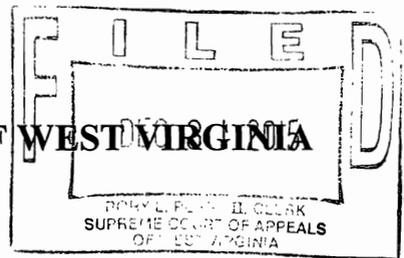


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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No. 15-0691

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**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.**

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**RESPONDENTS' BRIEF**

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## STATEMENT OF THE CASE

### **I. Factual Background**

#### **A. Events Related to Wrongful Death Claim**

On April 7, 2012, Victoria Hughes discovered that her husband Walter Hughes was having an extramarital affair. Mrs. Hughes moved from the couple's residence and into a hotel. The couple had four adult daughters, Kristal Hughes, Kristina Arntz, Kristie Canfield and Kristen Hite. On April 13, 2012, Kristal Hughes and Kristina Arntz traveled to their parents' home to retrieve personal items for their mother. (JA at 294)

Upon entering the home, Kristal Hughes went upstairs. Walter Hughes and Kristina Arntz remained downstairs. Kristina and her father began to argue. Walter Hughes pointed a handgun at Kristina Arntz. (JA at 305) Kristal Hughes heard her sister screaming and ran down the stairs. Walter Hughes pointed the gun toward his chest and said, "I'm going to blow my [expletive deleted] heart out." (JA at 306) Both daughters begged their father not to shoot himself. Eventually they were allowed to leave the residence. As they were leaving, Walter Hughes stated, "You had better say goodbye to me, Kristina. This is the last time you'll ever speak to me." He also stated he would be dead by midnight. (JA at 305, 306, 295)

The two daughters went to Kristal's home across the street, gathered her children and drove to the West Virginia State Police barracks. They informed office assistant Barbara Boward that Walter Hughes had a gun and was threatening to kill himself. (JA at 323) They also reported that Mr. Hughes had pointed the handgun at Kristina Arntz in a threatening manner. Kristal stated, "I thought he was going to kill her [Kristina]." (JA at 309)

Ms. Boward relayed to emergency dispatch that Walter Hughes possessed a handgun and was threatening to kill himself but did not transmit the information that he had threatened his daughter with the handgun. (JA at 328, 329)

West Virginia Troopers J. B. Flanigan, J. A. Ware and M. D. Gillmore responded to the Hughes's residence. Mr. Hughes denied that he was planning to kill himself. The troopers spoke with Mr. Hughes for about 15 minutes and left the scene. (JA at 319) Barbara Boward then informed Kristal Hughes and Kristina Arntz that everything was okay and they were free to leave. (JA at 310) Krystal asked, "So did they take him to the hospital?" Boward replied, "No, they said he was fine." Arntz then stated, "What do you mean he's okay?" Krystal then asked, "Did they take his gun?" (JA at 311)

Krystal's fiancé Todd Jones remained outside the Hughes residence until dark to see if any of the lights were turned on but the house remained dark. Kristina Arntz then telephoned the state police barracks and requested a welfare check on her father. (JA at 313) Several state troopers responded to this call. The troopers searched the house and outlying areas with flashlights but were unable to locate Mr. Hughes. While at the residence, the troopers located a suicide note, a cashier's check for \$82,000 made out to Victoria Hughes, jewelry, a wallet and a cellular phone belonging to Walter Hughes. (JA at 348)

Trooper Flanigan, Trooper Ware and Trooper Gillmore have acknowledged that they assumed a duty to protect Walter Hughes from harming himself or others when they responded to the emergency call. They also have testified that had they known that Walter Hughes had threatened his daughter with a handgun, he would have been arrested for domestic assault and his weapons would have been confiscated.

