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In the Supreme Court of Appeals of West Virginia

Docket No. 15-0691

WEST VIRGINIA STATE POLICE,
CORPORAL R.D. ESHBAUGH,
CORPORAL Z.L. NINE, TROOPER *and*
FIRST CLASS J.D. SEE,

Petitioners,

v.

VICTORIA HUGHES *individually and as the administratrix of the estate of Walter N. Hughes*, **KRISTINA ARNTZ, KRISTAL HUGHES,** *and* **KRISTIE CANFIELD,**

Respondents.

Appeal from a final order of the Circuit Court of Berkeley County (13-C-578)

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED BY DENYING QUALIFIED IMMUNITY TO PETITIONERS ON VICTORIA HUGHES'S CLAIM FOR WRONGFUL DEATH (COUNT I).

2. THE CIRCUIT COURT ERRED BY DENYING QUALIFIED IMMUNITY TO PETITIONERS ON VICTORIA HUGHES' CLAIM OF "MISHANDLING OF BODILY REMAINS" (COUNT II) AND THE HUGHES DAUGHTERS' UNMADE CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM.

STATEMENT OF THE CASE

I. Factual Background.

Walter Hughes and Victoria Hughes married in 1962 and had four daughters, Kristal Hughes (*a/k/a* Michelle), Kristina Arntz (*a/k/a* Tina), Kristie Canfield (*a/k/a* K.K.), and Kristin Hite (*a/k/a* Sputnik).[1] Within months of the wedding, Walter began to cheat on Victoria[2]—so often, in fact, that Victoria was unable to even guess how often: "I really can't remember. There was so many."[3] Walter also threatened Victoria, starting "[e]arly on in the marriage"[4] and continuing throughout,[5] although as would become a pattern in the family, she never sought a domestic violence order or did anything else to stop him.[6]

A. Spring and summer 2012.

Early in 2012, Victoria noted changes in Walter's behavior and, given that she "had been through it before,"[7] suspected that he was again cheating on her. On April 7, 2012,

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1 (Joint App'x ("JA") at 48 ¶ 2.)

2 (JA at 100–01.)

3 (JA at 101.)

4 (JA at 96.)

5 (JA at 97.)

6 (JA at 96.)

7 (JA at 100.)

she confronted Walter,[8] and he confirmed her suspicion.[9] This time, she considered divorcing him, and she moved out.[10] On April 11, Walter threatened to commit suicide, dramatically left his wallet, phone, jewelry, and all of his money on the counter,[11] and left the family home.[12] Victoria testified that Walter had threatened suicide several times before, beginning when they were dating,[13] always whenever she did not do what he wanted.[14] April 11 was no different, and within minutes, he returned home unharmed.[15]

Victoria never believed that Walter intended to harm himself on April 11; instead, she believed that he was just trying to scare her,[16] and it never occurred to her to seek help for him because she "just thought he was mean."[17] Victoria even testified that later the same day, she and Walter hosted an Easter egg hunt for the children of friends and family, and "[i]f people hadn't have known anything was going on, they would have never known because we could put on a good front,"[18] a skill that he would use again two days later:

> Q You were married to Mr. Hughes for a long time. Was he able to put on a front for people?
>
> A Oh, he was so good at it, but then so was I. People thought we had the perfect marriage.

(JA at 111.)

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8 (JA at 102.)

9 (JA at 49 ¶ 13.)

10 (JA at 94, 103.)

11 (JA at 105–06.)

12 (JA at 106.)

13 (JA at 105.)

14 (JA at 105.)

15 (JA at 106.)

16 (JA at 108.)

17 (JA at 107.)

18 (JA at 107.)

Victoria became convinced that Walter was going to harm her. Again, however, neither she nor the couple's daughters ever called the police, which Victoria justified by saying, "I have never called the police when things happened"; she "never even thought of it."[19] Nevertheless, given Walter's history and the incident, Victoria called Kristie on April 12, 2012, left the Hughes residence, and moved into a hotel in Winchester, Virginia.[20]

On Friday morning, April 13, 2012, Kristal confronted Walter about his most recent affair, and although he initially denied it, he ultimately confessed to her.[21] She described Walter as normal, not agitated, and certainly not suicidal.[22]

Later that day, Kristina called Kristal and said that she (Kristina) wanted to get some things from the Hughes house for their mother, Victoria.[23] Walter was not home at the time, but Walter, Kristal, and Kristina arranged to meet at the house.[24] When they arrived, Kristal went upstairs to retrieve Victoria's personal effects, and Walter and Kristina remained downstairs.[25] At some point, Walter revealed to Kristina, "I have been fucking around on your mother her whole life,"[26] and as a result, the two got into a shouting match over Walter's infidelities. Kristina testified that Walter "turned around and he lunged at me with his — and he had his gun like this [indicating] pointing it at me" and said, " 'This is what you want. This is what you want, Kristina.' "[27] Hearing Kristina scream, Kristal came downstairs.[28] Walter then

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19 (JA at 109.)

20 (JA at 96, 104, 108, 109, 49 ¶ 14.)

21 (JA at 294.)

22 (JA at 294.)

23 (JA at 49 ¶ 15, 116.)

24 (JA at 49 ¶ 16, 116.)

25 (JA at 49 ¶ 17, 117.)

26 (JA at 49–50 ¶¶ 18–23, 117–19.)

27 (JA at 119–20.)

"put [a gun] in his chest and said, 'I'm going to blow my fucking heart out.' "[29] The three continued arguing, when, according to the two daughters, Walter again threatened to kill himself: " 'You'd better say goodbye to me, Kristina. This is the last time you'll ever speak to me.' He had said also he would be dead by midnight."[30] Kristina and Kristal left the house and went to Kristal's house across the street.[31] Instead of calling the police, however,[32] Kristina and Kristal retrieved Kristal's children and drove to the Martinsburg barracks of the West Virginia State Police.[33] On the way, they also called Kristal's boyfriend, Todd Jones, and asked him to come home (*i.e.*, to his and Kristal's house).[34]

Precisely what happened when Kristina and Kristal arrived at the West Virginia State Police barracks is disputed, but for the purposes of the instant appeal, Petitioners accept *arguendo* Kristina and Kristal's version. According to them, they spoke with West Virginia State Police employee Barbara Boward, who (along with another FBI-certified coworker) is one of the first people visitors to the barracks normally encounter.[35] Kristina and Kristal testified that they told Ms. Boward both that Walter had threatened to kill himself and that Walter had threatened Kristina.[36] Ms. Boward tried to calm the daughters down and get the pertinent details from Kristina.[37] Kristal testified that Ms. Boward told the daughters, "Everything would be

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28 (JA at 49 ¶ 18, 119, 295.)

29 (JA at 50 ¶¶ 21–22, 120.)

30 (JA at 120–21, 295.)

31 (JA at 50 ¶ 24, 122.)

32 (JA at 122.)

33 (JA at 50 ¶ 26, 50, 122.)

34 (JA at 50 ¶ 25, 156.)

35 (JA at 326.)

36 (JA at 50 ¶ 27, 122–23.) Ms. Boward is "absolutely positive" that neither reported to that Walter had threatened Kristina. (JA at 329.) As demonstrated *infra*, it does not matter which version is correct.

37 (JA at 128.)

okay; help was on the way."[38] Neither daughter told Ms. Boward that they wanted to talk to the Troopers who were responding to the call.[39]

At 12:50 p.m., the West Virginia State Police dispatcher put a call out to any available unit for "a male subject [who] was threatening suicide with a firearm."[40] Trooper First Class Joshua Andrew Ware ("Trooper Ware") was the first to answer the call.[41] Corporal Joseph B. Flanigan ("Corporal Flanigan") and then Trooper First Class M.D. Gillmore ("Trooper First Class Gillmore") also answered the call shortly thereafter.[42] All three Troopers proceeded to the Hughes house.[43] While Kristina and Kristal were at the barracks reporting the incident, Todd Jones had arrived at the house he shared with Kristal. Jones went over to check on Walter, and the two discussed Walter's infidelity and the situation that it had caused.[44] Jones testified that he was not concerned about his safety.[45] While the two men were talking, Walter's brother Stacy pulled up.[46] Walter asked, Stacy, what Stacy wanted, Stacy said, "Making sure you're all right," Walter responded, "I'm fine," and Walter and Jones resumed their conversation.[47] Jones testified that after speaking with Walter, he did not believe that Walter was suicidal, so he left.[48]

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38 (JA at 146.)

