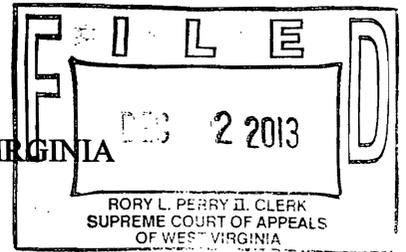


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



\_\_\_\_\_  
No. 13:0933  
\_\_\_\_\_

GENERAL PIPELINE CONSTRUCTION, INC.,  
Defendant Below, Petitioner,

v.

Circuit Court of Logan County  
Consolidated Civil Action No.: 06-C-238

CORA PHILLIPS HAIRSTON, et al.,  
Plaintiffs Below, Respondents.

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PETITIONER'S BRIEF

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### **III. ASSIGNMENTS OF ERROR**

a. It was error for the trial court to allow the trial to proceed or damages to be considered or awarded by the jury as to any Plaintiff without a determination by the trial court or by the jury whether or not West Virginia Code § 29-1-8a applied.

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

c. It was error for the trial court to allow expert or lay witnesses to testify as to the application and meaning of statutes and law or to allow expert witnesses to testify as to matters outside the scope of their expertise.

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

e. It was error for the Court to deny this Defendant's Motion for Judgment as a Matter of Law and allow the case to go to the jury without admissible evidence having been presented proving or tending to prove the elements of a common law cause of action.

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

g. It was error for the trial court to accept from the jury a verdict for emotional distress without a finding of physical damage to a grave or to the common area.

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

### **IV. STATEMENT OF THE CASE**

While there were previous West Virginia decisions concerning "desecration" when the events

made the subject of the Complaints involved here occurred, those previous decisions involved the handling of dead bodies or damage to known graves or cemeteries. Claims for the desecration of a grave the very existence of which was not apparent had not been addressed by this Court and, of equal importance, the effect of West Virginia Code §29-1-8a on the common law had not been determined. Decisions as to those issues were provided by this Court in its response to certified questions, given in regard to this same case, reported as *Hairston v. General Pipeline Constr., Inc., et al.*, 226 W. Va. 663, 704 S.E.2d 663 (2010). In that decision, the necessary elements of a common law desecration claim for damage to graves sites were clearly identified and it was also held that, if the Code section cited above applied, the statutory provisions prevailed over the common law. This appeal arises because of the failure of the trial court to follow those and other rulings of this Court.

Equitable Production Company (“Equitable”), Appellant in a related appeal currently before this Court as Docket Number 13-0934, contracted with Appellant General Pipeline Construction, Inc., (“General Pipeline”) in 2004 to relocate a gas gathering-pipeline on a large tract of wooded, unimproved, hillside land, which included the area known as Crystal Block Hollow, near the unincorporated town of Sarah Ann in southern Logan County, West Virginia. The small bulldozer used by General Pipeline, in tramping through the woods on an ATV trail down the mountainside to an access road, passed through an area later found to contain graves. There were no signs or other apparent outward indications that there were grave sites in the area, the most recent burial apparently occurring some forty (40) years before; neither the individual graves nor a cemetery were identified on any map; the site was not reserved for burials in or conveyed for that purpose by any deed or other recorded document; and the site was not included on any listing of grave sites or cemeteries kept by any agency or organization. (App. at 189-90 and 844).

After the legal issues had been resolved by this Court in response to the certified questions,

the trial judge recused himself and a special judge was appointed. The case was tried in Logan County for three weeks, from September 24, 2012, through October 14, 2012. That trial was rife with error detailed elsewhere in this Brief, ranging from procedural matters, such as the denial of a jury view of the grave sites jointly sought by counsel and twice requested by the jury; to evidentiary rulings, such as allowing an anthropologist and individual Plaintiffs to testify as to their beliefs about the requirements of the law and allowing a lawyer to testify as to the intent of the parties to a 1923 coal lease (App. at 841-44); to instructions given to the jury intertwining the common law elements of desecration and the statutory provisions of West Virginia Code §29-1-8a (App. at 1426-29); to accepting a jury verdict which awarded no compensatory damages but gave \$50,000.00 to each of the fourteen (14) Plaintiffs for mental distress, exactly the same amount to each without regard to any distinguishing facts (App. at 1-8), a possibility foreseen and declared improper by this Court in *Hairston, supra*.