## **B. Events Related to the Mishandling Bodily Remains Claim**

On November 29, 2012, State Police Corporal Z. L. Nine received a call reporting the finding of a human skull in a shale pit. Trooper Nine spoke with the caller, Curtis Rogers who stated that he along with Jerry Rogers and George Rogers were walking the property to look for items to haul away for scrap when they found the skull. (JA at 350) Corporal Nine, Trooper R. D. Eshbaugh and Trooper J. M. Walker responded to the scene at approximately 1:15 p.m. on November 29, 2012. (JA at 355, 356, 358)

Just north of where the skull was found were several concrete blocks where the troopers found a tan jacket, black t-shirt; part of a rib cage; arm bones; two femur bones; vertebrae, dentures; a portion of a hip bone; several other bones and a pair of brown shorts with a black belt. (JA at 350) The positioning of these items suggested that Walter Hughes had been sitting on the cement blocks prior to his death and fell forward and slightly left into the larger stack of blocks. (JA at 350, 361) Corporal Nine left the scene to retrieve the State Police crime scene van.

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

At approximately 2:15 p.m., Corporal Nine arrived back at the crime scene and Trooper J.D. See arrived about five minutes later. (JA at 372) At about 2:33 p.m., Berkeley County Medical Examiner Curtis Keller arrived on the scene. Corporal Nine and Trooper See processed the area by taking digital photographs of items that had been located and then bagged the evidence. Around 4:00 p.m., the bagged evidence was turned over to Curtis Keller. According to the troopers a “final walk-through” was conducted at 4:30 p.m. and the scene was “cleared” at 5:00 p.m. (JA at 364, 373)

On the following day, Victoria Hughes, Kristal Hughes, Kristina Arntz and Kristie Canfield decided to visit the site where the remains were found in order to leave flowers. The family members were accompanied by Kristina Arntz’s husband, Gary Arntz and Walter Hughes’ brother Bernie Hughes. (JA at 375, 376) Within minutes of arriving at the shale pit the family discovered a pelvic bone, an arm bone, vertebra, rib and finger bones and part of a jaw bone as well as Walter Hughes’ bottom dentures. Gary Arntz called West Virginia State Police and requested a trooper be sent to the location. Corporal Nine responded to the call and photographed, bagged and secured the items. (JA at 368)

On December 3, 2012, the fourth daughter, Kristen Hite, who had come from Germany, also wished to visit the location where he father’s remains had been found. Kristen Hite was accompanied by family members Victoria Hughes, Kristina Arntz, and Kristie Canfield. At the scene, the family discovered her Walter Hughes’ femur. Gary Arntz once again contacted the state police and requested a trooper be sent to the scene. (JA at 383, 385)

Several days later, Kristina Arntz spoke with a friend, Steve Parrish, at Walter Hughes’ memorial service. Mr. Parrish called later that day and offered to search the area. (JA at 315)

He located the shell casing from the bullet which killed Mr. Hughes approximately six to eight feet from where Mr. Hughes' remains were found. (JA at 315)

## **II. Admissions by State Police**

### **A. Corporal J. B. Flanigan**

1. He assumed a duty to protect Walter Hughes from harming himself or others when he responded to the dispatcher's call (JA at 335).
2. He was never informed that Hughes had been brandishing a handgun (JA at 339).
3. He was never informed that Hughes had pointed a loaded handgun directly at one of his daughters (JA at 339, 340)
4. If he had known that Hughes pointed a loaded gun at his daughter, he would have confirmed that fact with the daughter and arrested Hughes for domestic violence (JA at 342).
5. If he had known that Hughes pointed a loaded handgun at his daughter "it would have changed everything" (JA at 341).
6. If the responding officers had known of the domestic violence incident, Hughes would have been arrested and they could have taken the weapons from his home (JA at 343).

### **B. Trooper J. A. Ware**

1. When he responded to the call involving Walter Hughes, he assumed a duty to act on his behalf to protect himself from harming himself or others (JA at 387).
2. When the daughters reported the suicide threat to the State Police, they expected the State Police to take action to protect Walter Hughes from harming himself or others (JA at 387).

