FILED
JAN 20 2016
SUPREME COURT OF APPEALS

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' REPLY

Counsel for Petitioners

Michael D. Mullins (W. Va. Bar No. 7754)
Counsel of Record
Robert L. Bailey (W. Va. Bar No. 8902)
On Brief
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston WV 25326-1588
Telephone: (304) 353-8000
Facsimile: (304) 353-8180

Tracey B. Eberling (W. Va. Bar No. 6306)
Counsel of Record
Steptoe & Johnson PLLC
P.O. Box 2629
Martinsburg WV 25402
Telephone: (304) 262-3532
Facsimile: (304) 262-3541

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. No special relationship existed between Walter Hughes and the State Police, and in any event, even if it had, that still does not give rise to a duty. 1

A. Nothing in Respondents' brief demonstrates a special relationship. 2

B. Victoria Hughes does not even argue that Petitioners had a duty to arrest Walter for threatening Kristina. 5

II. Respondents have not identified any basis to affirm the circuit court's refusal to grant summary judgment on their claims arising from the unsuccessful search for Walter Hughes's remains. 6

III. A person's prediction that he would have done some act had he known some fact does not mean that the person had a non-discretionary duty to do so. 8

IV. Conclusion 10

TABLE OF AUTHORITIES

Cases

Aikens v. Debow,
208 W. Va. 486, 541 S.E.2d 576 (2000) 5

Dwight v. Girard Med. Ctr.,
623 A.2d 913 (Pa. Commonw. Ct. 1993) 4

People of State of Cal. v. The Jules Fribourg,
19 F.R.D. 432 (N.D. Cal. 1955) 4

W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.,
234 W. Va. 492, 766 S.E.2d 751 (2014) 5

Wolfe v. City of Wheeling,
182 W. Va. 253, 387 S.E.2d 307 (1989) 2, 3

ARGUMENT

Petitioners demonstrated in their opening brief that:

- Victoria Hughes's wrongful death claim in her representative capacity lacks merit because the West Virginia State Police ("the State Police") did not have a clearly established, non-discretionary duty to Walter Hughes to arrest him for threatening his daughter Kristina in order to prevent his suicide, and specifically that Barbara Boward did not have a clearly established, non-discretionary duty to Walter Hughes to tell the dispatcher that Walter Hughes had threatened Kristina, because Petitioners did not owe Walter Hughes any such duties;

- Victoria Hughes's claim for "mishandling of bodily remains" lacks merit because the State Police did not owe Respondents a clearly established, non-discretionary duty to Respondents to perform a better search for Walter Hughes's remains; and

- the daughters' claim for negligent infliction of emotional distress lacks merit because it is undisputed that the State Police respectfully handled those of Walter Hughes's remains that they did handle, and they did *not* handle those of Walter Hughes's remains on which the daughters base their claim, and West Virginia law does not recognize the tort of *not* handling remains.

As demonstrated below, the arguments in Respondents' response brief do nothing to undermine Petitioners' analysis.

I. No special relationship existed between Walter Hughes and the State Police, and in any event, even if it had, that still does not give rise to a duty.

Victoria Hughes argues that there was a special relationship between Walter Hughes and the State Police by virtue of the fact that two of Walter Hughes's daughters reported to State Police Dispatcher employee Barbara Boward that Walter Hughes had threatened to harm himself and Kristina, but that Ms. Boward only passed along to the April Troopers that Walter Hughes had threatened to harm himself. Had Ms. Boward also passed along that Walter Hughes had threatened Kristina, Victoria Hughes argues, the April Troopers might have arrested him for *that*, which, presumably, would have *prevented his suicide*.

A. Nothing in Respondents' brief demonstrates a special relationship.

As discussed in Petitioner's brief, a special relationship requires proof of:

> (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. The question of whether a special duty arises to protect an individual from a local governmental entity's negligence in the performance of a nondiscretionary governmental function is ordinarily a question of fact for the trier of the facts.

Syl. pt. 2, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989) (footnote omitted).

Victoria Hughes, however, does not point to any *evidence* of any of these elements. She has identified no "promises or actions" showing that Ms. Boward or the April Troopers assumed an affirmative duty to act on Walter Hughes's behalf.[1] In fact, *her own theory* is that Ms. Boward did nothing—*i.e.*, made no promises and took no action—with regard to the information about Walter Hughes threatening Kristina. It is also *Victoria Hughes's own theory* that the April Troopers made no promises and took no actions related to Walter Hughes threatening Kristina because they were *unaware of that threat. According to Victoria Hughes's own theory*, the April Troopers *could not possibly* have assumed any duty to arrest Walter Hughes for threatening Kristina.