The jury gave a further award of \$14,000.00 to one Plaintiff with a handwritten note on the Verdict Form “Overseer of restoring of cemetery.” (App. at 4). This was the same amount sought in damages by Plaintiffs for (1) erecting a monument where none had existed before; (2) building concrete stairs where none had existed before; (3) using subsurface radar to determine if any graves were located under the bulldozer’s path, although Plaintiff’s expert testified he saw no evidence of such graves; and (4) Plaintiffs’ expert’s fee for overseeing the above. (App. at 720, 723-25). All of this was to be performed on land to which Plaintiffs had shown no right or title. Seventy per cent of the fault was attributed to General Pipeline and the remainder to Equitable. (App. at 3).

Although not a part of this appeal, the jury was also asked to determine whether Defendants had been willful, wanton, reckless or malicious in their actions, although no punitive damages instructions were given and arguments by counsel to the jury on the subject were prohibited by the

Court. Instead of marking “Yes” or “No” in the spaces provided, the jury wrote “reckless only” as to each Defendant. (App. at 6). Based on this finding, the trial court held that punitive damages were appropriate and, in a second phase of the trial on October 18, 2012, additional evidence, primarily consisting of the income or lack of income of Defendants, was presented to the same jury. The jury awarded punitive damages of \$200,000.00 against Equitable. (App. at 1740-41).

A hearing on Defendants’ post-trial motions was held on February 25, 2013, and an Order denying those motions was finally entered during another hearing on July 26, 2013. (App. at 10-19). The pending Third-Party Complaints and the enforcement of the judgment in favor of Plaintiffs were stayed pending completion of this appeal.

#### **V. SUMMARY OF ARGUMENT**

It was held by this Court that West Virginia Code § 29-1-8a (sometimes referred to herein as “the statute”), if it applied, prevailed over the common law applicable to grave desecration claims. *Hairston, supra*. But in the preparation for and in the trial of this case no finding was made by the trial court as to whether the statute applied, which might have negated even the need for a trial, while during trial the distinction between the statutory standards and the common law elements was ignored, the two confused and mixed in the presentation of evidence, arguments and jury instructions, so that the requirements of one was used to determine liability under the other, and no factual finding was requested of the jury to permit it to determine the applicable law. In addition, evidentiary and procedural errors, such as allowing witnesses to testify as to the meaning and application of the law, allowing experts to testify far beyond their expertise, refusing a jury view when the appearance of the area was the single most important fact in the case, ignoring deficiencies in proof, and accepting a jury verdict awarding improper damages, were allowed. Because of these errors, the jury verdict must be set aside due to the lack of evidence and judgement entered for the

Defendant. If further proceedings are deemed necessary, attention must be given to the determination of the applicable law, and, if then necessary, the matter properly re-tried.

## VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

It is requested that this matter be scheduled for Rule 19 oral argument. The issues presented include errors by the trial court in the application of settled law, both that announced in *Hairston supra*; unsustainable exercises of discretion; and rulings contrary to the weight of the evidence; all primarily narrow issues of law. Oral argument will aid the Court in reaching the correct decision. However, because of the length of trial and of the record, additional time of at least thirty (30) minutes for each side should be allowed.

## VII. ARGUMENT

### Standard of Review

The rulings of the trial court concerning a new trial and its conclusion as to the existence of reversible error is reviewed by this Court under an abuse of discretion standard while the trial court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review. See, e.g., *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 672 S.E.2d 345 (2008).

- a. **It was error for the trial court to allow the trial to proceed or damages to be considered or awarded by the jury as to any Plaintiff without a determination by the trial court or by the jury whether or not West Virginia Code § 29-1-8a applied.**

As its first holding in earlier addressing the law applicable to these claims, *Hairston v. General Pipeline Construction, Inc.*, 226 W. Va. 663, 704 S.E.2d 663 (W. Va. 2010), this Court stated “that West Virginia Code § 29-1-8a preempts the common law with respect to the matters specifically addressed in the statute.”

During none of the proceedings in this matter before the lower court was any ruling made

or any instruction given to the jury for it to determine a fact controlling whether West Virginia Code § 29-1-8a applied to a Plaintiff's claim. Whether a determination of the applicable law is held to be purely a function of the trial court, as in *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004), even when a factual finding is involved, as in *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 690 S.E.2d 322 (2009); or a jury finding must be made before the trial court can act, as in *Perrine v. E. I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010), no such determination was made.

Because the statute prevailed over the common law, a determination that the statute did or did not apply was required before any Plaintiff could proceed with a claim:

The **prosecuting attorney** of the county in which a violation of any provision of this section is alleged to have occurred may be requested the Director of the Historic Preservation Section . . . to seek civil damages, injunctive relief and any other appropriate relief. . . .” (emphasis added.)