39 (JA at 125.)

40 (JA at 50 ¶ 28, 171, 177, 181, 345.)

41 (JA at 171, 177.)

42 (JA at 171, 187.)

43 (JA at 171.)

44 (JA at 153–54.)

45 (JA at 157.)

46 (JA at 318.)

47 (JA at 318.)

48 (JA at 165-66, 158.)

Within a minute or two after Jones left, the Troopers arrived, so Jones waited along the road while the Troopers spoke with Walter.[49] Just four minutes after the call had gone out, Corporal Flanigan arrived, then Trooper Ware, then Trooper First Class Gillmore.[50] Corporal Flanigan made first contact with Walter and spoke with him:

> A I spoke with Mr. Hughes, explained to him why I was there, and I asked him if he felt like harming himself or if he had a weapon on him. And he chuckled and said "no." And that's when he proceeded to explain to me that he was caught cheating on his wife again. His daughters were upset.
>
> And I explained to him the report of him threatening himself. He again laughed and said no, he'd not—had no intention whatsoever of harming himself, or hurting himself, or anybody else. I explained to him I needed to pat him down, just to make sure he didn't have a weapon on him. He said, That's fine.' He said he did have guns, but they were upstairs. I patted Mr. Hughes down, and he had no weapons on him at all, and there was none even in the vicinity of the—I guess like the foyer/entryway there of the house.
>
> * * * *
>
> A I remember part of the reason he said his wife was so upset and his daughters were upset, I believe the woman he got caught having an affair with was 30, 36 years old, somewhere in that age range. And he said it wasn't the first time it's happened, and his wife had threatened to leave him but—we just basically bantered back and forth about that and why he cheated on her.
>
> And he went on to advise him—I believe he said he was retired and just general conversation, talking to him, trying to get a feel if he was actually going to hurt himself or not.
>
> * * * *
>
> A After I spoke with him and he reiterated again that he had no intentions of harming himself or hurting himself and he wasn't going to commit suicide, I spoke with the gentleman outside again, upon leaving, and I explained to him that he's not making any threats to himself. He wasn't distraught. He wasn't emotional. He was calm.

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49 (JA at 50 ¶ 32, 159.)

50 (JA at 50 ¶ 33, 336, 345, 171–72.)

> And I told him—I said, We can't take his guns from the house.[] I said, We don't have that right. We can't just take the gentleman's guns when he's not making threats to himself or anybody else.[]
>
> I explained to him that if he or the family wanted to remove the guns from the residence, they could, either to get him out of the house, take him to dinner, just go for a walk somewhere, but the family members or somebody had to remove the guns, that we could not do that. I also explained to him the options of getting a mental hygiene done through the sheriff's office. If they felt it was necessary, they could file a petition.
>
> * * * *
>
> A I gave dispatch a brief rundown of what happened after I left, exactly—I explained speaking with him: He was calm. He was rational. He wasn't threatening to hurt himself. The male subject—I'm sorry, I did—I advised him [Jones] just to have somebody remain with him [Walter Hughes].
>
> I did tell him [Todd Jones] that before I left, that if they were worried about him [Walter Hughes], I said, There's nothing we can do. They're not going to lock him up at this point. I can't take him into custody when he's not making threats in my presence or doing anything irrational. Stay with him.' I did instruct him of that, and I told dispatch and stuff that over the radio, as well.
>
> * * * *
>
> Q Okay. But you're telling me he didn't appear emotionally upset when you talked to him?
>
> A No, sir. He was completely calm and rational.
>
> * * * *
>
> I specifically asked him if he was going to kill himself, and he said no. I asked him if he wanted to go to the hospital to talk to somebody, and he said no. And he was calm and he -- he was completely rational.

(JA at 178–82.)

Trooper Ware, who had overheard some of Corporal Flanigan's conversation with Walter Hughes, also testified that Walter appeared far from suicidal:

> Corporal Flanigan was talking to him. I don't remember what exactly was said. Mr. Hughes' demeanor was not agitated. He wasn't emotional. He was speaking to us just like you and I are speaking right now.

> He denied, you know—I don't know—I can't remember specifically how or what he would have said, but he made numerous—numerous times that, you know, he was not going to harm himself; he didn't wish to harm himself, any of those things.

(JA at 172; *see also id.* (noting that Walter appeared "calm and collected, normal") and ("He's not showing any signs of, you know, wanting to harm himself. There's no evidence he was attempting to harm himself with a firearm.").)

After speaking with Walter and concluding that he was not a threat to himself, the Troopers left.[51] On his way out, Corporal Flanigan spoke with Todd Jones and advised him that they could not take Walter into custody because he showed no signs of being suicidal, but that if the Hugheses wanted Walter's guns out of the house, they were free to arrange to take Walter somewhere for dinner and remove the guns themselves, and that they could call EMS for another evaluation or pursue a mental hygiene petition against Walter if they believed it was warranted;[52] Jones disputes that the Troopers told him about the EMS or mental hygiene options.[53]

According to Kristina, after the Troopers left, Ms. Boward advised Kristina and Kristal at the barracks, " 'Okay, girls. You can leave now. Everything is okay.' And I remember my sister saying, 'So did they take him to the hospital?' And she [Ms. Boward] said, 'No. They said he was fine.' "[54] Neither Kristina nor Kristal asked to speak with the Troopers,[55] and neither made any further efforts to contact law enforcement, health professionals, or anyone else.[56]

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51 (JA at 173.)

52 (JA at 50 ¶ 32, 172, 189.)

53 (JA at 171–72.)

54 (JA at 124; *see also* JA at 143.)

55 (JA at 125.)

56 (JA at 144.)

Instead, the family convened in the parking lot of a nearby grocery store.[57] They then separated into groups, with Kristina eventually returning to her mother (*see infra*), and Kristal and her family visiting stores.[58] Jones testified that he had come to believe that Walter was suicidal, but that he felt the best course of action was to leave Walter alone, believing that he "would settle down."[59] Jones was unable to explain in his deposition why he felt that the passage of time would fix the problem if he truly believed that Walter was suicidal.[60]

At 2:39 p.m., Walter sent Kristina a text message saying that she could tell Victoria that Victoria could move back in tomorrow, and where to find an $82,000 check.[61] Kristina did not respond, nor—again—did she call the police or seek any other help.[62] Instead, she drove to Leesburg, Virginia, where Victoria had gone, and told her that "there was nothing else we could do. He had — he was going to do it, and there was nothing we could do."[63]

Kristina and Todd Jones eventually returned home around 7:30 p.m.—some six hours after having met at the grocery store.[64] Jones looked across the street at Walter's house and saw no lights or movement.[65] So around 8:00 or 8:30 p.m., by then six hours after receiving Walter's text message, the Hughes family decided to call the West Virginia State Police and ask for a welfare check on Walter.[66] Troopers Berry and French (non-parties) arrived and searched

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57 (JA at 145, 162.)

58 (JA at 51 ¶ 36, 145.)

59 (JA at 164.)

60 (JA at 166–67.)

61 (JA at 312–13.)

62 (JA at 313.)

63 (JA at 128–29.)

64 (JA at 145.)

65 (JA at 51 ¶¶ 37–38, 145.)

66 (JA at 51 ¶ 39, 128.)

the house for Walter, but did not locate him.[67] They did locate Walter's wallet, cell phone, and the $82,000 check referred to in his text message, and a typed suicide note.[68] Trooper Berry recommended that Kristal file a missing person report, which she did that night.[69]

Thereafter, both the family and the West Virginia State Police (first, Trooper Berry, and later Corporal Ryan D. Eshbaugh ("Corporal Eshbaugh") when the missing person case was assigned to him after Trooper Berry transferred on May 7, 2012[70]) took significant steps to locate Walter Hughes. The Hughes family conducted extensive searches of the area of Walter's house, including a nearby shale pit. The week after his disappearance, the Hugheses had one hundred people and two K9s conduct a foot search of the shale pit, but they found nothing. Gary Arntz, Kristina's husband, searched the shale pit and surrounding areas every day from April 14, 2012, until at least August 2012, from the time that he got off of work until dark, but found nothing. Corporal Eshbaugh also searched the area with a K9, to no avail.

