trial court and counsel, outside of the presence of the jury, inspected the site during Respondents’ case-in-chief. Appendix I, Pgs. 493-495 (67:21-69:18). According to the trial court, the area was very steep, slippery and difficult to navigate. The trial court also indicated that vehicles would be necessary which would case the jury would bypass things it needed to view and the trial court noted that there had been environmental changes to the scene since the incident. As such, the trial court did not believe that the probative value of the site today would be fairly represented by a view. However, the trial court kept an official ruling under advisement.

Later, during another discussion about conducting a jury view after the jury requested a site visit, the trial court indicated that a jury view was something that could not reasonably be done with the jury. Appendix II, Pgs. 957-964 (4:11-11:12). The trial court explained that machinery was needed which, in and of itself, was a concern, the steep terrain had been exacerbated by recent

rain would be difficult to navigate and the trial court again remarked that the scene had changed since the incident. Again, the trial court kept the matter under advisement. During another discussion about a jury view, the trial court, after noting its previous inspection of the site, indicated that a jury view, in and of itself, was too dangerous, the terrain was too steep and that the jury would have problems viewing things. Finally, after the close of Respondents' case-in-chief, the trial court denied the request for a jury view based upon the aforementioned rationale. Appendix II, Pgs. 1143 (68:1-69:5). Notwithstanding, the trial court allowed the parties to call witnesses and to adduce photographs which specifically described the physical characteristics of scene. Appendix II, Pgs. 1168-1172 (testimony of General Pipeline witness Darren J. Robison) and 1221 (Respondents' scene photographs – Exhibits 72, 73 and 74).

Based upon the foregoing, the trial court gave serious concern to having a jury view. However, the trial court determined that a jury view was not feasible and did not have probative value. In fact, the trial court actually inspected the site and found it too problematic for a jury view. The terrain was too rough – approximately forty-five degree (45°) inclines. So, machinery would be needed to traverse the scene, but the use of such machinery raised safety concerns and the trial court had a grave concern for the safety of the jury. In addition, the trial court indicated that the scene had changed since the incident. Likewise, eight years had lapsed from the incident until the trial and the scene was not as it was in 2004. As such, the trial court did not believe that the probative value of the site today would be fairly represented by a view. While a jury view may have been preferable, it was too problematic as outlined by the trial court. However, the trial court made reasonable accommodations to the parties to present specific evidence about the current physical scene. As such, there was no “probable injury” to General Pipeline. Therefore, there was

no abuse of discretion in the trial court denying the request for the jury view and this Court should not disturb the verdict because of it.

5. The trial court did not abuse its discretion in denying Petitioner's Motion for Judgment as a Matter of Law and allowing the case to go to the jury because there was admissible evidence presented proving or tending to prove the elements of a common law cause of action.

In *Orr v. Crowder*, this Court held that when determining whether there was sufficient evidence to support a jury verdict, a trial court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inference which reasonably may be drawn from the facts proved. *Id.*, Syllabus Point 5, 173 W.Va. 335, 315 S.E.2d 593 (1984); *Pinnacle Mining v. Duncan Aircraft Sales*, Syl. Pt. 1, 182 W.Va. 307, 387 S.E.2d 542 (1989); *Pote v. Jarrell*, 186 W.Va. 369, 375, 412 S.E.2d 770, 776 (1990)(*per curiam*); *Horan v. Turnpike Fork, Inc.*, 189 W.Va. 621, 433 S.E.2d 559 (1993)(*per curiam*).

Here, General Pipeline failed to meet this burden and the trial court did not abuse its discretion in denying its Motion for Judgment as a matter of law. In fact, General Pipeline's argument flies in the face of common sense. Appendix II, Pg. 1233 (15:4-5). The evidence demonstrated that, in part, General Pipeline had a blatant disregard for a sacred cemetery. Respondents met all of the elements set forth for a common law desecration action in Syllabus Point 8 of the *Hairston* opinion.

