T. Eberling

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

BERKELEY COUNTY
CIRCUIT CLERK
2015 JUL 13 P 3:22
VIRGINIA M. SINE, CLERK

VICTORIA HUGHES, et al.,

Plaintiffs,

v.

Civil Action No. 13-C-578
Judge Silver

WEST VIRGINIA STATE POLICE, et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants West Virginia State Police, Corporal J.B. Flanigan, Corporal R.D. Eshbaugh, Senior Trooper Ware, Corporal Z.L. Nine, Sergeant J.M. Walker, Trooper J.D. See and Trooper M.D. Gillmore have moved for summary judgment in their favor against the Plaintiffs. As the basis for summary judgment, Defendants contend that: (1) no special relationship existed between themselves and Plaintiffs; (2) Plaintiffs cannot establish the elements of a cause of action for negligent mishandling of human remains; and (3) Defendants are entitled to qualified immunity.

The Court has carefully reviewed the Motion, Memorandum in Support of the Motion, Plaintiffs' Response in Opposition, the Reply, and the Addendum to the Reply, as well as oral argument of counsel at the pretrial hearing held on July 9, 2015. As a result of these deliberations, the Court concluded and ruled at the hearing that Defendants' Motion must be denied. In support of its decision, the Court makes the following findings of fact and conclusions of law.

Factual Background Viewed in the Light Most Favorable to the Plaintiffs

The following detailed recitation of alleged facts is taken from the report of Dr. Michael Lyman, the Plaintiffs' police procedures expert. The salient alleged facts are referenced by footnotes to deposition testimony or official police reports.

On April 7, 2012, Victoria Hughes discovered that her husband Walter Hughes was having an extramarital affair. Mrs. Hughes moved out of the residence on April 12 and into a hotel in the City of Winchester. The Hughes' had four daughters, Kristal Hughes, Kristina Arntz, Kristie (KK) Canfield and Kristen Hite who resided in Germany. Kristal lived across the street from the Hughes' residence with her boyfriend Todd Jones.

On Friday April 13, Kristal had a conversation with her father (Walter) and she told him that her sister Kristina was coming over to the house to pick up some things for her mother. Both Kristal and Mr. Hughes agreed to meet Kristina at the Hughes' residence.[1] Kristina drove to Kristal's house. The two then met with her father in Kristal's driveway.[2] During that meeting Walter told them that he had been cheating on his wife. Kristal told him that her mother just needed some time. The three then walked over to the Hughes' residence across the street and entered the home for the purpose of acquiring some of their mother's property.[3]

Upon entering the home, Kristal immediately went upstairs to retrieve some clothing for her mother. Walter and Kristina remained downstairs at which time he went back to the back porch "playhouse."[4] He came back into the house to get a key out of one of the cabinets and then returned to the playhouse. When he returned he was angry because Victoria wanted some loose change that she kept in a container. Walter went to put the key away and then stated, "This is pretty fucking common of you, Kristina."[5] He told her she was an embarrassment to her family. Kristina and her father began to argue over the woman he had been seeing. At one point in the argument Walter turned around and lunged at Kristina and had his gun pointed at her.[6] Kristina said her father was shaking the gun all around and she thought he was going to shoot her.[7] She looked up at her father who then stated, "This is what you want? This is what you want, Kristina?"[8] Kristina backed up to the loveseat located in the corner and dropped down to it and covered her head as she was screaming.[9]

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[1] Exhibit 2, Excerpts from Kristal Hughes' deposition, p. 15
[2] Exhibit 3, Excerpts from Kristina Arntz's deposition, p. 31
[3] Ibid, p. 31
[4] Ibid, p. 32
[5] Ibid
[6] Ibid, p. 33
[7] Ibid
[8] Ibid
[9] Ibid,

Kristal was upstairs when she heard her sister screaming[10] She went running down the stairs and saw Kristina on the loveseat covering her head with her dad pointing a gun at her. When she got to the bottom of the steps, Walter turned the gun at himself. Kristal then started screaming, "No, dad. No." He then pointed the gun toward his chest and said, "I'm going to blow my fucking heart out."[11] Kristina said that her father had foam on the sides of his mouth. Both Kristina and Kristal were begging him not to do it. Walter then wanted to know why Victoria had not responded to his texts or calls. Kristina told him that was because she destroyed her cell phone. He accused her of being a liar.[12] Kristina told him that she would get Victoria to call him. As Kristal and Kristina were leaving the residence Walter stated, "You had better say goodbye to me Kristina. This is the last time you'll ever speak to me." He also stated that he would be dead by midnight.[13] Kristina also stated that her father said that he had looked up on the Internet where to shoot himself in the heart so he would know how to do it.