3. He was unaware that Hughes had been brandishing a handgun or that he pointed a loaded handgun at his daughter (JA at 389, 390)
4. If he had known that Hughes had pointed a handgun at his daughter, he could have spoken to the daughter about an assault charge against the father and Hughes could have been arrested (JA at 391, 392)

### **C. Trooper M.D. Gillmore**

1. He assumed a duty to act to protect Mr. Hughes when he responded to the call (JA at 395).
2. When the daughters reported their father's suicidal threats to the State Police, they expected the State Police to evaluate the call and do what they could do to protect Hughes from harming himself or others (JA at 395, 396).
3. At no time did he know that Hughes had pointed a handgun directly at his daughter (JA at 397).
4. If he had been aware that Hughes had pointed a handgun at his daughter, the officers could have made a warrantless arrest of Hughes for domestic assault (JA at 398, 399).

### **D. Barbara K. Boward**

1. If a member of the public walked into the State Police headquarters either she or another office assistant would typically be with whom they would talk. (JA at 325).

2. She is trained and certified through the FBI and the West Virginia Automated Police Network. She takes the information and disseminates it to the dispatcher to put out over the radio (JA at 326).
3. It is part of her normal job duties to take a complaint and relay the information to a dispatcher (JA at 327).
4. Ms. Boward testified that she “absolutely” would have transmitted the fact that Walter Hughes threatened his daughter with a handgun if she had been aware of that fact. (JA at 329)

**E. Corporal J. D. See**

1. The troopers owed a duty to Mr. Hughes’ family to treat his bodily remains respectfully (JA at 413).
2. She doesn’t know if any real perimeters were set for this crime scene (JA at 415).
3. The investigating officer on the scene typically sets the perimeters of the crime scene (JA at 414).
4. Trooper See described her initial walk through as “We just kind of – like, in a zig-zag pattern just walked through the area. [Nine] indicated the items that were found already. And then, like I said we decided that he was going to take photographs and that – he asked me to the diagramming” (JA at 416).
5. When she did the walk through, Nine and Eshbaugh had already spray painted with green paint the areas where bodily remains or clothing were found (JA at 416).
6. After she arrived on the scene no additional bodily remains or other evidence was discovered other than the handgun that was underneath the shirt (JA at 417).

7. By the time she got there everything that they eventually bagged had already been marked (JA at 417).
8. All the bodily remains that were found were within 50 feet of where the police found Mr. Hughes' tan jacket, black t-shirt containing remnants of his rib cage and arm bones (JA at 419, 420).

**F. Corporal Z. L. Nine**

1. When the State Police conduct a crime scene investigation they should collect all the bodily remains available at the scene (JA at 352, 353).
2. When collecting bodily remains at a crime scene, the State Police should do a careful search for all available bodily remains (JA at 353).
3. When the State Police conduct a crime scene investigation involving bodily remains they should continue their search until all bodily remains available at the scene have been collected (JA at 353).
4. At the crime scene were a couple of concrete blocks that looked like they had been formed to make somewhere to sit with a wooden pallet on the ground. (JA at 362).
5. The jacket and other clothing were found right on the wooden pallet (JA at 362).
6. Intermingled with the clothing were remnants of Hughes' ribs and some arm bones (JA at 362).
7. It appeared that is where the body initially laid (JA at 362).
8. Within a fifty foot radius they found the other body parts (JA at 362, 363).
9. All the evidence except the firearm, was actually collected during the initial walk through (JA at 365).

10. Everything the State Police found was found between 1:17 p.m. when Eshbaugh arrived at the crime scene and 1:25 p.m. (JA at 366).
11. The only evidence collected was found during Corporal Nine's initial walkthrough which took eight minutes or less (JA at 366, 367).
12. The next day, he collected the bodily remains the family discovered which were found in the area where the concrete block and pallet were located (JA at 367, 368, 369).

### **SUMMARY OF ARGUMENT**

Petitioners have appealed the circuit court's July 13, 2015 order denying their Motion for Summary Judgment based upon qualified immunity. The Court in its review must apply the same standard for granting summary judgment as would be applied by the circuit court.

The public duty doctrine and its "special relationship" exception are applicable to Respondents' claims against Petitioners. Petitioners assumed an affirmative duty to act on behalf of Walter Hughes; knew their inaction could lead to harm; and had direct contact with Respondents. Respondents reasonably relied on the Petitioners to take action to protect Walter Hughes from himself or others.