At trial, Respondents, by a preponderance of the evidence, proved the following:

(1) The grave sites in question were within a publicly or privately maintained cemetery, clearly marked in a manner which will indicate its use as a cemetery, with identifiable boundaries and limits. The Respondents testified about their maintenance of the cemetery. Appendix I-II, Pgs. 229 (6:16-7:3); 251-5; 257-60; 267-73; 304-18; 323-5; 331-2; 334; 340-60; 430-57; 462-474; 475-85; 890-9; 907-47; 1075-96; 1075-96 & 1104-1120 (5:13-21:6). Local resident Brian McNeely testified that he witnessed Respondent Jimmy Early tending to the cemetery. Appendix I, 297 (186:7-187:8). Likewise, Mr. Updike opined that cemetery appears to have been maintained. Appendix I, Pgs. 664-665 (54:13-15). Also, various witnesses testified that there were hand-dug steps, shrubbery, graves and markers that clearly marked this area in a manner which will indicate its use as a cemetery. In addition, Mr. Updike opined that the sloping topographical outlay of this area separated this area from the rest of the mountainside which created boundaries and limits of the cemetery. Appendix I, Pgs. 707-708 (98:21-99:8) and 717-718 (108:20-109:19).

(2) There 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. The Respondents testified about the numerous burials at the cemetery over many years. Mr. Baisden testified about digging graves at the cemetery. No one indicated any objection or prohibition to these burials. Certain Respondents also testified about a company burial fund for interment at the cemetery. According to Death Certificates, funeral home records and the Register of Death, Mr. Updike opined that the area was recognized as cemetery. Appendix I, Pgs. 688-694 (79:2-85:10) and 719 (110:1-11). Based upon research in the case, Mr. Updike believed that Crystal Block was a typical coal company town with a cemetery. Appendix I, Pgs. 697-699 (88:23-90:15). In

addition, Mr. Lazenby opined that the subject mineral lease conveyed broad rights to Crystal Block Coal & Coke Company, as lessee, to utilize the surface property which included the right to burial. Appendix I, Pgs. 838-843 (8:16-13:23).

(3) The area was identifiable as a cemetery by its appearance prior to the Defendants' entry and the Defendants had prior knowledge of the existence of the cemetery. Various witnesses testified that the area was identifiable as a cemetery, by its appearance, prior to the Defendants' entry. Appendix I-II, Pgs. 229 (6:16-7:3); 251-5; 257-60; 267-73; 304-18; 323-5; 331-2; 334; 340-60; 430-57; 462-474; 475-85; 890-9; 907-47; 1075-96; 1075-96 & 1104-1120 (5:13-21:6). There were hand-dug steps, shrubbery, graves and markers that clearly marked this area in a manner which will indicate its use as a cemetery. *See Id.* & Appendix I, Pgs. 717-718 (108:17-109:22); *see Hairston*, at n. 7. Mr. McNeely testified that he visited the site in approximately 2002 (two years before the desecration) and the cemetery was intact, including the hand-dug steps. Appendix I, Pgs. 275-279 (100:20-115:3). When Michael O'Dell, an on-site General Pipeline employee, was called the scene by Mr. Keaton after the incident, it clearly was visible as a cemetery. Appendix I, Pgs. 215-225 (13:7-53:12). After the incident, forester Woody Ruffner went to the scene to investigate it and indicated in an email that the area obviously was a cemetery. Appendix I, Pgs. 365-368 (5:7-17:17). Mr. Fairless indicated that when he went to the scene, it immediately was evident that the scene was a cemetery. Appendix I, Pg. 870.

Furthermore, Mr. Baisden adamantly testified that he informed General Pipeline bulldozer operator Vandle Keaton about the cemetery before he trammed through it five (5) to nine (9) times. Appendix II, Pgs. 1069-1075 (9:14-15:14). Mr. Keaton's response to Mr.

Baisden – “F- them ‘N’s.”

(4) Plaintiffs’ decedents were interred in the cemetery by license or right. As aforementioned, Mr. Lazenby opined that the subject mineral lease conveyed broad rights to Crystal Block Coal & Coke Company, as lessee, to utilize the surface property to create a company town which included the right to burial. Appendix I, Pgs. 838-843 (8:16-13:23). Death Certificates, Registers of Death and funeral home records also identify the area as the Crystal Block Cemetery. Appendix I, Pgs. 688-94 (79:2-85:10).

(5) There is no dispute that the Respondents were the next of kin of their decedents with the right to assert a claim for desecration. Each of the Respondents testified about their respective familial relationships to their decedents, adduced pertinent records and there was no objection to that testimony or evidence.

(6) General Pipeline, in party, proximately caused, either directly or indirectly, 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. Numerous witnesses testified about this matter and Plaintiffs adduced various exhibits which substantiated this claim. Mr. Baisden testified that, after Vandle Keaton ignored his warning, a significant amount of dirt was removed from the area.