The two sisters were in their father's house about 15 minutes and after leaving, went across the street and got Kristal's children. Kristal said that her father frightened her and they didn't have time to wait if they called 911. She said they needed to get out of the neighborhood because he was foaming at the mouth.[14]

After leaving the residence Kristina called her mother at the hotel and told her that Walter was going to kill himself.[15] She said she was concerned that her father would first kill Victoria and then kill himself. That's why they went to the state police.[16]

After Kristal and Kristina left for the state police barracks, Todd Jones, Kristal's boyfriend went over to the Hughes residence and spoke with Walter. Jones said Walter was upset and had been crying. Walter told Jones to take care of Kristal and stated that the cops are probably on the way.[17]

Kristina and Kristal drove to the state police barracks. Kristina went in first and Kristal shortly thereafter. Once there they encountered West Virginia State Police Office Assistant Barbara Boward and told her that they needed help.[18] Kristina said she announced that she had an emergency and stated, "My dad has a gun and is threatening to kill himself. I thought he was going to kill me."[19] Kristina said she explained the whole thing about how her father came at her with a gun. Boward tried to calm her down and asked for her father's name and address. She stated that she recalled her sister telling Boward, "He's going to be dead by the time they get there."[20] Boward asked Kristina if she was in fear for her life and she replied, "Yes." Kristal also

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[10] Exhibit 2, p. 18
[11] Exhibit 3, p. 34
[12] Ibid
[13] Ibid, p. 34-35; Exhibit 2, p. 18
[14] Exhibit 2, p. 20
[15] Exhibit 3, p. 35
[16] Ibid, p. 37
[17] Exhibit 4, Excerpts from Todd Jones' deposition, p. 12, 17
[18] Exhibit 5, Excerpt from WVSP's Answers to Plaintiff's 1st Set of Interrogatories, No. 7
[19] Exhibit 3, p. 37
[20] Ibid, p. 40

said, "I thought he was going to kill her [Kristina]."[21] Boward told them that they could not leave the barracks but said that she would dispatch the police.

It should be noted that Boward stated that Kristina came in and said, "...her father had a gun, was threatening to commit suicide."[22] She also stated that she got Walter's name and address and got Kristina's name and contacted dispatch. Boward also stated, however, that she was never told that the father pointed a gun at one of the daughters.[23] She said she got the information she needed from them and told them to have a seat and then she contacted dispatch and they sent the troopers out.

According to the Radio Call Log dated April 2012 Sheet No. 1, the following information was dispatched:

> "From IP to KJF888 04/13/12 1245 hrs. Kristina Arndts (434-227-0762)
> Came on station and advised that her father, Walter Hughes, 69, is at his residence at 35 Cutlip Dr., (off Hanshew off Berkeley Station) with a handgun and is threatening to kill himself. He is distraught because his wife left him. He has an automatic handgun and several other weapons in the residence. At 1253 hrs. Mrs. Arndts' sister advised that her husband, Todd Jones, had spoken to Mr. Hughes and calmed him down. All information was passed on to Romney who dispatched same."[24]

The computer assisted dispatch (CAD) transmission stated:

> "Walter Hughes 69 YOA Has gun and going to kill himself per F at STA
> Another was at scene unsure if still there
> No drugs or alcohol"

Responding to the Hughes residence were West Virginia State Police Troopers J. B. Flanigan, J. A. Ware and M. D. Gillmore. At the time the troopers arrived, Todd Jones, who resided across the street, stood along the road and observed.[25]

Flanigan was the first to arrive and went to Mr. Hughes' door and was speaking with him when Ware and Gillmore arrived. Flanigan stated that when he arrived, he spoke with a man [believed to be Todd Jones] who was mowing his lawn. Jones stated that the first two troopers who arrived, entered Hughes' home [Flanigan and Ware] and the third one remained outside [Gillmore].[26]

Flanigan stated that Hughes admitted getting caught cheating but denied that he was planning to kill himself.[27] Flanigan patted Hughes down for weapons but Hughes told him that he had guns upstairs in the house. Flanigan stated that as he spoke with Hughes, he was trying to get a feel as

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[21] Ibid, p. 38
[22] Exhibit 6, Excerpts from Barbara Boward deposition, p. 17
[23] Ibid, p. 18
[24] Exhibit 7, Radio call log (WVSP 001011)
[25] Exhibit 4, p. 19
[26] Exhibit 4, p. 19
[27] Exhibit 8, Excerpts from Corporal Flanigan deposition, p. 16

to whether he [Hughes] was actually going to hurt himself or not.[28] Flanigan said that he explained to Jones the options of getting a mental hygiene done through the sheriff's department and if the family felt it necessary, they could file a petition.[29] Jones denies that Flanigan advised him of the option of filing a mental hygiene petition.