B. Fall 2012.

On November 29, 2012, Berkeley County 911 transferred to the West Virginia State Police[71] a call from some people who had been trespassing in the shale pit near Walter and Victoria's house reporting that they had located a human skull.[72] Corporal Zachary L. Nine ("Corporal Nine") took the call and was the first to arrive.[73] The 20-plus-acre shale pit was abandoned and overgrown with unmaintained foliage, brush, and other vegetation.[74] Shortly

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67 (JA at 51 ¶¶ 40–41.)

68 (JA at 51 ¶ 43, 110, 148.)

69 (JA at 51 ¶ 44.)

70 (JA at 51 ¶¶ 45–46.)

71 (JA at 209.)

72 (JA at 197–98, 205.)

73 (JA at 205.)

74 (JA at 215.)

thereafter, Corporal Eshbaugh (still the investigating officer in Walter Hughes's missing person investigation) and Sergeant J.M. Walker ("Sergeant Walker") arrived.[75]

After the Troopers interviewed the 911 caller, Sergeant Walker drove his vehicle around in order to see how expansive the area to be searched was based on his experience and the information the callers had provided.[76] Corporal Nine and Corporal Eshbaugh then began the first of what would be three searches of the area that afternoon for additional remains.[77] As they encountered items, they marked around them with green paint.[78] By the end of the first search, they had discovered a jacket, pants, and belt, a pill box, and what appeared to be a human skull, rib bones, vertebrae, arm bones, leg bones, jaw bone, and other bones.[79] The items were spread over an area of about six thousand square feet.[80] Corporal Nine called Lieutenant Lambert, the crime scene team ("CST") supervisor, to activate the CST to respond to document and collect the items.[81] When Lambert approved Nine's request, Nine drove to the Martinsburg detachment to retrieve the CST's truck (which contained tools and supplies needed for the recovery and documentation of what they had located[82]). Trooper First Class Jeanette D. See (*nee* Schuessler) ("Trooper First Class See") was also called to respond as a member of the CST.[83]

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75 (JA at 197, 205.)

76 (JA at 206–07, 215 (describing process used to reach decision about areas to cover).)

77 (JA at 198, 206.)

78 (JA at 206.)

79 (JA at 206–07, 208–09, 210, 214–15, 371, 419–20.)

80 (JA at 214, 411.)

81 (JA at 207.)

82 (JA at 205, 207.)

83 (JA at 213.)

Corporal Eshbaugh and Corporal Nine advised Trooper First Class See of the situation.[84] The three then made a second pass through the area to photograph, document, and collect the items that had been found in the first search and to search for additional items. Corporal Nine took photographs; Corporal Eshbaugh documented what each photograph represented and where it was located (with GPS); and Trooper First Class See took measurements and made a schematic diagram indicating where each item had been found.[85]

After the Troopers completed their second sweep of the area, Trooper First Class See made a third and final search of the area where the items had been located in an effort to find anything left.[86] She located no further remains, but did find a pistol,[87] which she turned over to Corporal Eshbaugh, who logged it into evidence. They did not locate any more remains or other objects during their second or the third searches, but the Troopers had been searching for items the whole time they were there; it would just happen to turn out that they found everything they would find during their first pass of the difficult area.[88] The circuit court would use this fact to justify calling the Troopers' efforts a "failure to search."[89]

The Berkeley County medical examiner, Curtis Keller, was contacted, and all of the items (except for the gun) were turned over to him.[90] Corporal Nine, representing the CST, and Corporal Eshbaugh, as the missing person report investigating officer, met, discussed what had been located, the nature of the scene, and so on, and concluded that they had found and

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84 (JA at 403–04.)

85 (JA at 199–200, 205, 209, 364.)

86 (JA at 215, 412, 416.)

87 (JA at 215, 412, 198.)

88 (JA at 210.)

89 (*See* discussion *infra*.)

90 (JA at 209.)

recovered everything that they were going to under the circumstances.[91] Corporal Nine had to balance their desire to continue the search the following day (it was beginning to get dark) against the conditions at the site, the likelihood that there were additional remains to be discovered given the time and conditions since Mr. Hughes's suicide, and the police resources necessary to press the search into another day—resources that he would have had to take away from other law enforcement activities. Corporal Eshbaugh testified that the search was reasonable under the circumstances and that he would not have done anything any differently:

> Q Knowing all of what we have just gone through about the family finding bones on the 30th, on December 3rd, and the shell casing found later, do you believe the search that was conducted by the state police at the crime scene was adequate?
>
> A I believe it was at the time.
>
> Q Why do you believe that?
>
> A Because I take pride in my work. I genuinely wanted to help the family out. I didn't want to leave anything behind, you know, so we put effort into it, to finding everything we could.
>
> Q Knowing what you know now, is there anything today that you would do differently?
>
> A No, sir.

(JA at 202.) Trooper First Class See also testified that they had done the best job they could given that the remains were spread out over such a large, difficult area.[92] So around 5:00 p.m., the Troopers secured the scene and departed.[93]

The following day, members of the Hughes family decided to visit the site where, it by then appeared, Walter Hughes had at some point taken his life.[94] While they were there,

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91 (JA at 215, 411–12.)

92 (JA at 413.)

93 (JA at 200.)

they discovered a few additional bones, which upset several of the family members present.[95] The medical examiner was contacted, and he contacted Corporal Nine and requested that Corporal Nine collect the additional items.[96] Corporal Nine did so, and then, per the medical examiner's directions, transported the items to a local funeral home to join the remains located the previous day.[97] Before he left the shale pit, Corporal Nine conducted yet another search of the overall area, but did not located anything else.[98] On December 3, 2012, the Hugheses' other daughter, Kristin Hite, returned to the area and visited the site with the other Hughes family members.[99] While there, the family found one more piece of Mr. Hughes's remains (what appeared to be a leg bone), which again upset them.[100] Kristina's husband reported this, and a West Virginia State Police Trooper came and transported the bone to the funeral home.[101]

II. Procedural Background.

In August 2013, Victoria Hughes individually and in her capacity as Walter Hughes's personal representative, and three of the Hughes daughters—Kristal, Kristina, and Kristie—sued the West Virginia State Police, three West Virginia State Police Troopers (Corporal Flanigan, Trooper Ware, and Corporal Eshbaugh), the West Virginia Office of the Chief Medical Examiner, Division of the West Virginia Department of Health and Human Resources, and the Berkeley County medical examiner, Curtis Keller.

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94 (JA at 52 ¶ 55, 201.)

95 (JA at 52 ¶ 56.)

96 (JA at 201, 210.)

97 (JA at 52 ¶ 60, 210.)

98 (JA at 369.)

99 (JA at 52 ¶ 61.)

100 (JA at 52 ¶ 62.)

101 (JA at 52 ¶ 63, 383–84.)

Respondents amended their complaint twice, resulting in their Second Amended Complaint. Therein, Victoria Hughes set out a claim for Walter Hughes's wrongful death ("Count I"), alleging that the three Troopers who responded to the Hughes residence on April 13, 2012—Corporal Flanigan, Trooper Ware, and Trooper First Class Gillmore (collectively, the "April Troopers")[102]—"knew or should have known of the dangerous situation reported to them by Plaintiffs Kristal Hughes and Kristina Arntz and the potential for Walter Hughes to harm *himself or others*,"[103] "assumed an affirmative duty to exercise reasonable care to protect Walter Hughes from harming *himself or others*,"[104] and "breached their duty of care by failing to take Walter Hughes into custody for *his own protection and the protection of others*."[105]

Victoria Hughes also made a claim for "mishandling of bodily remains" ("Count II"), wherein she alleged that the West Virginia State Police (vicariously),[106] and Corporal Eshbaugh,[107] Corporal Nine,[108] Sergeant Walker,[109] and Trooper First Class See[110] (collectively, the "November Troopers") were liable for mishandling [*sic* not handling] the bodily remains of Walter Hughes in the fall of 2012 by conducting a less-than-perfect search and, in the process, locating fewer than every piece of Mr. Hughes's skeletonized remains. Recognizing that Victoria Hughes was the only proper plaintiff in Count II, and although not contained in any of

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102 Victoria named Trooper First Class See in Count I; she apparently meant to say Trooper First Class Gillmore, as it is undisputed that Trooper First Class See was not yet involved in the case. (JA at 213.)

103 (JA at 53 ¶ 71 (emphasis added).)

104 (JA at 53 ¶ 72 (emphasis added).)