West Virginia Code § 29-1-8a(g)(1).

Such a determination was required before any finding could be made as to what damages could be recovered:

Civil damages may include:

- (I) forfeiture of any and all equipment used in disturbing the protected unmarked graves or grave markers;
- (ii) any and all costs incurred in cleaning, restoring, analyzing, accessioning and curating the recovered material;
- (iii) any and all costs associated with recovery of data, and analyzing, publishing, accessioning and curating materials when the prohibited activity is so extensive as to preclude the restoration of the unmarked burials or grave markers;
- (iv) Any and all costs associated with restoring the land to its original contour or the grave marker to its original condition;
- (v) Any and all costs associated with reinterment of the human skeletal remains; and
- (vi) Any and all costs associated with the determination and collection of the civil damages.

West Virginia Code § 29-1-8a(g)(2).

Such a determination was required before any finding could be made that Plaintiffs could receive any damages awarded:

When civil damages are recovered, the proceeds . . . shall be deposited into the Endangered Historic Properties Fund and may be expended by the Commissioner of Culture and History for archaeological programs at the state level . . . .”

West Virginia Code § 29-1-8a(g)(2).

If the trial court had determined that West Virginia Code § 29-1-8a applied to the events made the subject of this litigation, or even as to any singular claim of any Plaintiff, then this trial should never have even taken place as to at least that singular claim or Plaintiff. Plaintiffs simply cannot prosecute claims or receive any award of damages for matters to which the statute applies.

If the court had determined that the statute applied, then whether or not either Defendant reported the “discovery” (interesting in its own right because the accusation was that Defendants failed to report as a “discovery” that which Plaintiffs argue was an obvious and well-known cemetery) would have been irrelevant, and the various arguments and errors which occurred could have been avoided, because the statutory liability does not depend upon that failure. West Virginia Code § 29-1-8a(g).

If the trial court had determined that the statute did not apply, reliance upon that statute as justification for a jury instruction that Defendants’ failure under West Virginia Code § 29-1-8a(d) to subsequently report the previous discovery of a grave was *prima facie* negligence, to be considered by the jury in determining whether or not common law damages should be awarded, was completely misplaced. (App. at 1-9).

It is beyond argument that the subsequent failure to report the “discovery” of a grave to the Sheriff of the county cannot have been a proximate cause of the physical damage claimed to have

been caused by the very act which resulted in the discovery. Absent such a proximate relationship, the giving of the negligence instruction based on this statute was improper.

Under West Virginia law, a "violation of a statute is prima facie evidence of negligence." Syl. Pt. 1, in part, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990); accord *Spurlin v. Nardo*, 145 W.Va. 408, 415, 114 S.E.2d 913, 918 (1960).

"In order to be actionable," however, "such violation must be the proximate cause of the plaintiff's injury." Syl. Pt. 1, in part, *Anderson*, 183 W.Va. at 79, 394 S.E.2d at 63; accord *Waugh v. Traxler*, 186 W.Va. 355, 358, 412 S.E.2d 756, 759 (1991).

An erroneous instruction such as that given by the lower court based on West Virginia Code § 29-1-8a(g) is presumed to be prejudicial and warrants at least a new trial unless it appears that the complaining party was not prejudiced by such instruction. Syllabus Point 2, *Hollen v. Linger*, 151 W. Va. 255, 151 S.E.2d 330 (1966). syllabus point 3, *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001); Syl. Pt. 4, *Matheny v. Fairmont Gen. Hosp.*, 212 W. Va. 740, 575 S.E.2d 350 (2002).

**b. It was error for the trial court to allow personal representatives of deceased claimants to participate as Plaintiffs.**

In *Hairston*, this Court held "that the next of kin who possess the right to recover in a common law cause of action for grave desecration shall be the decedent's surviving spouse or, if such spouse is deceased, the person or persons of closest and equal degree of kinship in the order provided by West Virginia Code § 42-1-1, et seq."

Two individuals who were originally named as Plaintiffs in one of the actions consolidated into this single case subsequently died and the administrators of their estates, Shirley J. Wilder, the daughter of Louella Wilder, deceased, and Jacqueline Powell Hamlett, executor of the estate of Ulysses Olbert, deceased, were substituted as Plaintiffs in this action. Neither these personal

representatives nor any of the beneficiaries of the estates of Louella Wilder, deceased, and Ulysses Olbert, deceased, would have qualified as one of the “persons of closest and equal degree of kinship” inasmuch as others members of the same class as their decedents remained as Plaintiffs.