The troopers spoke with Mr. Hughes for about 15 minutes.[30] After speaking with Mr. Hughes, a trooper [believed to be Flanigan] spoke with Jones who told him that he thought Mr. Hughes was suicidal and wasn't himself.[31] Jones asked them if there was anything that troopers could do and he was told, "He is 68 years old, he can do what he wants."[32]

Jones stated that he was then told to have one of the daughters take Mr. Hughes out to dinner while the second daughter went in the house to collect the handguns. When Jones asked about the gun that Mr. Hughes carried in his pocket the troopers said there was nothing they could do.[33] The troopers then left the scene.

Dispatcher Boward informed Kristal and Kristina, "Everything is okay." Krystal then asked, "So did they take him to the hospital?" Boward replied, "No, they said he was fine."[34] Arntz then stated, "What do you mean he's okay?" Krystal then asked, "Did they take his gun?"[35] Kristal and Kristina left the barracks and met with their husbands at a local Food Lion parking lot because they were afraid to return to their father's residence for fear that he would be angry with them that they contacted the police. Kristina returned to her mother's Hotel in Winchester.

At about 2:39 p.m., Kristina received a text from Mr. Hughes. It stated,

> "So I see I have been lied to again. You can tell your mother that she can move back in tomorrow. There is an $82,000 check in her name on the table. I am so sorry this happened, Kristina. I love you."[36]

Todd Jones remained outside the Hughes residence until dark to see if any of the lights inside the residence were still on. He noticed that it was dark there were no lights on inside the residence.

Kristina did not respond to the text but drove to Leesburg and informed her mother about the text. Between 8:00 and 8:30 p.m., Kristina phoned the barracks and requested a welfare check on her father.[37]

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[28] Ibid, p. 17
[29] Ibid, p. 19
[30] Exhibit 4, p. 19
[31] Ibid, p. 20
[32] Ibid
[33] Ibid, p. 21
[34] Exhibit 3, p. 39
[35] Ibid, p. 40
[36] ibid, p. 47-48
[37] Exhibit 3, p. 48

Troopers C. J. Berry and French responded to the call at about 9:30 p.m.[38] After arriving at the Hughes residence, they met with Kristal Hughes who told him that her father made suicidal threats earlier that day at about 12:00 noon with a small handgun in his possession.[39] The troopers searched the house and outlying areas with flashlights what were unable to locate Mr. Hughes.

While at the residence, however, troopers located several items including a suicide note, a cashier's check for $82,000 made out to Victoria Hughes, some jewelry, a wallet and a cellular phone belonging to Walter Hughes. Kristal was later informed that she should fill out a missing persons report. On May 7, 2012, Kristina and Kristal learned that Trooper Berry had been transferred and that Trooper R. D. Eshbaugh was now in charge of Walter's missing person case.

On November 29, 2012, at about 1:10 p.m., Corporal Z. L. Nine received a call from a person who reported finding a human skull in a stone quarry located in the 700 block of Berkley Station Road.[40] Nine spoke with the caller, Curtis Rogers who stated that he along with Jerry Rogers and George Rogers were walking the property to look for items to haul away for scrap when they found the skull.[41]

Corporal Nine along with Troopers R. D. Eshbaugh, J. D. See (formerly Schuessler) and J. M. Walker responded to the scene at about 1:15 p.m.[42] Nine stated that he was the "Team Leader" and that Eshbaugh was present to provide physical security while Nine and See processed the scene.[43] Walker was called away from the scene at about 2:08 p.m.[44]

The troopers began searching the area and located several other human remains. Nine stated, "I initially started to walk around."[45] Nine also stated that after about 10-15 minutes Eshbaugh and Walker assisted him in searching.[46] Once the skull was located, Eshbaugh phoned Lt. Lambert of the Crime Scene Unit and requested the crime scene team.[47]

Just north of the skull were concrete blocks where a tan jacket, black t-shirt; part of a rib cage; arm bones; two femur bones; vertebrae, dentures; a portion of a hip bone; several other bones and a pair of brown shorts with a black belt.[48]

A black Ruger semi-automatic pistol was located in front of one of the block seats located near the jacket and T-shirt. The jacket and T-shirt were found within inches of one another. The positioning of those items along with the gun suggested that Mr. Hughes was sitting