105 (JA at 53 ¶ 73 (emphasis added).) Petitioners explain the significance of the highlighting *infra*.

106 (JA at 54 ¶ 76.)

107 (JA at 54 ¶ 78.)

108 (JA at 54 ¶ 80.)

109 (JA at 54 ¶ 80.)

110 (JA at 54 ¶ 80.)

the complaints, the circuit court allowed the three daughters to state—after the close of discovery, with no notice to Petitioners—a claim for negligent infliction of emotional distress based on the same allegations in Count II.[111]

The West Virginia State Police, Corporal Flanigan, Corporal Eshbaugh, Trooper Ware, Corporal Nine, Sergeant Walker, Trooper First Class See, and Trooper First Class Gillmore all timely moved for summary judgment.[112] In Count I, as described, Victoria initially blamed the April Troopers for failing to take Walter into protective custody against his will because, she alleged, he was a danger *to himself* and was going to commit suicide. Because discovery had made it clear that under the circumstances, the April Troopers owed Walter no clearly established duty to take him into protective custody against his will, Victoria agreed to dismiss the April Troopers and no longer presses that theory.[113]

Instead, the circuit court erroneously accepted the alternate theory that the West Virginia State Police owed *Walter Hughes* a duty to arrest him *for threatening Kristina*, because if only they had arrested him for threatening Kristina, then perhaps he might not have committed suicide: "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."[114] Thus, the theory goes, Barbara Boward caused Walter Hughes's death when she did not inform the dispatcher to tell the April Troopers that Walter had threatened Kristina: "The alleged negligent act in this circumstances was the failure of Barbara

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111 (JA at 792–93 (Circuit Court Order (July 15, 2013) ("Order").)

112 (JA at 71–92.)

113 (JA at 790–91.) Victoria also agreed to dismiss (and the circuit court did dismiss) Sergeant Walker, whose sole connection to this case is that he was on the scene with the November Troopers for a few moments before being called away to an unrelated matter. (*Id.*)

114 (JA at 793 (emphasis added).)

Boward to foward this information to the police officers via the dispatcher."[115] Because Ms. Boward had a non-discretionary duty to tell the dispatchers that Walter had threatened Kristina, the circuit court held without explanation, the West Virginia State Police is not entitled to qualified immunity (and, thus, summary judgment) on Count I.[116]

In Count II, the circuit court held that because the November Troopers did not conduct a perfect search and find every piece of Walter Hughes's skeletonized remains at the scene, they—and, vicariously, the State Police[117]—had negligently mishandled Walter's body: "Viewing the facts in the light most favorable to the Plaintiffs . . . , 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."[118] The circuit court thus artificially divided Mr. Hughes's remains into the ones that that the Troopers *did* find as a result of their search efforts, and the ones that they did not find during their searching. Based on that artificial division, the circuit court concluded that the November Troopers' failure to *find* the other remains constituted a "*failure to search*" for them.[119] Based on this *non sequitur*, the circuit court held (again without citing a statute or case) that "while the method of conducting a search may involve discretionary decision making, *the failure to search* does not" and denied Petitioners' motion for qualified immunity summary judgment.[120]

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115 (JA at 793.)

116 (JA at 793.)

117 (JA at 794.)

118 (JA at 791–92 (emphasis added).)

119 (JA at 794 (emphasis added).)

120 (JA at 794 (emphasis added).)

SUMMARY OF ARGUMENT

The circuit court erred by refusing to afford Petitioners' qualified immunity. In Count I, there is no constitutional provision, statute, case, or other law requiring that Ms. Boward provide any particular information to the dispatcher, or declaring that the West Virginia State Police had a non-discretionary duty to arrest Walter Hughes for threatening Kristina. Walter Hughes also did not have a clearly established right to be arrested for threatening Kristina—to prevent his suicide or otherwise. No person has a clearly established right to be arrested, for anything, including for committing a crime against a third party, regardless of whether such arrest might fortuitously have prevented his subsequent suicide. Furthermore, Walter Hughes had no clearly established right to be arrested, because if any such right exists, it runs only to the public at large and not to him, and Victoria Hughes failed to show that the West Virginia State Police had a special relationship with *Walter Hughes*.

In Count II and the daughters' negligent infliction of emotional distress claim, the West Virginia State Police does not have a non-discretionary duty to look for or find every piece of the skeletonized remains of a person's family member who committed suicide. Moreover, no person has a clearly established right to have the police search for, much less find every part of the remains of a family member who committed suicide months earlier, whether that claim is styled as a "mishandling of bodily remains" or a negligent infliction of emotional distress.

Petitioners timely appealed.[121] The Court's review of the circuit court's denial of Petitioners' motion for summary judgment is *de novo*.[122]

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[121] (*See* Notice of Appeal.) *See also Fucillo v. Kerner ex rel. J.B.*, 231 W. Va. 195, 197–98, 744 S.E.2d 305, 307–08 (2013) ("Because the order at issue in this case is an interlocutory order predicated in part on qualified immunity, we find that the order is subject to immediate appeal under [*Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009)] and [*Jarvis v. W. Va. State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010)].").

[122] Syl. pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case represents issues of fundamental public importance (the immunity of an agency of the State of West Virginia and its officers), Petitioners request W. VA. R. APP. P. 20 oral arguments.

ARGUMENT

I. The circuit court erred by denying qualified immunity to Petitioners on Victoria Hughes's claim for wrongful death (Count I).

A. Qualified immunity generally.

"[Q]ualified immunity is not a 'one-size-fits-all' proposition."[123] Immunities must therefore "be assessed on a case-by-case basis in light of the governmental entities and/or officials named and the nature of the actions and allegations giving rise to the claim."[124]

For the purposes of analyzing qualified immunity, it is helpful to divide the universe of government conduct into three tiers. The first tier consists of legislative, judicial, and executive policy-making acts (not at issue here). The State and its agencies its officials are absolutely immune from civil actions arising from Tier-1 conduct.[125] The third, narrow tier consists of "ministerial" acts: clearly, precisely defined acts that the Legislature has mandated in response to certain specific circumstances. The State and its agencies and officials are not entitled to qualified immunity for civil actions arising from Tier-3 conduct.[126]

In between lies everything else, the lion's share of executive conduct: Tier-2 or "discretionary" acts, for which State actors are entitled to qualified immunity:

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[123] *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 571 n.17, 746 S.E.2d 554, 562 n.17 (2013) (footnote omitted).

[124] 231 W. Va. at 571, 746 S.E.2d at 562 (citation omitted).

[125] Syl. pt. 10, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).

[126] *See A.B.*, 234 W. Va. at 506, 766 S.E.2d at 765.

> A [State] public executive official who is acting within the scope of his authority . . . is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.

Syl., in part, *State v. Chase Securities, Inc.,* 188 W. Va. 356, 424 S.E.2d 591 (1992).[127] Unless an officer's conduct falls into the third tier, his mere negligence is not actionable:

> If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Syl. pt. 4, *Clark v. Dunn,* 195 W. Va. 272, 465 S.E.2d 374 (1995). As the Court has recognized (in the materially identical context of a constitutional claim), even if an officer violates a right, qualified immunity is required if "the submissions of the parties could establish the officer's conduct violated a . . . right but further finds that it would be clear to any reasonable officer that such conduct was lawful in the situation confronted."[128]

Analysis of whether the State and its agencies and officials[129] are entitled to qualified immunity thus necessarily requires first ascertaining into which tier the conduct in

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[127] *Accord* syl. pt. 11, *A.B.* Respondents never pursued any theory that Petitioners' conduct was ever "fraudulent, malicious, or oppressive."

[128] Syl. pt. 6, *City of Saint Albans v. Botkins*, 228 W. Va. 393, 719 S.E.2d 863 (2011).

[129] The parties do not dispute that all of the Troopers were acting within the scope of their employment for the West Virginia State Police, so syl. pt. 12, *A.B.*, is inapposite. Nor have Respondents suggested that there is any reason in this case to believe that the State of West Virginia's immunity should be any less than that owed to individuals. Accordingly, the State (*qua* the West Virginia State Police) is entitled to the same qualified immunity. *See Jarvis*, 227 W. Va. at 481, 711 S.E.2d a 551 (observing that "it is not disputed that the West Virginia State Police is a State Agency"); syl. pt. 9, *Parkulo v. W. Va. Bd. of Probation & Parole,* 199 W. Va. 161, 483 S.E.2d 507 (1996)); syl. pt. 6, *Clark.*

question falls,[130] a question of law where (as here) no material facts are disputed,[131] and then whether the conduct violated a clearly established right.