Had the state troopers who responded to Walter Hughes' residence known that Mr. Hughes had threatened his daughter with a handgun they would have arrested him for domestic assault and confiscated his weapons. Since the troopers did not have knowledge of the domestic assault they failed to arrest Mr. Hughes. The negligent omission in this case was Barbara Boward's failure to provide critical information to the troopers. Ms. Boward testified that she "absolutely" would have transmitted this information to the troopers but she was never informed

that Mr. Hughes had threatened his daughter with the handgun. Whether Ms. Boward knew or did not know this information is a disputed fact question. Should the jury conclude that she knew of Hughes' threat to his daughter, Boward breached a nondiscretionary duty to transmit this vital information to the state troopers.

Petitioners claim they diligently conducted a search for the bodily remains of Walter Hughes. Respondents contend that the facts support a much different version of what actually occurred. It is undisputed that the bodily remains recovered by the state police on November 29, 2012 were discovered during the eight minute period between Corporal Eshbaugh's arrival at 1:17 p.m. and Corporal Nine's call to activate the crime scene response team at 1:25 p.m. The next day Respondents readily observed a pelvic bone, an arm bone, vertebra, rib and finger bones, part of a jaw bone and Walter Hughes' lower dentures all within several inches to several feet from the concrete blocks and wooden pallet where Mr. Hughes had died. A reasonable inference to be drawn is that the state troopers collected only what was immediately visible upon their arrival at the crime scene. Should the jury adopt this inference, Petitioners breached a non-discretionary duty to conduct a search for Walter Hughes' remains.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondents concur with Petitioners' request for W. Va. R. App. P. 20 oral arguments.

### **ARGUMENT**

#### **I. Standard of Review**

Petitioners have appealed the circuit court's July 13, 2015 order denying their Motion for Summary Judgment. The Petitioners contend that the circuit court erred when it determined that

they were not entitled to qualified immunity as a matter of law. The Court's review of the circuit court order is de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In undertaking this review, the Court should apply the same standard for granting summary judgment as would be applied by the circuit court. *Subcarrier Commc'ns, Inc. v. Nield*, 218 W.Va. 292, 296, 624 S.E.2d 729, 733 (2005). That standard of review is well established and well known: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In accord, Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995); Syl. Pt. 3, *Evans v. Mutual Mining*, 199 W.Va. 526, 485 S.E.2d 695 (1997).

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

## **II. Petitioners Breached a Duty to Respondents Arising Under the Special Relationship Exception to the Public Duty Doctrine**

The public duty doctrine and its "special relationship" exception apply to W. Va. Code § 29-12-5 actions against the State and its instrumentalities, unless the doctrine is expressly

waived or altered by the terms of the applicable insurance contract. Syl. Pt. 10, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

The four requirements for the application of the “special relationship” exception are: (1) An assumption by the state 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 state governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the state governmental entity's affirmative undertaking. Syl. Pt. 12, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

The question of whether a special duty arises to protect an individual from a State governmental entity's negligence is ordinarily a question of fact for the trier of facts." Syl. Pt. 11, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

The circuit court relied upon the following facts in ruling that existence of a special duty was a question of fact for the jury. Kristina Arntz and Kristal Hughes drove to the state police barracks and reported that their father had a gun and was threatening to kill himself and had threatened his daughter. They were told by the office assistant designated to take complaints that they could not leave the barracks but she would dispatch the police to their father's residence. The information regarding Mr. Hughes threatening to kill himself was provided to the dispatcher and the state police responded to the call. The state police spent approximately fifteen minutes speaking with Mr. Hughes and left without taking any action. After the troopers had left the residence, the daughters were informed that everything was “okay” and they were free to go. The state troopers involved acknowledged that they assumed a duty to act on Walter Hughes' behalf to protect him from harming himself or others. The troopers also acknowledged that when

the daughters travelled to the state police barracks and made their report, they expected the state police to take action to protect Walter Hughes from harming himself or others.