In addition, Michael O’Dell, an on-site General Pipeline employee, testified that Vandle Keaton did not walk the cemetery path before cutting the road. Appendix I, Pgs. 215-225 (13:7-53:12). Then, Mr. Keaton partially cut the road through the cemetery when he was called to the scene. Appendix I, Pgs. 215-225 (13:7-53:12). When Mr. O’Dell arrived at the scene, it clearly was visible as a cemetery. Mr. O’Dell testified that Mr. Keaton shut off the bulldozer at the

cemetery. Mr. Keaton knocked over grave markers, but there were other undisturbed grave markers in the area. At this point, Mr. O'Dell helped clean the area with a shovel and rake. Later that day, Mr. Keaton resumed and finished cutting the road through the cemetery. The testimony of Mr. O'Dell was corroborated by Gary O'Dell, his brother and another on-site General Pipeline employee.

Moreover, there was testimony that after the road was cut through the cemetery, it opened the area to ATV traffic and became a party spot. Appendix, Pgs. 314-315; 1167 (164:165:22). Equitable Production Company emails verify this situation. Local resident Steven Hatfield also testified that the area above the cemetery was not a "party spot" until General Pipeline made a road through the cemetery. Appendix II, Pg. 1167 (164:165:22).

Consequently, General Pipeline failed to meet its burn as articulated in *Orr*. General Pipeline's arguments merely go to the weight of the evidence. The jury considered General Pipeline's arguments and soundly rejected all of them. If anything, the jury's verdict reflects the heinous acts and omissions of General Pipeline, which the jury also found to be reckless. *See Willis v. Mountfair Gas Coal Co.*, 104 W.Va. 12, 138 S.E. 749 (1927)(jury verdicts are to be liberally construed and upheld); *See also State v. Hill*, 120 W.Va. 582, 200 S.E. 587 (1938)(when the verdict is construed liberally, the court can collect the meaning of the jury the verdict will serve) and *McNeely v. Frich*, 187 W.Va. 26, 415 S.E.2d 267 (1992)(a jury is better able to judge circumstances of a case, the weight of the testimony, and the peculiar hardships and aggravations attendant upon an injury). The reprehensible conduct of General Pipeline warranted the jury verdict and the trial court did not abuse its discretion in accepted it.

6. The trial court did not abuse its discretion in giving the adverse inference jury instruction because there was a specific plan to spoliage the evidence from the Crystal Block Cemetery.

With respect to jury instructions:

[a] trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion. *See State v. Guthrie*, Syl. Pt. 4, 194 W.Va., 657, 461 S.E.2d 163 (1995).

A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties. *See Tennant v. Marion Health Care Foundation, Inc.*, Syl. Pt. 6, 194 W.Va. 97, 459 S.E.2d 374 (1995). Instructions must be read as a whole, and if, when so read, it is apparent they could not have misled the jury, then the verdict will not be disturbed, even though one of the instructions which is not a binding instruction may have been susceptible of a doubtful construction while standing alone. *See Tennant* at Syl. Pt. 7.

In *Skaggs v. Elk Run Coal Co., Inc.*, this Court made clear that:

[t]o challenge jury instructions successfully, a challenger must first demonstrate the charge as a whole created a substantial and ineradicable doubt about whether the jury was properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the

entire record, that the challenged instruction could not have affected the outcome of the case. *See Id.*, 198 W.Va. 51, 70, 479 S.E.2d 561, 580 (1996).

In *Tracy v. Cottrell*, this Court established a four (4) part analysis for determining whether to give an adverse inference instruction. *See Id.*, 206 W.Va. 363, 371, 524 S.E.2d 879, 887 (1999); *see also Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003). Before a trial court may give an adverse inference jury instruction for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault (meaning a determination of whether the destruction of the evidence was intentional or negligent) in causing the destruction of the evidence. The party requesting has the burden of proof on each element of the four (4) factors of the spoliation test. If, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, then the requisite analysis ends and no adverse inference instruction may be given.

Here, there is no dispute that General Pipeline had control or authority over the destroyed evidence at the cemetery. General Pipeline was hired by Equitable to relocate a pipeline and it controlled the scene at the time in question. Mr. Keaton did not walk the cemetery path as he claimed. Mr. Baisden, noticed the direction of the work was heading toward to the cemetery and told Mr. Keaton about the existence of the cemetery. Mr. Keaton said "F- them 'N's" and then

cut the road through the cemetery. After the incident, on-site General Pipeline employees testified that Mr. Keaton stopped work once he entered in the cemetery to clean the scene, but he finished cutting the road later in the day. Then, the hand-dug steps, graves and soil were removed from the scene.