B. The West Virginia State Police did not have a non-discretionary duty to Walter Hughes to arrest him for threatening Kristina (and Barbara Boward did not have a non-discretionary duty to Walter Hughes to tell the dispatcher that he had threatened Kristina).

The circuit court held that a jury might believe the following: that Kristina reported to Barbara Boward both that Walter Hughes had threatened to commit suicide and that he had threatened Kristina; that Ms. Boward had a non-discretionary duty to give both reports to the dispatchers to give to the April Troopers but relayed only Walter's threat to commit suicide; that had the April Troopers known that Walter had threatened Kristina they would have arrested him for *that crime*; that his subsequent incarceration for *that crime* would have *prevented his suicide*; and thus that Ms. Boward wrongfully caused Walter Hughes's death.[132]

In addition to the obvious substantive foreseeability and proximate cause problems with this theory, the circuit court's initial finding that Ms. Boward had a non-discretionary duty to give to the April Troopers (via the dispatcher) Kristina's report that Walter Hughes threatened her, and its consequent denial of qualified immunity, was erroneous. The court simply found, without explanation, that "this alleged negligent act was a non-discretionary, ministerial act to which qualified immunity would not apply."[133]

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130 Syl. pt. 10, in pertinent part, *A.B.*

131 *See* syl. pt. 1, *Hutchison v. City of Huntington,* 198 W. Va. 139, 479 S.E.2d 649 (1996) ("The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.").

132 (JA at 793.)

133 (JA at 793.)

The "definition of a discretionary function is broad."[134] The definition of a non-discretionary (or "ministerial") function is thus narrow: A "law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused."[135] A duty is ministerial only "if it is 'absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts,' that is, 'the duty must dictate the scope of the employee's conduct.' "[136] It is up to the Legislature to clearly define ministerial duties.[137]

The only remotely relevant testimony was this brief exchange with Ms. Boward:

> Q Is it part of your normal job duties to take a complaint and then relay the information to a dispatcher? Is that —
>
> A It is, because I do not have the capability of entering information into their computer-aided dispatch.

(JA at 327.) "Normal job duties" is a far cry from evidence that the law imposed on Ms. Boward (or the West Virginia State Police) a precise, absolute, certain, or imperative duty, owed to Walter Hughes, where fixed, designated facts dictated the scope of her conduct, requiring only her obedience, to tell the dispatcher to tell the Troopers that Walter Hughes had threatened

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134 *Eddy v. Virgin Islands Water and Power Auth.*, 256 F.3d 204, 210-11 (3d Cir. 2001).

135 *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984).

136 *Schroeder v. St. Louis County*, 708 N.W.2d 497, 506 (Minn. 2006) (citations omitted); *see also M.W. ex rel. T.W. v. Madison County Bd. of Educ.*, 262 F. Supp. 2d 737, 746 (E.D. Ky. 2003) (observing that ministerial acts are limited to those "requiring 'obedience to the orders of others' ") (citations omitted).

137 *Compare Payne*, 231 W. Va. at 574–75, 746 S.E.2d at 565–66 (observing that "qualified immunity insulates the State and its agencies from liability based on vague or principled notions of government regulation" and that "[r]equirements for [greater executive care] may be wise; however, ***it is for the Legislature to impose such requirements***" and ultimately finding "that the circuit court erred in refusing to grant summary judgment to the DHHR defendants on the basis of qualified immunity") (emphasis added), *with Clark v. Kelly*, 101 W. Va. 650, 133 S.E. 365, 369 (1926) (calling ministerial jailer's statutory duties to "keep the jail clean and well ventilated, and in good sanitary condition at all times, and free from bugs and vermin," "to furnish every prisoner with a bed and bedding cleanly and sufficient," *etc.*).

Kristina. What Ms. Boward "normally" did is not the same as what the law *required* her to do, and Victoria Hughes put on no evidence that anything required Ms. Boward to pass along Kristina's supposed complaint that Walter Hughes had threatened her.[138]

If a government agency does not have a non-discretionary duty to do something, then no employee of that agency can possibly have a non-discretionary duty in her capacity as such to perform any step in the series of steps necessary to accomplish that thing. It is well-settled that the provision of police services is a discretionary act.[139] It is thus without question that the State Police did not have a non-discretionary duty to provide *any* particular response to Kristina's reports, so it is impossible for Ms. Boward to have had a non-discretionary duty requiring her to perform one step in the series of steps necessary to accomplishing the performance of the West Virginia State Police's entirely discretionary response.

Finally, for the same reasons discussed in the following section, the circuit court erred by finding that the West Virginia State Police had a non-discretionary duty *to Walter Hughes* to arrest him for threatening Kristina because even if Ms. Boward or the West Virginia State Police had such a non-discretionary duty, it did not owe that duty *to the person who was ultimately injured*: Walter Hughes. If that duty was owed to anyone, it was to Kristina.

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138 *See, e.g.*, *Doucette v. City of Lewiston*, 697 A.2d 1292, 1294 (Maine 1997) (finding dispatcher's functions "fall within the discretionary function immunity provisions of [Maine's governmental immunity law]"); *cf. Muthukumarana v. Montgomery County*, 805 A.2d 372, 399 (Md. 2002) (citing *Wolfe* and holding that because both call-takers and dispatchers are part of the chain of the provision of emergency services to the public, no reason to distinguish either from a police officer).

139 *See, e.g.*, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 761 (2005) (recognizing "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands," to arrest or not arrest, and holding that even state "shall arrest" statutes do not create a non-discretionary duty); *Chicago v. Morales*, 527 U.S. 41, 62 (1999) (it is simply "common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances").

C. Walter Hughes did not have a clearly established right to be arrested for threatening Kristina—the only "right" that Victoria Hughes alleges (and the circuit court held) Petitioners breached.

Walter Hughes did not have a clearly established right to be arrested for threatening Kristina. It is critical to keep in mind that in Count I, Victoria Hughes is the sole proper plaintiff *only* in her capacity as Walter Hughes's personal representative.[140] She thus cannot properly allege in Count I that any right of her own, her daughters, or any other person was violated. Instead, she must prove, *inter alia*, that the West Virginia State Police breached a duty ***owed to Walter Hughes***. The circuit court, however, plainly allowed Victoria to paste together parts of two purported duties, allegedly owed to two different people, and find that the breach of one caused the harm that allegedly might have resulted from the breach of the other.

1. The West Virginia State Police did not breach any clearly established duty to arrest Walter Hughes for threatening Kristina, because they did not owe him any such duty.

The circuit court erroneously held that Barbara Boward owed a duty to pass to the April Troopers (via the dispatcher) both Kristina's report that Walter Hughes had threatened suicide and her report that Walter Hughes had threatened her (*i.e.*, Kristina). Thus, Victoria Hughes's theory goes, if Ms. Boward had done so, even though the April Troopers correctly concluded that they could not force Walter into custody *for threatening suicide*, they could have arrested him *for threatening Kristina*, and then maybe he would not have committed suicide.

Missing entirely from this theory and from the circuit court's order is analysis of "***to whom***" any such duty was owed. To be actionable, a duty must be owed to a particular person, and its breach can be the basis of a cause of action only by that particular person:

> [I]n order to form the basis for a valid cause of action, this duty [to conduct one's self so as not to injure others] must be brought home to the particular plaintiff, for "a duty owing to everybody can never

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140 *See* W. VA. CODE § 55-7-6.

> become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance . . . ."

Robertson v. LeMaster, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983).