There is argument to be made that, pursuant to West Virginia Code § 55-7-8a the action instituted by Louella Wilder, deceased, and Ulysses Olbert, deceased, may properly be revived by their respective personal representatives. The result of revival in the name of the personal representative, however, is that, instead of the claimants being the “persons of closest and equal degree of kinship” to the interred decedent as this Court directed in *Hairston*, others not qualified as members of that class will have been admitted while others – possibly children of Louella Wilder, deceased, and Ulysses Olbert, deceased, who are not beneficiaries of their respective estates and certainly nieces and nephews of Louella Wilder, deceased, and Ulysses Olbert, deceased, who’s parent still survives – individuals of equal closeness and degree of kinship to the interred decedents to the personal representatives of Louella Wilder, deceased, and Ulysses Olbert, deceased, remain excluded.

- c. **It was error for the trial court to allow expert or lay witnesses to testify as to the application and meaning of statutes and law or to allow expert witnesses to testify as to matters outside the scope of their expertise.**

During the course of the trial, the Court allowed Plaintiffs’ counsel in the examination of individual Plaintiffs and others called as experts to solicit testimony and to argue to the jury as to the meaning and application of law to which Defendants were supposedly subject. This primarily involved West Virginia Code § 29-1-8a(d) but included other portions of that statute. (App. at 709-18).

This error was most egregiously shown in the testimony of William Updike, an unemployed anthropologist, as to the supposed reporting requirements of West Virginia Code § 29-1-8a(d) (App.

at 709-18) but is also well illustrated in that same witness's testimony as to the federal statutes which were asserted to be applicable to Equitable (App. at 716-18); the testimony of attorney Marc Lazenby (App. at 841-44), and the testimony of Plaintiff James Olbert who was not qualified as an expert in any capacity. (App. at 316-17).

Testimony as to the law is not admissible because it is irrelevant under Rule 401 of the West Virginia Rules of Evidence.

It is a general rule of law that it is the duty of the jury to take the law from the court and to apply that law to the facts as it finds them from the evidence. The [jury] instructions are the law of the case.

*Nesbitt v. Flaccus*, 149 W. Va. 65, 77, 138 S.E.2d 859, 867 (1964) (citations omitted).

The trial judge is the "sole source of the law," and witnesses should not be allowed to testify on the status of the law, just as counsel are forbidden to argue the law to jurors. Hearing statements of "the law" from several sources would not be helpful to jurors.

....

... [A]n expert's testimony is proper under Rules 702 and 704 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding to the legal standards upon which their verdict must be based, the testimony should not be allowed. A witness, expert or non-expert, should not be allowed to define the law of the case.

Indeed, it is black-letter law that it is not for witnesses but for the judge to instruct the jury as to applicable principles of law. In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge. The danger is that the jury may think that the "expert" in the particular branch of the law knows more than the judge—surely an impermissible inference in our system of law.

Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Rule 702[.] Franklin D. Cleckley, *Handbook On Evidence For West Virginia Lawyers* § 7-4(B), pp. 7-78-7-79 (2000).

*Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634 at 644, 600 S.E.2d 346 at 356 (W. Va. 2004).

The Court allowed William Updike, qualified as an expert based upon his education as an anthropologist, to express before the jury his opinions as to the identification and location of grave sites in the area. (App. at 791-92). However, over strenuous objections (App. at 697-99, 789-93), he was also allowed to offer his opinions regarding a host of other subjects including the intentions of Crystal Block Hollow Coal & Coke Company, the former coal operator and lessee of the property which included the grave sites, to provide such a burial site; the reporting duties of Defendants pursuant to West Virginia Code § 29-1-8a(d) (discussed above) after “discovery” of the grave sites; the proper actions of a gas producer in locating a pipeline; whether a person would have seen the graves while walking through the woods; and that, despite his inability to identify any other grave sites, that there were additional graves in the area, specifically graves located beneath the ATV trail followed by the bulldozer; and the cost of installing a concrete staircase where none had existed before up the hillside to the graves, the cost of determining whether there were graves under the bulldozer path, and his fees for having the site designated as an historic site (even though the property was owned by land trust).

The justification for the ruling by the Court was that Mr. Updike had been qualified as an expert and, therefore, could express any opinions he wanted. (App. at 713, 714, 717-18, 779-780).