---

[1] It remains critical to bear in mind that as a matter of law, Victoria Hughes sues for wrongful death solely in her capacity as Walter Hughes's personal representative, so Walter is the sole possible "party who was injured." Respondents' confusion about this fact is peppered throughout their brief and is independently adequate to dispose of Victoria Hughes's wrongful death claim. For example, they allege that "*Respondents* reasonably relied on the Petitioners to take action to protect Walter Hughes from himself and others" (Resps.' Br. at 9 (emphasis added)) and that "it was reasonable for *Respondents* to rely on the state police to take action" (*id.* at 13 (emphasis added)). How "justifiable reliance" could exist after the daughters were told that Walter Hughes was not taken into custody or to the hospital is not explained by the Respondents. Such allegations are wholly irrelevant. It *does not matter* whether *Respondents* did or did not rely on anything that Petitioners said or did. It only matters whether *Walter Hughes* relied on some promise or act by Petitioners, and Respondents do not even allege that he did.

Relatedly, Victoria Hughes also points to no evidence of the second element—knowledge on the part of Ms. Boward or the April Troopers that not arresting Walter Hughes for threatening Kristina could lead to Walter Hughes's suicide. In fact, again is Victoria Hughes's very theory that the April Troopers had no such knowledge.

It is undisputed that there was no direct contact between Barbara Boward and Walter Hughes. And although there was direct contact between the April Troopers and Walter Hughes, it is again Victoria Hughes's very theory that that contact had nothing to do with Walter Hughes threatening Kristina.

Finally, nowhere in her response does Victoria Hughes identify any evidence that Walter Hughes relied on Petitioners' alleged "affirmative undertaking," much less that any such reliance would have been justifiable. The absence of proof of *Walter Hughes's* reliance is as critical in establishing the non-existence of a "special relationship" as is the absence of proof of Petitioners' supposed "voluntary affirmative undertaking of a duty to act toward" Walter Hughes, because "[t]he element of reliance provides the essential causative link between the special duty assumed by the . . . governmental entity and the injury."[2]

Instead, Victoria Hughes relies exclusively on what she calls the April Troopers' "admissions."[3] She points to passages in the troopers' depositions where exchanges like this one took place:

> Q Do you agree that, when you responded to the call in this case involving Walter Hughes, you assumed a duty to act on his behalf to protect him from harming himself or others?
>
> MS. EBERLING: Object to the form. You can answer.

---

2 *Wolfe*, 182 W. Va. at 257, 387 S.E.2d at 311.

3 (*See* Resps.' Br. at 12.)

THE DEPONENT: Yes, sir. I had a duty to look out for his welfare upon responding to the call. Yes.

(JA at 335 (Corporal Flanigan); *cf.* Resps.' Br. at 5; *see also* Resps.' Br. at 5 (citing JA 387 (same for Trooper Ware); Resps.' Br. at 6 (citing JA at 395 (Trooper Gillmore).)

As the transcript makes clear, Petitioners objected to these questions, and they remain objected-to, as Victoria Hughes never sought any resolution of Petitioners' objections before quoting the passages in her brief.

The reason for these objections is clear: While a deponent can admit that he did or did not say some specific words, or that he did or did not take some specific action, he cannot "admit" in any legally meaningful sense that he undertook a duty when as a matter of law he did not, any more than he can admit that 2 and 2 make 5 when they do not.[4] If the deponents had *denied* that they undertook any duty, Respondents undoubtedly would not simply have accepted that denial and dismissed their claims. Instead, whether someone undertook a duty arises from application of the law to the facts, not from a deponent's subjective belief or opinion.

Had Victoria Hughes identified some *factual evidence* (1) that Ms. Boward or any of the April Troopers promised Walter Hughes that they would act on his behalf, or that they indeed did act on Walter Hughes's behalf, by arresting him for threatening Kristina, (2) that Petitioners had knowledge that not arresting Walter Hughes *for threatening Kristina* could lead to his *suicide*, (3) some direct contact between Petitioners and Walter Hughes, and (4) that Walter Hughes somehow justifiably relied on Petitioners' "affirmative undertaking" to arrest him for threatening Kristina, *then* perhaps it might be up to a jury to resolve the existence of a special

---

[4] *Cf. People of State of Cal. v. The Jules Fribourg*, 19 F.R.D. 432, 435 (N.D. Cal. 1955) (in both "interrogatories and requests for admissions . . . , . . . the matters called for must be matters of fact rather than legal opinions and conclusions"); *accord Dwight v. Girard Med. Ctr.*, 623 A.2d 913, 916 (Pa. Commonw. Ct. 1993).

relationship between Walter Hughes and Petitioners sufficient to evade the special relationship doctrine and, ultimately, to deny Petitioners qualified immunity.