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[38] Exhibit 9, West Virginia State Police Complaint Report; Action Taken (WVSP 000003)
[39] Ibid
[40] Exhibit 10, Crime Scene Report by Nine dated November 29, 2012, p. 4 (WVSP 000219)
[41] Exhibit 11, Eshbaugh's Report of Investigation dated December 2, 2012 (WVSP 00194)
[42] Exhibit 12, Excerpts from Corporal Nine deposition, p. 13-14; 16
[43] Ibid, p. 13-15
[44] Ibid, p. 18
[45] Ibid, p. 20
[46] Ibid
[47] Ibid, p. 23
[48] Exhibit 11; Exhibit 13, WVSP Crime Scene Administrative Log, p. 6 (WVSP 000221)

on the cement blocks prior to his death and fell forward and slightly left into the larger stack of blocks.[49]

On the same date at about 1:30 p.m., Corporal Nine made a request for the state police crime scene team to respond and for the medical examiner to come to the location. The troopers continued to search the area for additional evidence. At about 2:00 p.m., Corporal Nine left the scene to obtain the crime scene vehicle.

At approximately 2:00 p.m., Victoria Hughes received a phone call from a friend who told her that human remains had been located in a shale pit nearby the Hughes home. Kristal walked down to the shale pit where she met with Trooper R. D. Eshbaugh. Eshbaugh asked Kristal if her father was wearing khaki shorts at the time he was missing. He also asked if Mr. Hughes wore dentures. Kristal also told Eshbaugh that her father carried a small plastic "Icebreakers" container that contained his pills. Eshbaugh told Kristal to go back to her house and keep other family members away from the scene so we could be properly processed. He told Kristal that he would go to the residence and let the family know what was found before he departed.

At about 2:15 p.m., Corporal Nine arrived in the crime scene vehicle and Trooper See arrived about five minutes later.[50] At about 2:33 p.m., Berkeley County Medical Examiner Curtis Keller arrived on the scene. Nine and See processed the area by taking digital photographs of all that was located, bagged the evidence, and handed the evidence over to Mr. Keller with the exception of the Ruger pistol which was collected and contained in evidence at the barracks.

Around 4:00 p.m., the items found were packaged and turned over to Keller. A firearm that was located was also secured and turned over to Eshbaugh who was the investigating officer. The "final walk-through" was conducted at 4:30 p.m. and the scene was "cleared" at 5:00 p.m.[51]

That evening, around 5:00 p.m., Eshbaugh came to the Hughes' residence at 35 Cutlip Drive and met with Victoria Hughes and her daughters. He informed them what evidence they located and they stated that he thought the remains were those of Mr. Hughes. Eshbaugh said that a positive identification could not be made until the medical examiner compared the dentures.

On November 30, 2012, the following day, Medical Examiner Curtis Keller phoned the family and said that based on what was located at the site, there was not much to go on. He requested the name of Walter Hughes' dentist and the place where Hughes had his dentures made.

Later that afternoon, Victoria, Kristal, Kristina and Kristie (KK) decided to visit the site where the remains were found so they could leave flowers there. They were accompanied by Gary Arntz and Walter's brother Bernie.[52] After arriving at the shale pit they discovered additional body parts which included a pelvic bone, an arm bone, a vertebra, rib and finger bones

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[49] Exhibit 11, Exhibit 12, , p. 23
[50] Exhibit 14, Crime Scene Report by Nine dated November 29, 2012, p. 5 (WVSP 000220)
[51] Exhibit 12, p. 36; Exhibit 15, Crime Scene Report by Nine dated November 29, 2012, p. 10 (WVSP 000225)
[52] Exhibit 16, Excerpts from Kristie Canfield deposition, p. 52; 56

and part of a jaw bone. Also located were Mr. Hughes' bottom dentures. Gary Arntz called West Virginia State Police and reported locating more bones. They requested a trooper be sent to the location.

Corporal Nine responded to the call and met with two unidentified male subjects. Nine then photographed, bagged and secured the items.[53] After doing so, he looked further in an attempt to locate any other items that may be in the area. Nine stated, "I dug around more in that area to try and locate anything else that may be behind. At that point, I didn't find anything and I left."[54] Nine left the scene at about 4:10 p.m.[55] He then took the remains to the Brown Funeral home where he placed them with the remains located the previous day.[56]

On December 3, 2012, another daughter, Kristen Hite who had traveled from Germany, wished to visit the location where he father's remains were found and where the family had left flowers. Kristen went to the site accompanied by family members Victoria Hughes, Kristina Arntz, and Kristie Canfield. While at the scene, Kristen discovered her father's femur. Kristina's husband, Gary Arntz, contacted the state police and reported that officers had not properly collected another body part of Walter Hughes. Corporal Maynard came out and picked up that bone.[57]

Kristina stated that she saw a friend, Steve Parrish, at Walter's memorial service. He called her later that day and offered to go search the area.[58] That Saturday they went over and made a grid, used rakes and leaf blowers and they moved the palette that had been left in the concrete blocks.[59] They located the shell casing from the bullet. It was located about 6-8 feet from the pallet where Mr. Hughes' remains were found.[60] No other evidence was located. Parish called Gary to verify that it was a Ruger handgun and then they called the state police to inform them about the shell casing.[61]

Plaintiffs' Proferred Admissions by Individual State Police Defendants

Corporal J. B. Flanigan

1. Flanigan assumed a duty to protect Walter Hughes from harming himself or others when he responded to the dispatcher's call (Exhibit 8, Page 11, lines 18 – 24).
2. Flanigan was never informed that Hughes had been brandishing a handgun (Ibid, Page 21, lines 8 – 24).