The circuit court determined that a jury would be entitled to conclude that (1) Petitioners assumed an affirmative duty to act on behalf of Walter Hughes; (2) that Petitioners knew that inaction on their part could lead to harm; (3) that Respondents' visit to the state police barracks was a form of direct contact as was the state police contact with Walter Hughes; and (4) it was reasonable for Respondents to rely on the state police to take action. The circuit court correctly ruled that a properly instructed jury would be entitled to find that Petitioners assumed a duty to act when they responded to the Respondents' entreaties and that Respondents justifiably relied upon this undertaking.

### **III. Petitioners Breached a Duty to Respondents in the Handling Walter Hughes's Bodily Remains**

A cause of action exists for the negligent mishandling a dead body even where the handling is otherwise authorized. *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 327 S.E.2d 438 (1985). In this case, the circuit court determined that a reasonable jury could conclude that Petitioners were negligent in the handling of Walter Hughes' remains. In making this finding the circuit court relied upon the following facts.

Pursuant to standard police practices, Petitioners were required to conduct a crime scene investigation, collect all the evidence, including the human remains, and turn the remains over to the medical examiner for identification of the body, cause of death, and eventual disposition of the remains to the family of the decedent for burial.

Corporal Nine, who was in charge of the crime scene investigation, 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. In addition, they should continue their search until all bodily remains available at the scene have been collected.

All the bodily remains recovered by the state police during the crime scene investigation were actually discovered during Corporal Nine's initial walk through which took eight minutes or less. All these remains were found within a fifty foot radius from the concrete blocks and wooden pallet where Walter Hughes took his life.

The following day the family visited the location where the body was discovered to leave flowers. They immediately discovered a pelvic bone, an arm bone, a vertebra, rib and finger bones and part of a jaw bone as well as Walter Hughes' bottom dentures. All the bones and the bottom denture were discovered within several feet of the concrete blocks and pallet. The family did not search for these bones. The bones were readily observable in the location where the body was found.

On December 3, 2012, a fourth daughter, Kristen Hite, who had traveled to West Virginia from Germany, wished to visit the location where her father's remains were found. Kristen went to the site accompanied by Victoria Hughes, Kristina Arntz, and Kristie Canfield. The family discovered another femur bone approximately fifteen feet from the concrete blocks and wooden pallet.

A few days later Kristina Arntz spoke with a friend, Steve Parrish, at her father's memorial service. He offered to search the area where the remains were found. He located the

shell casing from the bullet which killed Walter Hughes approximately six to eight feet from the pallet where remains were found.

The circuit court ruled that Victoria Hughes, as the surviving spouse of Walter Hughes, was the proper party to prosecute the claim for negligent mishandling of her husband's remains. The circuit court further ruled that the facts supported a negligent infliction of emotional distress claim on behalf of each daughter pursuant to West Virginia precedent establishing that "[a]n individual may recover for the negligent infliction of emotional damages absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious." Syl. pt.2, *Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 635, 482 S.E.2d 620 (W.Va. 1997); *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1997). The court found that Respondents had made a sufficient showing that their emotional distress damages claims were not spurious by producing expert psychological testimony establishing severe emotional distress experienced as a result of discovering the bodily remains of their father. (JA at 792, 793)

#### **IV. Qualified Immunity is Not Available for Non-Discretionary Acts**

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

*Clark v. Dunn*, 195 W. Va. 272, 278 n.2, 465 S.E.2d at 380 n.2 ("This opinion does not address causes of action arising out of ministerial functions of government agencies or officers."). In the instant case the acts or omissions giving rise to the suit do not constitute legislative, judicial, executive or administrative policy-making acts or otherwise involve discretionary governmental functions.