But she did not. Petitioners are therefore entitled to qualified immunity on Victoria Hughes's claim that they somehow caused Walter Hughes's death by not arresting him for threatening Kristina.

B. Victoria Hughes does not even argue that Petitioners had a duty to arrest Walter Hughes for threatening Kristina.

The existence of a special relationship does *not* establish a duty the breach of which can give rise to liability (*e.g.*, to support a claim for wrongful death). Instead, even where a plaintiff proves the existence of a special relationship between the government actors and the person injured, all that does is take the public duty doctrine out of the picture. Such a plaintiff still must establish a duty the breach of which is actionably wrongful: "The 'special relationship' or 'special duty' doctrine is an exception to the liability defense known as the public duty doctrine; it is neither an immunity concept ***nor a stand-alone basis of liability.***"[5]

Even if the public duty doctrine did not apply, the law still imposed on the April Troopers no duty to arrest Walter Hughes for threatening Kristina in order to prevent his suicide. "The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law."[6] It is undisputed that it was not foreseeable to the April Troopers that not arresting Walter *for threatening suicide* would lead to his suicide. *A fortiori*, it was not foreseeable that not arresting him for threatening Kristina would cause his suicide.

---

[5] Syl. pt. 14, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (emphasis added).

[6] Syl. pt. 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).

Victoria Hughes has identified no evidence—indeed, has made no real argument—that Petitioners had a duty to arrest Walter Hughes for threatening Kristina in order to prevent his suicide. As Petitioners demonstrated in their brief, no such duty exists—in the abstract or under the circumstances of this case. Victoria Hughes also identified no evidence that Ms. Boward had a non-discretionary duty to report to the April Troopers that Walter Hughes had threatened Kristina. Nor has she identified any evidence that the April Troopers had a duty to arrest Walter Hughes for threatening Kristina in order to prevent his suicide.

As noted, it is important to recall that Victoria Hughes does *not* argue that the April Troopers had a duty to arrest Walter Hughes based on his threat to kill himself. She initially pressed such a claim, but abandoned it after it became clear that the April Troopers had no way to know that Walter Hughes would kill himself. Instead, she now argues only that Ms. Boward should have told the April Troopers that Walter Hughes had *threatened Kristina*, that the April Troopers should thereafter have arrested Walter Hughes *for threatening Kristina*, and that *that* arrest could have prevented his *suicide*—the same injury that Victoria Hughes no longer claims the April Troopers had a duty to prevent based on his threatening to cause it.[7] It would be difficult to overstate the irrationality of this theory, but it suffices to say that she has made a classic conflation of but-for causation with legal proximate causation.

II. Respondents have not identified any basis to affirm the circuit court's refusal to grant summary judgment on their claims arising from the unsuccessful search for Walter Hughes's remains.

Respondents are correct that "[a] cause of action exists for the negligent ***mishandling*** of a dead body . . . ."[8] But they still cannot—and do not—explain how *not* handling

---

[7] (Resps.' Br. at 9 ("The negligent omission in this case was Barbara Boward's failure to provide critical information to the troopers.").)

[8] (Resps.' Br. at 13 (emphasis added).)

remains can possibly constitute *mis*handling them. As Petitioners demonstrated, the history and purpose of the State's existing negligent *mis*handling tort provide no basis for expanding it to impose a duty on the police to *handle* all of a person's extant remains.[9]

Respondents say that "Petitioners claim that they diligently conducted a search for the bodily remains of Walter Hughes" but that "Respondents contend that the facts support a much different version of what actually occurred."[10] Respondents do not, however, then actually press this supposed difference in what "the facts" will show. It is beyond dispute that Petitioners did search for and find some of Walter Hughes's remains in November.

Respondents' claim requires equating "collecting only what was immediately visible"[11] with "not conducting a search at all." Even accepting *arguendo* that that is what happened, walking around an area and collecting "what was immediately visible" is still a search. It might be, in Respondents' estimation, a poor one. But it is a search. The found items did not rise up and place themselves in a box; the November Troopers searched for and found them. As a matter of law, therefore, no reasonable jury could possibly conclude that Petitioners did not conduct any search for Walter's remains.