[53] Exhibit 12, , p. 44
[54] Ibid, p. 45
[55] Exhibit 17, Corporal Nine's Crime Scene Response Report Detailed Narrative (WVSP 001079)
[56] Ibid
[57] Exhibit 18, Excerpts from Corporal Eshbaugh deposition, p. 36
[58] Exhibit 2, p. 78
[59] Ibid
[60] Ibid
[61] Ibid, p. 79

3. Flanigan was never informed that Hughes had pointed a loaded handgun directly at one of his daughters (Ibid, Page 21, line 25; Page 22, lines 1 – 6).
4. If Flanigan had the information that Hughes pointed a loaded gun at his daughter, he would have confirmed that fact with the daughter and arrested Hughes for domestic violence (Ibid, Page 24, lines 5- 11).
5. If Flanigan had known that Hughes pointed a loaded handgun at his daughter "it would have changed everything" (Ibid, Page 23, lines 13 -25).
6. If Flanigan and the responding officers had known of the domestic violence incident, Hughes would have been arrested and they could have taken the weapons from his home (Ibid, Page 25, lines 10 – 21).
7. If the State Troopers had confiscated his weapons, he would not have been able to shoot himself (Ibid, Page 26, lines 18 – 20).
8. Flanigan arrived at the Hughes residence at 12:54 p.m. (Ibid, Page 30, lines 3 – 19).
9. At 12:57 p.m., Flanigan believes he advised dispatch that Todd Jones had reported numerous guns in the residence and that Hughes was still threatening to kill himself (Ibid, Page 31, lines 8 -25; Page 32, lines 1 – 4).

<u>Trooper J. A. Ware</u>

1. When he responded to the call involving Walter Hughes, he assume a duty to act on his behalf to protect himself from harming himself or others (Exhibit 19, Excerpts from Trooper Ware Deposition, Page 17, lines 10 – 15).
2. When the daughters reported the suicide threat to the State Police, they expected the State Police to take action to protect Walter Hughes from harming himself or others (Ibid, Page 17, lines 17 – 22).

3. Flanigan made contact with Mr. Hughes on the porch speaking to him (Ibid, Page 20, lines 18 – 22)
4. Ware was unaware that Hughes had been brandishing a handgun or that he pointed a loaded handgun at his daughter 15 minutes before he arrived on the scene (Ibid, Page 49, lines 23 – 25; Page 50, lines 1 – 10)
5. If Ware had known that Hughes was pointed a handgun at his daughter, he could have spoken to the daughter about an assault charge against the father and Hughes could have been arrested (Ibid, Page 51, lines 17 – 25; Page 52, Lines 1 – 3)

Trooper M.D. Gillmore

1. He assumed a duty to act to protect Mr. Hughes when he responded to the call (Exhibit 20, Excerpts from Trooper Gillmore Deposition, Page 23, lines 6 - 10).
2. When the daughters reported their father's suicidal threats to the State Police, they expected the State Police to evaluate the call and do what they could do to protect Hughes from harming himself or others (Ibid, Page 23, lines 11 – 25; Page 24. Lines 1 – 3).
3. Gillmore became aware on his way to the call that the complaint was made at the State Police barracks (Ibid, Page 24, lines 13 - 17).
4. At no time did Gillmore know that Hughes had pointed a handgun directly at his daughter (Ibid, Page 30, lines 4 – 9).
5. If he had been aware that Hughes had pointed a handgun at his daughter, the officers could have made a warrantless arrest of Hughes for domestic assault (Ibid, Page 31, lines 21 – 25; Page 32, lines 1 – 25; Page 33, line 1).
6. It would be very upsetting for family members to discover their loved one's body parts under the circumstances of this case (Ibid, Page 54, lines 8 – 21).