**A. Qualified Immunity Has No Application to Respondents' Wrongful Death Claim**

The state troopers who responded to Walter Hughes' residence have testified that had they known that Mr. Hughes had threatened his daughter with a handgun they would have arrested Mr. Hughes for domestic assault and confiscated his weapons. The exercise of discretion to effectuate the arrest Walter Hughes is therefore not in issue. However, since the troopers did not have knowledge of the domestic assault they failed to arrest Mr. Hughes. The negligent omission in this case was the failure of Barbara Boward to provide this information to the troopers. Her failure to provide this information was not a discretionary act. Ms. Boward testified that she "absolutely" would have transmitted this information to the troopers because "if [Mr. Hughes] is going to point a gun at his daughter, chances are he's going to point it at a state trooper, and the troopers needed to be aware of that." If the jury ultimately concludes that she knew of the threat to the daughter, Ms. Boward breached a nondiscretionary duty on her part to transmit this vital information to the state troopers. Since this duty was within the scope of her employment her negligence is attributable to the State Police under the doctrine of *respondeat superior*.

**B. Qualified Immunity has No Application to Petitioners' Claim of Mishandling the Remains of Walter Hughes**

Petitioners contend the facts support the inference that they diligently conducted a search for the bodily remains of Walter Hughes and eventually exercised their discretion to conclude the search. Respondents, however, contend that the facts support a much different version of what actually occurred. The Court must adopt Respondents' version for the purposes of assessing Petitioners' claim of qualified immunity. It is undisputed from the testimony of Corporal Nine (and police records in the case) that the bodily remains recovered on November 29, 2012 were discovered during the eight minute period between Corporal Eshbaugh's arrival at 1:17 p.m. and Corporal Nine's call to activate the crime scene response team at 1:25 p.m. The only item of evidence not discovered during this eight minute period was the handgun which was later found underneath the remains when they were moved after being photographed. Thus, although the state troopers remained at the crime scene until 5:00 p.m. while they marked, photographed, and collected the evidence found between 1:17 p.m. and 1:25 p.m., there is no record of any additional bodily remains being located. The very next day the Respondents were able to readily discover a pelvic bone, an arm bone, vertebra, rib and finger bones, part of a jaw bone and Walter Hughes' lower dentures within several inches to several feet from the concrete blocks and wooden pallet where Walter Hughes had died. Petitioners have failed to provide any plausible explanation how these bodily remains were easily observed by Respondents but could not be found by Petitioners conducting a crime scene search. Respondents submit the only reasonable inference to be drawn is that the state troopers marked, photographed and collected only what was immediately visible upon arrival at the crime scene but conducted no search for bodily remains. Should a jury adopt this reasonable inference, neither the individual state troopers nor the West Virginia State Police would be entitled to qualified immunity. No discretionary decision

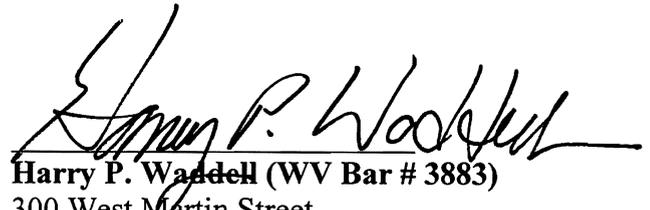
by the individual officers is being challenged. Plaintiffs are claiming the State Police negligently failed to search despite the existence of a clear non-discretionary duty to conduct a search for all available bodily remains. Since the individual officers were operating within the scope of their employment, that negligence is attributed to the State Police under the doctrine of *respondeat superior*.

### CONCLUSION

Respondents Victoria Hughes, Kristina Arntz, Kristal Hughes and Kristie Canfield respectfully request that the Court AFFIRM the order of the Circuit Court of Berkeley County, West Virginia, denying Petitioners qualified immunity and ORDER that his case be remanded to the circuit court for further proceedings.

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

By Counsel



**Harry P. Wandell (WV Bar # 3883)**

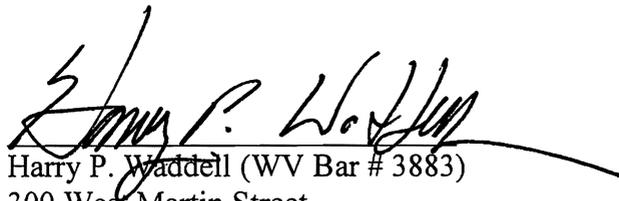
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2015, true and accurate copies of the foregoing *Respondents' Brief* were deposited in the U.S. Mail, postage prepaid, addressed to counsel of record for the parties as follows:

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