In some *other* hypothetical jurisdiction, under some *other* hypothetical set of facts, it is conceivable that (1) if someone reports to an employee of a police department that X is suicidal, (2) that employee passes that information along to officers from that department, and (3) those officers respond and determine that X is indeed suicidal, then (4) those officers and their department might have a duty to force X into custody against his will, such that (5) if X subsequently harms himself, those officers and their department might be liable to X.[141]

Similarly, in another hypothetical jurisdiction under other hypothetical facts, it is conceivable that (1) if someone reports to an employee of a police department that X has threatened Y, (2) that employee passes the information along to officers from that department, and (3) those officers respond and determine that X did indeed threaten Y, then (4) those officers and their department might have a duty ***to Y*** to arrest X for threatening Y, such that (5) if X subsequently ***harms Y***, then those officers and their department might be liable ***to Y***.[142]

Here, it is undisputed that Walter Hughes did not harm Kristina and that Kristina is not a plaintiff in Count I. So even if the West Virginia State Police owed *her* a duty to arrest

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[141] West Virginia is, of course, not such a jurisdiction. *See, e.g.*, syl. pt. 6, *Moats v. Preston County Comm'n*, 206 W. Va. 8, 10, 521 S.E.2d 180, 182 (1999) ("Recovery for wrongful death by suicide may be possible where the defendant had a duty to prevent the suicide from occurring. In order to recover, the plaintiff must show the existence of some relationship between the defendant(s) and the decedent giving rise to a duty to prevent the decedent from committing suicide. Generally, such relationship exists if one of the parties, *knowing the other is suicidal*, is placed *in the superior position of caretaker of the other who depends upon that caretaker either entirely or with respect to a particular matter*.") (emphasis added). Nor do the facts of this case match the facts of the hypothetical. In any event, Victoria Hughes correctly no longer presses the theory that any of the April Troopers had a clearly established duty to Walter Hughes to reject his persuasive and convincing assurances and take him into custody against his will based solely on the report that he had threatened suicide.

[142] Again, however, West Virginia is not such a jurisdiction. As demonstrated herein, there is no clearly-established right to *any* degree of service from police officers, firefighters, *etc.*

Walter for threatening *her*, any "breach" of that "duty" cannot form any basis whatsoever to deny qualified immunity to the West Virginia State Police on *Walter Hughes's* claim (via Victoria, his representative) for *his* wrongful death, because *any such hypothetical duty to arrest Walter Hughes for threatening Kristina was not a duty owed to Walter Hughes*. Victoria Hughes failed to identify any clearly established right that the West Virginia State Police owed *to Walter Hughes*, the breach of which proximately caused his death.

2. The West Virginia State Police did not breach any clearly established duty to Walter Hughes because any such duty was, if anything, only a public duty.

Even if the West Virginia State Police could ever have had a duty to arrest Walter Hughes for threatening Kristina, any such duty would not run to Walter (or to Kristina), but to the public as a whole, and would thus not be actionable by Walter (or by Kristina):

> The primary element of negligence is a breach of a *duty*. In the context of an alleged failure of a local governmental entity to provide any, or sufficient, . . . police protection to a particular individual, the local governmental entity's duty is defined at common law by the public duty doctrine.
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> * * * *
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> As a specific example of the public duty doctrine, the duty . . . to provide police protection runs ordinarily to all citizens and is to protect the safety and well-being of the public at large; therefore, absent a special duty to the plaintiff(s), no liability attaches to a . . . police department's failure to provide adequate . . . police protection. . . .

Randall v. Fairmont City Police Dep't, 186 W. Va. 336, 346–47, 412 S.E.2d 737, 747–48 (1991).[143] "The public duty doctrine, simply stated, is that a governmental entity is not liable because of its failure to enforce regulatory or penal statutes."[144] The only exception to the public

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[143] *See also Holsten v. Massey*, 200 W. Va. 775, 780–82, 490 S.E.2d 864, 869–71 (1997); *cf.* syl. pt. 10, *Parkulo*.

[144] Syl. pt. 1, *Benson v. Kutsch*, 181 W. Va. 1, 380 S.E.2d 36 (1989).

duty doctrine is where a "special relationship" exists between the defendant police department and the person to whom the duty was allegedly owed:

> In this situation, then, it is critical for a plaintiff to establish a special duty owed to him or her by the local governmental entity: "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."

Randall, 186 W. Va. at 347, 412 S.E.2d at 748 (citations omitted); *accord* syl. pt. 1, *Wolfe v. City of Wheeling,* 182 W. Va. 253, 387 S.E.2d 307 (1989). A plaintiff seeking to establish a private right to any certain level of police service must prove four elements:

> 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.

Syl. pt. 2, *Wolfe* (emphasis added).[145]

The Court recognized in *Wolfe* that the point of the special relationship exception is to prevent "the unfairness that the courts have perceived in precluding recovery when [the government's] voluntary undertaking has *lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forego other available avenues of protection*."[146] " On the other hand," however, when—as here—"the reliance

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[145] As the emphasized phrases make clear, in Count I, any evidence proffered to show a special relationship between the West Virginia State Police and anyone other than Walter Hughes is irrelevant to the analysis of whether Walter Hughes had a special relationship with the West Virginia State Police. *See* syl. pt. 2, *Wolfe*; *accord Walker v. Meadows*, 206 W. Va. 78, 83–84, 521 S.E.2d 801, 806–07 (1999).

[146] *Wolfe*, 182 W. Va. at 257, 387 S.E.2d at 311 (indentation and citation omitted).

element is either not present at all or, if present, is not causally related to the ultimate harm, this underlying concern is inapplicable, and the invocation of the 'special duty' exception is then no longer justified."[147]

Thus, in Count I, even if there were any such thing as the right to be arrested for threatening a third party—as a pretext to preventing the arrestee's own suicide or otherwise—in order to establish that such right was clearly established with regard to Walter Hughes, Victoria Hughes was required to identify evidence that the West Virginia State Police had assumed, through promises or actions, an affirmative duty to act on behalf of *Walter Hughes*, knowledge on the West Virginia State Police's part that its inaction could lead to *Walter Hughes's suicide*, some form of direct contact between the West Virginia State Police and *Walter Hughes*, and *Walter Hughes*'s justifiable reliance on the West Virginia State Police's "undertaking."

Because the circuit court's analysis was very terse (just parroting the elements of the exception without discussion or explanation[148]), it is difficult to know what facts, exactly, the circuit court believed supported which elements of the special relationship exception.[149] Nevertheless, Victoria Hughes's theory is ultimately inherently self-defeating. She strenuously asserts that the April Troopers (and, vicariously, the West Virginia State Police) failed to respond to Kristina's report that Walter Hughes threatened Kristina because *they never knew about it*. This assertion eviscerates element (1)—her allegation that the April Troopers assumed, through

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147 *Id.* (indentation and citation omitted).

148 (*See* JA at 791.)

149 *But see* syl. pt. 4, *Payne* ("A circuit court's order denying summary judgment on qualified immunity grounds on the basis of disputed issues of material fact must contain sufficient detail to permit meaningful appellate review. In particular, the court must identify those material facts which are disputed by competent evidence and must provide a description of the competing evidence or inferences therefrom giving rise to the dispute which preclude summary disposition.").

promises or actions, to arrest Walter for threatening Kristina: How can an officer possibly assume a duty to act on something that he *does not even know about*?

Likewise, it also precludes element (3)—direct contact. It is undisputed that the only contact that Walter had with the West Virginia State Police was when the April Troopers talked to him about the report that he was suicidal. But Victoria Hughes no longer pursues the theory that Walter had a clearly established right to be forced into protective custody arising from that report. Instead, she argues that Walter had the right to be arrested for *threatening Kristina*. But the very thrust of her argument is that *the April Troopers did not have any contact with Walter about that*. The "direct contact" requirement is personal: the injured person must have had direct contact with the government related to the duty allegedly breached.[150] Again, the circuit court erroneously allowed Victoria to stitch together parts of two theories together in an attempt to create one living, clearly established right.

And finally, it is undeniable that as for element (4)—justifiable reliance—Walter did not rely on whatever the April Troopers said to him about his threatening Kristina, because Victoria Hughes herself insists that that conversation *never happened*. In any event, Victoria Hughes failed to identify any evidence of how Walter Hughes relied on anything the April Troopers said to him, much less how any such reliance might have been justifiable. Instead, the sole evidence is that Walter did everything he possibly could to disabuse the April Troopers that he was in any sense being "lulled into a false sense of security" or that he they "induced Walter to relax his own vigilance or forego other available avenues of protection," because it was Walter Hughes himself that did all of the lulling and inducing on April 13, 2012.

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[150] *See, e.g.*, *Barbina v. Curry*, 221 W. Va. 41, 49, 650 S.E.2d 140, 148 (2007) (carving an "exception" out of the direct contact requirement in child abuse cases).

Petitioners respectfully submit that the Court should reject the circuit court's acceptance of Victoria Hughes's theory and hold that Walter Hughes did not have a clearly established right to be arrested for threatening Kristina—in order to prevent his suicide or otherwise—because even if a corresponding "duty" existed, it was a public, not private, one.