Respondents suffered substantial prejudice from General Pipeline as a result of the missing or destroyed evidence at the cemetery. General Pipeline took advantage of this missing evidence, which was in its possession, to deny knowledge of the cemetery and to claim there was no damage to the cemetery. Respondents' expert witnesses also did not have an opportunity to inspect the cemetery after the incident, but before removal of items, including the hand-dug steps.

There was a reasonable anticipation that the evidence would be needed for litigation. Mr. Keaton ignored Mr. Baisden's warning, made a reprehensible comment and then cut the road. Upon realizing his reckless mistake, he stopped work in the cemetery and called on-site employees to the scene in order to alter it. Then, Mr. Keaton resumed cutting the road through the cemetery, thereby discarding any evidence by the end of the day and he did not bother notify the Sheriff about the incident. Mr. Keaton anticipated litigation, so he continued a reckless course of behavior.

General Pipeline intentionally caused the destruction of the evidence at the cemetery. Mr. Keaton cut the road through the cemetery despite being warned by Mr. Baisden. The incident would not have occurred but for that simple fact.

The adverse inference jury instruction was warranted by the facts of the case and it was an accurate statement of law. In reading the jury instructions as a whole, the jury was not misled

by this instruction. Consequently, the trial court did not abuse its discretion in giving the adverse inference instruction and this Court should not disturb the verdict.

7. The trial court did not abuse its discretion in accepting from the jury a verdict for emotional distress because there was admissible evidence presented proving or tending to prove physical damage to a grave or to the common area.

As aforementioned, numerous witnesses testified about the defacement, damage and other mistreatment to the physical area of the decedents' grave sites and of the common areas of the cemetery, including, but not limited to the hand-dug steps, graves and soil, in a manner that a reasonable person knows will outrage the sensibilities of others. *See supra*. Each Respondent similarly testified about the desecration with respect to their decedents' graves and the cemetery common areas, including the fact that each of their decedents were located in the path of the bulldozer. The evidence against General Pipeline was overwhelming and the Respondents' emotional distress was evident. General Pipeline's argument goes to the weight of the evidence and the jury rejected the argument. The jury determined that General Pipeline's conduct was reckless and made an award in accord with Syllabus Point 10 of the *Hairston* opinion.

Furthermore, General Pipeline's claim that the jury's equal emotional damage awards and award to Plaintiff Cora Hairston as "overseer of restoration of the cemetery" is based upon sympathy is based upon pure speculation with no legal support. The "equal treatment" argument merely goes to the weight of the evidence, not the law. At trial, General Pipeline made the same argument to the jury, the jury considered that argument and then soundly rejected it. The jury was disgusted by General Pipeline's conduct and it was at liberty to make the awards for indeterminate damages in any way it deemed proper. *See Hairston* at Syl. Pt. 10; *See also Willis, supra; State v.*

Hill, supra and *McNeely, supra*. General Pipeline overlooks the fact that the graves of Respondents' decedents, along with the cemetery's common areas, are gone or decimated and they have to go to a steep road, cut by General Pipeline, through the cemetery in order to mourn their dead. *See Ritter v. Couch*, 71 W.Va. at 227, 228, 76 S.E. at 430 (If relatives of blood may not defend the graves of their departed[,] who may? Always the human heart has rebelled against the invasion of the cemetery precincts; always has the human mind contemplated the grave as the last and enduring resting place after the struggles and sorrows of this world.). Consequently, the trial court did not abuse its discretion in accepting the verdict and this Court should not disturb it.

8. There is no basis for such other and further relief from alleged errors which are in the Appendix or the record which Petitioner did not argue with specificity or particularity.

General Pipeline generally asserts errors by the trial court which are apparent in the Appendix or record to which it is entitled to relief. However, General Pipeline does not assert these alleged errors with any specificity, particularity or argument. Issues not raised in this appeal are deemed waived. *See Mack-Evans v. Hilltop Healthcare Ctr., Inc.*, 226 W. Va. 257, 264 n.12, 700 S.E.2d 317, 324 n.12 (2010) (“To the extent that the issue was raised below, but not on appeal, it is deemed waived.”); *State v. Lockhart*, 208 W. Va. 622, 627 n.4, 542 S.E.2d 443, 448 n.4 (2000) (“Assignments of error that are not briefed are deemed waived.”); *See Addair v. Bryant*, Syl. Pt. 6, 168 W.Va. 306, 284 S.E.2d 374 (1981)(“Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.”); *State v. LaRock*, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996) (“Although we liberally construe briefs in determining issues presented for review, issues which are . . . mentioned only in passing but are not supported with pertinent