Barbara Kay Boward

1. If a member of the public walked into the State Police headquarters in Martinsburg either she or another office assistant would be who they would typically talk to. (Exhibit 6, Page 12, lines 1 – 5; lines 22 – 25).
2. She takes all kinds of complaints and because she is trained and certified through the FBI and the West Virginia Automated Police Network she takes the information and disseminates it to the dispatcher to put out over the radio (Ibid, Page 13, lines 6 – 22).
3. It is part of her normal job duties to take a complaint and relay the information to a dispatcher (Ibid, Page 14, lines 20 – 25).
4. She told the daughters to take a seat and she contacted dispatch (Ibid, Page 21, lines 14 – 22).
5. When one daughter told her she wanted to leave and go back to the scene, Boward told her to wait until she heard from the troopers to make sure they were secure (Ibid, Page 26, lines 213 – 25; Page 27, lines 1 – 9).

Corporal J. D. See

1. When she arrived on the crime scene she met with Troopers Eshbaugh and Nine. They advised her the deceased could be Mr. Hughes and that they had already done a canvas of the area and marked several bones they had found of the deceased (Exhibit 21, Excerpts from Corporal See Deposition, Page 13, lines 5 – 19)
2. At that point she and Trooper Nine "kind of walked" through the area to where the items found were located. He was going to take photographs and he requested she do a diagram (Ibid, Page 14, lines 8 – 13).

3. Curtis Keller was there while they collected bodily remains. He was making his field notes as they collected and "it was a joint effort". As they were collecting something, Keller would be there watching what was being collected and making his field notes. (Ibid Page 23, lines 8 – 15)
4. Keller did not physically collect the remains but he was there during this entire process (Ibid, Page 24, lines 4 – 10).
5. Trooper Nine was in charge of the crime scene (Ibid, Page 25, lines 15 – 25).
6. Trooper Eshbaugh was in charge of the investigation (Ibid, Page 26, lines 1 – 21).
7. After diagram measurements and photographing was completed, they coordinated collecting the remains with Keller (Ibid, Page 26, lines 23 – 25; Page 27, line 1).
8. They did a final walk through after they bagged the remains. They didn't do the walk through "like on TV shows" where "they stand in a line and all walk out and then walk back". We "just kind of zig-zagged up through the area" (Ibid Page 31, lines 5 – 13).
9. As investigating officer, Trooper Eshbaugh had the authority to have the crime scene team keep searching (Ibid, Page 35, lines 19 – 25; Page 36, lines 1 – 20).
10. The troopers owed a duty to Mr. Hughes' family to treat his bodily remains respectfully (Ibid, Page 41, lines 14 – 16).
11. She doesn't know if any real perimeters were set for this crime scene (Ibid, Page 55).
12. The investigating officer on the scene typically sets the perimeters of the crime scene (Ibid, Page 54, lines 7 – 22).
13. Trooper See described her initial walk through as "We just kind of – like, in a zig-zag pattern just walked through the area. [Nine] indicated the items that were found already.

And then, like I said we decided that he was going to take photographs and that – he asked me to the diagramming" (Ibid, Page 57, lines 5 – 20).

14. When she did the walk through, Nine and Eshbaugh had already spray painted with green paint the areas where bodily remains or clothing were found (Ibid Page 57, lines 21 – 25).
15. After she arrived on the scene no additional bodily remains or other evidence was discovered other than the handgun that was underneath the shirt (Ibid, Page 58, lines 1 – 5).
16. By the time she got there everything that they eventually bagged had already been marked (Ibid Page 58, lines 6 – 9).
17. All the bodily remains that were found were within 50 feet of where the police found Mr. Hughes' tan jacket, black t-shirt containing remnants of his rib cage and arm bones (Ibid, Page 79, lines 9 – 25; Page 80, lines 1 – 23).

<u>Corporal Z. L. Nine</u>

1. When the State Police conduct a crime scene investigation they should collect all the evidence available at the scene. (Exhibit 12, Page 10, line 25; Page 11, lines 1 – 3).
2. When the State Police conduct a crime scene investigation they should collect all the bodily remains available at the scene. (Ibid, Page 11, lines 7 – 11).
3. When collecting bodily remains at a crime scene, the State Police should do a careful search for all available bodily remains (Ibid, Page 11, lines 17 – 21).
4. When the State Police conduct a crime scene investigation involving bodily remains they should continue their search until all bodily remains available at the scene have been collected. (Ibid Page 11, lines 23 – 25; Page 12, lines 1 – 4).