D. Summary.

Just as "[t]here is no constitutional right to be arrested,"[151] there is likewise no common-law right to be arrested—regardless of whether it arguably might have prevented one's later suicide or not.[152] Allowing Victoria Hughes's claim would place the West Virginia State Police—and all police departments—in the impossible position of having to decide between pretextually arresting someone for a crime hoping that maybe that will prevent his suicide, and risk getting sued for doing so,[153] and not arresting him and risk getting sued for not doing so. That is *precisely* the Hobson's choice that qualified immunity is meant to eliminate. The West Virginia State Police did not have a non-discretionary duty to Walter Hughes to respond to Kristina's claim that he threatened her. Furthermore, Walter Hughes lacked a clearly established right to have the West Virginia State Police arrest him for threatening Kristina.

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151 *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

152 *Cf. State v. Steadman*, 827 So. 2d 1022 (Fla. Dist. Ct. App. 2002) (noting that "a defendant does not have a right to be arrested in order to be prevented from committing further crimes").

153 *See, e.g.*, *Bailey v. Kennedy*, 349 F.3d 731 (4th Cir. 2003) (holding officers *liable* for taking Bailey into custody after receiving a report that the he "was at home, intoxicated, and suicidal" and where he was intoxicated but "denied any thoughts of suicide," finding that the officers lacked "probable cause to seize [him] for an emergency mental evaluation" generally authorized by state law, noting that "[t]he law does not permit . . . baseless detention of citizens for psychological evaluations").

II. The circuit court erred by denying qualified immunity to Petitioners on Victoria Hughes' claim of "mishandling of bodily remains" (Count II) and the Hughes daughters' unmade claim for negligent infliction of emotional distress claim.

A. The circuit court erred in finding that Petitioners had a non-discretionary duty to Respondents to perform a better (or any) search for Walter Hughes's remains.

The circuit court set out what it believed the "two possible versions of what occurred during the crime investigation scene" on November 29, 2012: (1) that Petitioners "diligently searched for the bodily remains of Walter Hughes and properly exercised their discretion to conclude there was no point in continuing the search,"[154] (2) or that Petitioners "marked, photographed and collected what was readily visible upon arrival at the scene without conducting any *subsequent* search . . . ."[155] The circuit court then equated not "conducting any *subsequent* search"—*i.e.*, not conducting another search after the first one that had located all of Mr. Hughes's remains that Petitioners would recover that day—with a "failure to search."[156] Because, the circuit court held, a jury might believe the latter proposition—*i.e.*, that the November Troopers had "failed to search" for the remains that they did not find—and because the West Virginia State Police had a non-discretionary duty to conduct a search, Petitioners were not entitled to qualified immunity. That holding is clearly erroneous.

First, such an artificial division is a naked attempt to evade qualified immunity. The act of searching for an unknown number of the skeletonized remains of someone who killed himself in an overgrown shale pit likely more than seven months earlier, and, in the process, finding fewer than all of those remains is not two distinct acts—a search for the ones that were

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154 (JA at 794.)

155 (JA at 794 (emphasis added); *see also* JA at 252 (Respondents' Resp., alleging that the November Troopers marked the remains that they found during their first search and "***thereafter*** did no search to locate any ***remaining*** bodily remains") (emphasis added).)

156 (JA at 794.)

found and a "failure to search" for the ones that were not—but rather one act—a less-than-perfect search. Accepting Respondents' theory would turn every partially successful effort into two: a completely successful one, and a completely unsuccessful one. And it is undisputed that the November Troopers *did search* for Mr. Hughes's remains, and that as a result they *did locate* some, if not all, of them. Respondents' complaint is not that Petitioners "failed to search" for Walter Hughes's remains, but that they simply did not search as hard or for as long as Respondents might have wished.

The circuit court recognized (and Respondents begrudgingly acknowledged) that the method of conducting a search is discretionary decision-making.[157] The sole evidence is that the area where Mr. Hughes's remains were located was a twenty-plus-acre abandoned shale pit that had grown over with brush and was open to the elements and any person or animal that wandered through. The immediate area was large, covering thousands of square feet. The remains had been exposed to the elements for nearly seven months. While Petitioners are reluctant to provide too graphic or disrespectful a description of the effects that such exposure to weather and fauna surely had had, it is clear that the November Troopers had no way of knowing whether there even *were* any more skeletal remains to find. Even after the subsequent discovery of additional remains, a significant amount of Walter Hughes's skeleton is unaccounted for.

It is undisputed that the Troopers did search for, find, and recover some of those remains. They met with the witnesses and located the skull, circumnavigated the area and, applying their expertise to the circumstances before them, identified a practical search area. They searched that area and located some human remains and other items. They marked those objects, then went back and photographed them, logged their location, and drew a schematic diagram of the area and the location of the items, all the while continuing to search for more

[157] (JA at 794.)

items. They transferred custody of the items to the medical examiner. Darkness began to fall. At no point did the only person with any expertise in knowing what bones had not been found—the medical examiner—ever say, "You're missing something; keep looking." So they met, balanced the likelihood of finding any more remains against the resources needed to secure the area overnight and resume the search the next day, and, in another textbook exercise of executive discretion, decided that those resources would be better applied to other demands.[158]

Second, neither Respondents nor the circuit court identified the supposed source of a non-discretionary duty of the West Virginia State Police to conduct *any search whatsoever* for Mr. Hughes's remains. Respondents asserted—without citation—that "standard police practices" gave Petitioners a non-discretionary duty to "collect all the evidence."[159] The circuit court's opinion failed to identify the basis for its holding why Petitioners had a non-discretionary duty to search for Walter Hughes's remains. The reason is clear: Petitioners did not have a non-discretionary duty to search for Mr. Hughes's remains—flawlessly or at all. The circuit court erred by concluding that the West Virginia State Police owed a non-discretionary duty to Respondents to conduct any—or a better—search.

B. There is no such tort as negligently *not* handling remains.

Victoria Hughes claims that Petitioners' failure to find (or, as the circuit court put it, "failure to search" for) those parts of Walter Hughes's skeletonized remains that the family would come to find later in the week constituted the West Virginia state-law tort of "mishandling

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[158] *See, e.g.*, *Gooden v. Howard County, Md.*, 954 F.2d 960, 964 (4th Cir. 1992) ("The basic principles of qualified immunity are well known and we see no reason to belabor them here. A test of the objective reasonableness of official action has been formulated with the express purpose of according police officers latitude in exercising what are inescapably discretionary functions replete with close judgment calls.").

[159] (JA at 246–47.)

of bodily remains." Under the undisputed circumstances, West Virginia law does not recognize a clearly established right to what Victoria Hughes alleges.

This Court has recognized "[a] cause of action . . . for negligently or intentionally ***mis***handling ***or losing*** a dead body, even when its disinterment and reinterment are authorized."[160] The Court based this cause of action on the "quasi-property rights of the survivors," which are: "to receive [the body] in the condition in which it was left, without mutilation; to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the body without interference."[161] As the circuit court recognized by precluding anyone but Victoria Hughes from being a plaintiff in Count II, "the cause of action ordinarily belongs to the party with the right to possession of the body."[162]

Victoria Hughes does not assert that Petitioners mishandled the remains that they *did* find, but instead that they *did not handle* the remains that they *did not* find. West Virginia law does not recognize a right to force the police to handle bodily remains. As *Whitehair* makes clear, the question is whether the defendant's conduct interfered with the plaintiff's quasi-property right to control disposition of the deceased's remains. In each of the negligent *mis*handling cases—as the name of the tort and Victoria Hughes's own claim make clear—the remains in question were *mis*handled: that is, they were or had been within the defendant's control, and then he did something to *interfere* with the survivor's quasi-property rights.[163]

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[160] Syl. pt. 2, *Whitehair v. Highland Memory Gardens, Inc.*, 174 W. Va. 458, 327 S.E.2d 438 (1985) (emphasis added).

[161] 174 W. Va. at 461, 327 S.E.2d at 441.