authority [] are not considered on appeal.”); *see also Tiernan*, 203 W.Va. at 140 n. 10, 506 S.E.2d at 583 n. 10 (“Issues not raised on appeal or merely mentioned in passing are deemed waived.”). The West Virginia Rules of Appellate Procedure are not mere procedural niceties, they set forth a structured method to permit litigants and this Court to carefully review each case. “Judges are not like pigs, hunting for truffles buried in briefs.” *State Dept. of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995). Furthermore, as this Court previously found, “[a] skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim. *State v. Kaufman*, 227 W.Va. at 555 n.39, 711 S.E.2d at 625 n.39 (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

“An appellant must carry the burden of showing error in the judgment of which he complains. This Court has explained that it will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.” *Morgan*, at Syllabus Point 5; *Tennant*, at Syl. Pt. 2; *Goldman*, 208 W.Va. at 199-200 n. 22, 539 S.E.2d at 459-60 n. 22 (deeming assignment of error that “is terse and lacks any authority to support it” to have been waived); *Tiernan*, 203 W.Va. at 140 n. 10, 506 S.E.2d at 583 n. 10 (“Issues not raised on appeal or merely mentioned in passing are deemed waived.” (citation omitted)); *State v. Lilly*, 194 W.Va. at 605 n. 16, 461 S.E.2d at 111 n. 16 (“[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.” (internal quotations and citation omitted)).

“As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might

have been remedied in the trial court if objected to there.” *State v. Thomas*, Syl. Pt. 17, 157 W.Va. 640, 203 S.E.2d 445 (1974); *Tennant*, at Syl. Pt. 2.

To the extent this Court does not find Petitioner’s failure to state this assignment of error with specificity or particularity, Respondents reassert and reallege their previous arguments and the rulings of the trial court. As such, there was no abuse of discretion by the trial court which would warrant relief to the Petitioner.

VIII. CONCLUSION

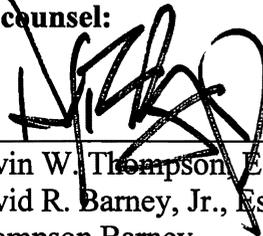
Based upon the law and the facts of the case, the circuit court did not abuse its discretion. The trial court made specific findings about the applicability of West Virginia Code § 29-1-8a to the case and those findings were not an abuse of discretion. The trial court did not abuse its discretion in allowing the personal representatives of deceased claimants Louella Wilder and Ulysses Olbert to participate as Plaintiffs. The trial court did not abuse its discretion in allowing expert witness testimony because that testimony was about standards of care and the expert witnesses testified about matters within their fields of expertise. There was no expert testimony from lay witnesses. The trial court did not abuse its discretion in denying a jury view because it was too problematic and not probative. The trial did not abuse its discretion in denying General Pipeline’s Motion for Judgment as a Matter of Law and allowing the case to go to the jury because there was admissible evidence presented proving or tending to prove the elements of a common law cause of action. The trial court did not abuse its discretion in giving the adverse inference jury instruction because that there was a specific plan to spoliage the evidence from the Crystal Block Cemetery after General Pipeline employee Vandle Keaton bulldozed the area, despite being put on notice about it by local resident Oather Bud Baisden. The trial court did not

abuse its discretion in accepting the jury verdict for emotional distress because there was overwhelming evidence of physical damage to the graves of Respondents' decedent and to the common area of the Crystal Block Cemetery. The trial court did not abuse its discretion in its rulings and General Pipeline failed to raise any reviewable issue regarding any apparent error.

WHEREFORE, Respondents, Plaintiffs below, respectfully request this Honorable Court to deny Petitioner General Pipeline Construction, Inc.'s, Petition and to enter an Order effectuating the decision, along with any other relief deemed necessary and proper.

Dated: January 16, 2014

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

GENERAL PIPELINE CONSTRUCTION, INC.,

Defendant Below, Petitioner,

v.

Supreme Court 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.*,

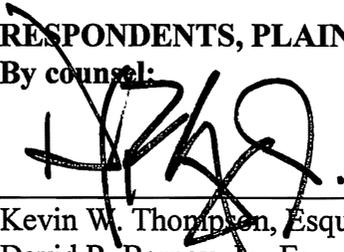
Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs hereby certify that on **January 16, 2014**, a true copy of the foregoing "*Respondents' Brief*" was served upon the following counsel of record by Hand-Delivery:

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