5. At the crime scene were a couple of concrete blocks that looked like they had been formed to make somewhere to sit with a wooden pallet on the ground. (Ibid, Page 32, lines 4 – 10).
6. The jacket and other clothing were found right on the wooden pallet (Ibid, Page 32, lines 11 - 14).
7. Intermingled with the clothing were remnants of Hughes' ribs and some arm bones (Ibid, Page 32, lines 15 – 20).
8. It appeared that is where the body initially laid (Ibid, Page 32, lines 21 – 23).
9. Within a fifty foot radius they found the other body parts (Ibid, Page 32, lines 24 – 25; Page 33, lines 1 – 6).
10. All the evidence except the firearm, was actually collected during the initial walk through (Ibid, Page 41, lines 13 – 16).
11. Everything the State Police found was found between 1:17 p.m. when Eshbaugh arrived at the crime scene and 1:25 p.m. (Ibid, Page 42, lines 18 – 22).
12. The only evidence collected was what was found during Nine's initial walkthrough which took eight minutes or less (Ibid, Page 42, lines 23 – 25; Page 43, line 1).
13. The next day, he collected the bodily remains the family discovered which were found in the area where the concrete block and pallet were located (Ibid, Page 43, lines 20 – 25; Page 44, lines 1 – 25; Page 45, lines 1 – 13).
14. There was never any consideration by the State Police of coming back the next day to continue searching (Ibid, Page 50, lines 4 – 10).

Corporal R. D. Eshbaugh

1. When the State Police conduct a crime scene investigation involving bodily remains they should bag and label all the bodily remains available at the scene (Exhibit 18, Page 8, lines 21 – 25).
2. When collecting bodily remains at a crime scene, the State Police should do a careful search for all available bodily remains (Ibid, Page 9, lines 11 – 14).
3. When the State Police conduct a crime scene investigation involving bodily remains, they should continue their search until all bodily remains available at the scene have been collected (Ibid, Page 9, lines 15 – 19).
4. Trooper Eshbaugh spoke with Kristal Hughes at the crime scene and suggested she go back to the house and keep the other family members away so the crime scene could be properly processed (Ibid, Page 19, lines 8 – 21).
5. Trooper Eshbaugh also told Kristal Hughes that he would let the family know what was found before he left (Ibid, Page 20, lines 1 – 4).

Applicable Legal Standard

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). Summary Judgment is only appropriate when "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In accord, Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syllabus Point 1,

Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995); Syllabus Point 3, *Evans v. Mutual Mining*, 199 W.Va. 526, 485 S.E.2d 695 (1997). Summary judgment is only appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

The party moving for summary judgment "has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syllabus Point 6, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

The trial court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), quoting *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951).

Discussion

The Court having reviewed the respective memoranda and arguments of the parties and the record in this case, finds as follows:

1. Plaintiffs do not oppose the dismissal of J.B. Flanigan, J.A. Ware, J.M. Walker and

M.D. Gillmore from this civil action. Accordingly the Court ORDERS that Defendants J.B. Flanigan, J.A. Ware, J.M. Walker and M.D. Gillmore are dismissed from this action with prejudice.

2. With respect to the remaining Defendants, the Court finds that the Plaintiffs could prove at the trial of this matter that a "special relationship" existed between Plaintiffs and/or Plaintiffs' decedent Walter Hughes, and thereby avoid the bar to liability represented by the public duty doctrine[62] by proving that: (i) the state police assumed an affirmative duty to act on behalf of Walter Hughes and/or his family members; (ii) the state police knew that inaction could lead to harm; (iii) the Plaintiff daughters' visit to state police barracks was a form of direct contact as was the troopers' interaction with Hughes at his residence; and (iv) the Plaintiffs reasonably and justifiably relied upon the state police to take action.

3. The Court further finds that a cause of action exists for the negligent mishandling of a dead body even where the handling is otherwise authorized. *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 327 S.E.2d 438 (1985). Viewing the facts in the light most

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[62] If a special relationship exists between a local governmental entity and an individual which gives rise to a duty to such individual, and the duty is breached causing injuries, then a suit may be maintained against such entity. Syl. pt. 3, *Benson v. Kutsch*, 181 W.Va. 1, 380 S.E.2d 36 (1989). Accord, syl. pt. 1, *Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989).

In syllabus point 2 of *Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989), the West Virginia Supreme Court established a four-part general test for determining whether a local governmental entity owes an actionable special duty to a particular individual, as opposed to a mere general duty to the public as a whole for which no cause of action lies:

> To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

In syllabus point 3 of *Wolfe v. City of Wheeling* the Court stated that the question of whether a special duty arises to protect an individual from a local governmental entity's negligence is ordinarily a question of fact for the trier of the facts. In the present case, the Court finds that these facts create a jury question as to whether a special relationship existed between the state police Defendants and the Plaintiffs.

favorable to the Plaintiffs as the Court must do in considering the Defendants' motions, the Court finds that a reasonable jury could conclude that the State Police failed to perform a search for all available bodily remains and failed to collect all the bodily remains available at the scene. In making this finding the Court notes that all the bodily remains recovered during Defendants' crime scene investigation were discovered during the initial walk through which took eight minutes or less. The next day the family visited the location where the body was discovered and found a pelvic bone, an arm bone, a vertebra, rib and finger bones and part of a jaw bone as well as Walter Hughes' bottom dentures. All the bones were discovered within several feet of the concrete blocks and pallet where Mr. Hughes' died. According to the Plaintiffs' version of the facts, the family did not search for these bones – the bones were readily observable in the location where the body was found. A jury could reasonably infer from these facts that the state police conducted no search at all beyond their initial walk through. In addition, the psychological evidence presented supports Plaintiffs' claims of severe emotional distress resulting from discovery of the bodily remains.