[162] 174 W. Va. at 463, 327 S.E.2d at 443. *See also* 25A C.J.S. DEAD BODIES § 41 ("A cause of action for interference with, or mishandling of, a corpse generally requires a showing of an *interference with the right of the next of kin to dispose of the body.*") (emphasis added)

[163] *See, e.g., Hairston v. Gen. Pipeline Const., Inc.*, 226 W. Va. 663, 704 S.E.2d 663 (2010) (defendant dragged a bulldozer through grave sites); *Brown v. Matthews Mortuary, Inc.*, 801 P.2d 37 (Idaho 1990) (citing *Whitehair* in case where crematory lost love one's remains that it once had possession of); *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989) (defendant's mining

But someone who *never even knows where some of a person's skeletonized remains are* cannot possibly "interfere" in any way with these quasi-property rights. And Victoria Hughes ardently alleges—in fact, it is the core of her claim—that Petitioners *never knew* the location of the remains that the Hughes family found. There is no evidence that Petitioners ever did anything to *prevent* Victoria from receiving Walter Hughes's remains in the condition they were when he died or before they were discovered months later. Indeed, it is Respondents' argument that Petitioners never "treated" the remains *in any way at all*, so *a fortiori* they could not possibly have *mis*treated those remains.

C. There is no clearly established claim for negligent infliction of emotional distress based on the police not finding every part of a family member's skeletonized remains.

Negligence absent physical harm is a slippery beast that the Court has made great strides to keep on a strong chain. The Restatements and the majority of jurisdictions[164] (and, historically, West Virginia[165]) deny recovery altogether.[166] In *Harless v. First Nat'l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982), the Court observed that "the right to recover emotional distress in the absence of some physical injury or a subsequently developed physical injury" was still "ordinarily predicated on some *intentional* wrong of the defendant."[167] As late as *Belcher v.*

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operations underneath a "family cemetery" caused subsidence and the disturbance of the graves of the plaintiff's relatives); *Whitehair* (defendant lost disinterred bodies).

[164] *See, e.g.*, *Muchow v. Lindblad*, 435 N.W.2d 918, 923 (N.D. 1989) (affirming grant of qualified immunity summary judgment in a case where the plaintiffs accused the police of not conducting a thorough enough investigation into their family member's death, which the police ruled suicide but which was actually a homicide).

[165] *See Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475 (1945), *overruled by Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992).

[166] *See* RESTATEMENT (SECOND) OF TORTS § 436A (1965) ("If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.").

[167] 169 W. Va. at 689, 289 S.E.2d at 701 (emphasis added).

Goins, 184 W. Va. 395, 400 S.E.2d 830 (1990), the Court in *dicta* described a cause of action for negligent infliction of emotional distress arising only from a "plaintiff who witness[es] a physical injury to a closely related person [and] suffer[s] mental anguish *that manifests itself as a physical injury* and *the plaintiff [was] within the zone of danger so as to be subject to an unreasonable risk of bodily harm created by the defendant.*"[168] And in *Heldreth*, the Court allowed such a claim.[169]

Since then, the Court has continued to hold that allowing an open-ended claim for negligence causing only psychic harm creates too great a risk of permitting frivolous claims and, as a consequence, has not recognized a blanket tort of negligent infliction of emotional distress. Instead, the Court has allowed such a claim only in very limited circumstances, each with their own specific elements, imposed to minimize the risk of a frivolous claim.[170]

The Hughes daughters do not allege that they witnessed their father suffer a physical injury, nor (as explained *supra*) do they truly allege that the November Troopers ***mis**handled* Mr. Hughes's remains. It is undisputed that Petitioners respectfully handled the remains that they did handle; Respondents instead assert only that the November Troopers *failed to handle* the remains that they did *not find* on November 29, 2012. But one cannot ***mis**handle* something one has *never handled*. Such an allegation does not fall under *Ricottilli*. The Hughes daughters did not have a clearly established right to have the West Virginia State Police find and

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168 184 W. Va. at 408, 400 S.E.2d at 843 (emphasis added).

169 *See* syl. pt. 1, *Heldreth*.

170 *See* syl. pt. 12, *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996) (allowing recovery where defendant negligently exposed plaintiff to a disease, thereby causing the plaintiff to experience emotional distress based on "fear of contracting [that] disease"); *Ricottilli v. Summersville Mem. Hosp.*, 188 W. Va. 674, 425 S.E.2d 629 (1992) (allowing recovery for negligent infliction of emotional distress for negligent *mishandling* of a relative's corpse).

handle Mr. Hughes's remains, the only thing that they allege the November Troopers failed to do. Nor have they offered any reason in this case to extend *Ricottilli* to cover these facts.

D. Summary.

Respondents would hold the November Troopers (and, vicariously, the State Police) liable for "failing to search" for every piece of Mr. Hughes's skeletal remains, by which they and the circuit court clearly meant "failing to find" every piece of those remains. Presumably Respondents would have had the November Troopers decide to call out more manpower, or to use better equipment, or to perform a better or longer search into the night, or to continue the search into the next days by allocating finite, limited law enforcement resources away from other calls, all to find what, given the passage of nearly seven months of exposure to nature, *might* be left of Mr. Hughes's remains. This is the discretionary conduct of classic qualified immunity.

There is no evidence that November Troopers' were not authorized to make those decision, and it is undisputed that the November Troopers' conduct was within the scope of their duties. The circuit court thus clearly erred by refusing to grant qualified immunity to the November Troopers and the West Virginia State Police:

> If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Syl. pt. 4, *Clark.*

CONCLUSION

Qualified immunity "is to be applied with due respect for the perspective of police officers on the scene and not with the greater leisure and acquired wisdom of judicial

hindsight."[171] "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not [act], and being mulcted in damages if he does."[172] But that is exactly what Respondents seek to do here.

Victoria Hughes seeks to hold Petitioners liable for failing to arrest Walter Hughes for threatening Kristina, apparently on the pretext that this might have prevented Walter from later committing suicide. Regardless of how that duty is couched, under the circumstances that the parties do not dispute or accept *arguendo*, neither the West Virginia State Police nor its employees had a non-discretionary or clearly-established duty to Walter Hughes to arrest Walter for threatening Kristina. Furthermore, and perhaps most importantly, even if it could be said that the West Virginia State Police violated some right of Walter Hughes on April 13, 2012, an objectively reasonable officer could easily have believed—indeed, would have believed, factually and legally—that the West Virginia State Police's employees' conduct that day was lawful. The circuit court therefore erred by denying Petitioners qualified immunity on Count I.

Likewise, Respondents seek to hold Petitioners liable for failing to find all of Walter's remains. But under the circumstances that the parties do not dispute or accept *arguendo*, neither the West Virginia State Police nor the November Troopers had a non-discretionary or clearly-established duty to look for or find all of Walter's remains. And, again, even if it could be said that the West Virginia State Police had violated some right of Victoria Hughes or the Hughes daughters in the fall of 2012, an objectively reasonable officer could have believed that the West Virginia State Police's conduct and that of its agents was perfectly lawful.

Stepping back from the trees momentarily, it becomes crystal clear that the forest of Respondents' claims seeks to hold the West Virginia State Police and their Troopers liable for

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171 *Gooden*, 954 F.2d at 964-65.

172 Syl., *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987).

breaching the "duty" to do a good job (and, in the case of Count I, even for breaching a duty that they supposedly owed to Kristina in a claim that only Walter Hughes might ever have had). But they offer no reason to distinguish this case from the canonical police case, where courts routinely apply qualified immunity:

> Unless expressly limited by statute, qualified immunity is necessarily broad and protects "all but the plainly incompetent or those who knowingly violate the law." .... The policy considerations driving the qualified immunity doctrine are straightforward: "public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society." Such fear stymies the work of state government, and will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Maston v. Wagner, No. 14-1113, slip op. at 19 (W. Va. Nov. 10, 2015) (citations omitted).

Finally, even if the Court were, for the first time in this case, to hold that any of the causes of action that Respondents base their claims on exist, that would not have been something that Petitioners could possibly have known about in 2012, a fact that obliges affording Petitioners qualified immunity.[173]

Accordingly, Petitioners respectfully request that the Court **REVERSE** the order of the Circuit Court of Berkeley County, West Virginia, denying Petitioners qualified immunity, and **ORDER** that this case be remanded with directions to the circuit court to enter summary judgment for Petitioners on all of Respondents' claims.

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[173] *See Smith v. Ray*, 781 F.3d 95, 100 (4th Cir. 2015) (noting that the "qualified-immunity inquiry asks whether the right was clearly established at the time the violation occurred").

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2015, true and accurate copies of the foregoing *Petitioners' Brief* were hand delivered or deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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