---

[9] Respondents try the same "admits" ruse here that they did in their special relationship argument. They claim that "Corporal Nine . . . admitted that when the State Police conduct a crime scene investigation involving bodily remains *they should* do a careful search for all available bodily remains and collect all the bodily remains available at the scene" (Resps.' Br. at 14 (emphasis added)) and "they *should* continue their search until all bodily remains available at the scene have been collected" (*id.* (emphasis added)); *see also id.* at 7 (citing Trooper See's objected-to-but-never-resolved deposition for the proposition that "[t]he troopers *owed a duty* to Mr. Hughes' [*sic*] family to treat his bodily remains respectfully") (emphasis added)); *id.* at 8 (citing Corporal Nine's objected-to-but-never-resolved deposition testimony). Respondents made no effort to explore what, precisely, Corporal Nine was supposedly admitting by his use of "should." Nevertheless, it is clear that none of the offices can "admit" that the law imposed a non-discretionary duty on them to do anything. As noted, duty is a question of law for the court to decide, not for a police officer to "admit" in his or her deposition.

[10] (Resps.' Br. at 10.)

[11] (Resps.' Br. at 10.)

Furthermore—and critically—even if such a factual conclusion were possible, *it would change nothing*, because Respondents also failed to identify any non-discretionary legal duty imposed on the November Troopers to have conducted *any* search whatsoever for Walter Hughes's remains, and they certainly have not shown that such a duty arises from the tort of negligent *mis*handling of bodily remains.

In reality, Respondents just argue that Petitioners did not *adequately* search for and find *all* of Walter Hughes's remains. For the purpose of Respondents' claim, Petitioners could concede the former opinion, and they do concede the latter fact. But the law does not impose on the police a duty of any kind to search for or find all of a person's remains. Failing to do so does not constitute *mis*handling of those remains. It only constitutes *not* handling them.

III. A person's prediction that he would have done some act had he known some fact does not mean that the person had a non-discretionary duty to do so.

Respondents argue that qualified immunity does not apply to Victoria Hughes's wrongful death claim or to Respondents' claims arising out of the November search because the duties involved were non-discretionary. Why, exactly, this is so is difficult to understand.

As for the wrongful death claim, Victoria Hughes argues that the fact that the April Troopers "testified that had they known that Mr. Hughes had threatened his daughter with a handgun they would have arrested him for assault" necessarily means that "[t]he exercise of discretion to effectuate the arrest of Walter Hughes is therefore not an issue."[12] She similarly asserts that the fact that Ms. Boward testified that she "would have transmitted this information [that Walter Hughes threatened Kristina] to the troopers"[13] had she known about it somehow means that she had a non-discretionary duty to do so.

---

[12] (Resps.' Br. at 16.)

[13] (Resps.' Br. at 16.)

These are, generously, *non sequiturs*. A person's belief that he would have done some act had he known of some fact does not in any way whatsoever mean that he had a non-discretionary duty to have done so. It just means that he believes that he would have done so. The obvious problem with the inference that Respondents' theory requires the Court to make—*i.e.*, that whenever a person says that he believes that he *would* have done something, a non-discretionary duty *required* him to do so—is that Respondents failed to explore *why* the trooper believed that he would have arrested Walter Hughes had he known Walter Hughes was threatening Kristina. Perhaps he believed it to be a good idea. Perhaps there was an internal practice to do so. Perhaps he was motivated by sympathy, or by a good work ethic. But it says nothing about whether there was any legal duty, much less a non-discretionary one.

As for Respondents' claims arising out of the search for Walter Hughes's remains, they base their argument that the November Troopers had a non-discretionary duty to find all of Walter Hughes's remains on this statement: "No discretionary decision by the individual officers is being challenged."[14] But that is *exactly* what Respondents challenge. Respondents argue only that the November Troopers should have done more than they did.

Respondents continue, saying that they "are claiming the State Police negligently failed to search despite the existence of a clear non-discretionary duty to conduct a search for all available bodily remains."[15] But that is pure *ipse dixit*. Nowhere do Respondents share with Petitioners or the Court the source of this supposed non-discretionary duty. They say it exists, *ergo* it exists. As Petitioners demonstrated in their brief, the law imposed no such duty, non-discretionary or otherwise.

---

[14] (Resps.' Br. at 17–18.)

[15] (*Id.*)

IV. Conclusion

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.

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

Tracy B. Eberling by Katherine Mullins #11425

Michael D. Mullins (W. Va. Bar No. 7754)
Robert L. Bailey (W. Va. Bar No. 8902) *(on brief)*
P.O. Box 1588
Charleston, W. Va. 25326-1588
Telephone: (304) 353-8000
Fax: (304) 353-8180

STEPTOE & JOHNSON PLLC
Of Counsel

Tracey B. Eberling (W. Va. Bar No. 6306)
P.O. Box 2629
Martinsburg WV 25402-2629
Telephone: (304) 263-6991
Facsimile: (304) 262-3541

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2016, 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:

Harry P. Waddell, Esquire
300 West Main Street
Martinsburg, WV 25401

Tracey B. Eberling by Katherine Mullins #11425

Tracey B. Eberling
Counsel of Record for Petitioner