4. Defendants are correct that Victoria Hughes, as the surviving spouse of Walter Hughes, is the proper party plaintiff to bring the negligent mishandling of human remains claim. However, Kristal Hughes, Kristina Arntz and Kristie Canfield have set forth in their complaints factual allegations sufficient to support claims for negligent infliction of emotional distress. The West Virginia Supreme Court has held that "[a]n individual may recover for the negligent infliction of emotional damages absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious." Syl.pt.2, *Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 635, 482 S.E.2d 620 (W.Va. 1997); *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1997). The Court finds that the facts in this

case viewed in the light most favorable to the Plaintiffs are sufficient to guarantee that the claims for emotional distress damages are not spurious.

5. The remaining issue to be addressed by the Court are Defendants' claims of qualified immunity. The Court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or otherwise involve discretionary governmental functions. *Syl. Pt.10, W.Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). Qualified immunity has no application to non-discretionary government functions nor does it affect the liability of the State, its agencies, officials and employees for actions based upon ministerial functions of government agencies or officers. *Id.*

6. Under the facts of this case the Court finds that the West Virginia State Police as an entity is not entitled to qualified immunity for the wrongful death claim involving Walter Hughes. If the individual police officers responding to the call had known that Walter Hughes had threatened his daughter with a handgun they would have arrested Walter Hughes and confiscated his weapons. However, the officers had no knowledge of this fact because the information was never conveyed to the dispatcher who broadcast the call for assistance. The alleged negligent act in this circumstance was the failure of Barbara Boward to forward this information to the police officers via the dispatcher. The Court finds this alleged negligent act was a non-discretionary, ministerial act to which qualified immunity would not apply. Accordingly, since it was within the scope of Ms. Boward's duties to take the pertinent information from Mr. Hughes' daughters and transmit it to the dispatcher her alleged negligence may be attributed to the State Police under the doctrine of *respondeat superior*. In making this

finding the Court notes that should the trier of fact ultimately credit Ms. Boward's testimony that she was not informed of the threat to the daughter then no liability would attach to the Defendant West Virginia State Police for this claim.

7. With regard to the claim for qualified immunity for the mishandling of the remains of Walter Hughes, the Court finds there are two possible versions of what occurred during the crime scene investigation. Defendants contend they diligently searched for the bodily remains of Walter Hughes and properly exercised their discretion to conclude there was no point in continuing the search. Plaintiffs contend that the only reasonable inference to be drawn from the facts is that Defendants marked, photographed and collected what was readily visible upon arrival at the scene without conducting any subsequent search, especially in light of the other several body parts that were subsequently found at the scene by family members. Plaintiffs contend that while the method of conducting a search may involve discretionary decision making, the failure to search does not. The Court finds that the issue of qualified immunity ultimately depends on which version of the facts is adopted by the trier of fact after hearing all the evidence and judging the credibility of the witnesses. If the jury should adopt the Plaintiffs' version, the Court finds that neither the individual police officers nor the State Police would be entitled to qualified immunity as no discretionary act or decision would be implicated. Since it is undisputed that the individual officers were operating within the scope of their employment, their negligence would be attributed to the State Police under the doctrine of *respondeat superior*.

Ruling

Accordingly, the Court **GRANTS** Defendants' motion for summary judgment in part by dismissing all claims against Defendants J.B. Flanigan, J.A. Ware, J.M. Walker and M.D. Gillmore; and **DENIES** Defendants' motion for summary judgment as to Defendants West Virginia State Police, R.D. Eshbaugh, Z.L. Nine, and J.D. See.

The objections and exceptions to the rulings of the Court by the parties are noted and preserved.

The Clerk shall forward attested copies of this Order to:

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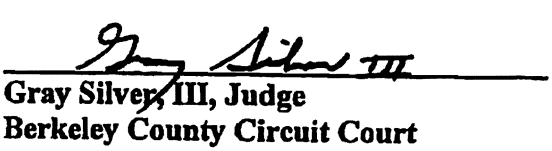
ENTER: 7/13/15



Gray Silver, III, Judge
Berkeley County Circuit Court

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Clerk Circuit Court
By: J. Cooper
Deputy Clerk