L. J. Fairless, whose sole qualification was that he owned a funeral home although he was not a licensed funeral director, supposedly called to testify as to cost of erecting a monument (even though none had existed before) on which was to be engraved the history of the black community in Crystal Block Hollow and identify those buried in the area, was allowed to opine as to whether or not graves were located beneath the ATV trail followed by the bulldozer. (App. at 871, 875-76,

878).

Marc Lazenby, an attorney, was qualified as an expert based on his experience in performing title searches, testified that he was unable to locate any deed or other document granting, authorizing or even recognizing a right of burial or the existence of an area set aside for any burial in Crystal Block Hollow. (App. at 839)

However, Mr. Lazenby was then invited by the trial court to perform some further research and testify further, when he was allowed to opine that, because the 1924 coal lease held by Crystal Block Coal & Coke Company allowed Crystal Block to erect housing and other facilities for its employees, the land owner and the coal company must also have intended, even though never reduced to writing and there was no indication either party ever even knew of any of the woodland burials, to provide a place for the burial of black (but not white) residents of the area. (App. at 843-44, 854-56). This lease ended by its own terms in 1954 but the right of burial allegedly created by the lessee would have bound the land owner, without further compensation, in perpetuity. See, e.g., *England v. Central Pocahontas Coal Co.*, 86 W.Va. 575, 104 S.E. 46 (1920).

This opinion was aided by improper comments by the trial court, violating Rule 605 in spirit if not in fact. (App. at 855-57).

The West Virginia Supreme Court of Appeals has consistently held that a valid written agreement using plain and unambiguous language is to be enforced according to its plain intent and should not be construed. See, e.g., Syl. Pt. 5, *New v. Gamestop, Inc.*, No. 12-1371, 2013 W.Va. Lexis 1230 (W. Va. Nov. 6, 2013).

There was no ambiguity identified in the coal lease and no reason for the trial court to allow parole evidence the sole purpose of which was to alter the terms of the contract.

West Virginia Rules of Evidence Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

This Court stated in *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995), that in determining who qualifies as an expert, a trial court should conduct a two-step inquiry.

First, a circuit judge must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. **Second, the circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. There must be a match.** 195 W. Va. at 525, 466 S.E.2d at 184. See also, Syllabus Point 5 of *Gentry* (emphasis added).

Here, the witnesses may have been recognized by the Court as qualified to testify as experts about certain matters but following that, the Court then denied any objection to the witness's testimony, ruling that because the witness was qualified as an expert the witness could offer any opinions he wanted without any consideration of the limit of his qualifications or the opinion the witness was then expressing.

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

This Court identified in *Hairston* the factual issues which had to be determined as to a common law claim for desecration as including: (1) if the grave site in question is located in a publicly or privately maintained cemetery; (2) whether the publically or privately maintained cemetery is clearly marked in a manner which will indicate its use as a cemetery; (3) whether the publically or privately maintained cemetery has identifiable boundaries and limits; (4) whether the area was identifiable as a cemetery by its appearance prior to defendant's entry; and (5) that the defendant proximately caused, either directly or indirectly, defacement, damage, or other mistreatment of the physical area of the4 decedent's grave site or common areas of the cemetery in a manner that a reasonable person knows will outrage the sensibilities of others.

A motion for a jury view was made on behalf of General Pipeline, and was ultimately was granted by the Court. While no order was entered, this is reflected in the various discussions had during trial. (App. at 166-67, 337, 957-64, 1143).

As the trial progressed, arrangements were made for the view and concerns of the trial court addressed, (App. at 166-67, 337, 957-64, 1143), but no jury view scheduled. The members of the jury requested such a view on two different occasions which are only found in the transcript because of the trial court's reference in discussing the view. (Cited above). Finally, the trial court announced that no view would be allowed. (App. at 1143.)

Jury views are most usually addressed by this Court in criminal matters, this Court stating in one of the most recent decisions that the standard of review to be applied is that:

[a] motion for a jury view lies peculiarly within the discretion of the trial court, and, unless the denial of such view works probable injury to the moving party, the ruling will not be disturbed.' Syllabus Point 1, *Collar v. McMullin*, 107 W. Va. 440, 148 S.E. 496 (1929)."

*State v. Brown*, 210 W. Va. 14, 552 S.E.2d 390 (W. Va. 2001).

There is no reason to believe this same Rule does not apply in civil actions as the seminal decision often cited was a civil action. *Gunn v. Ohio River R.R.*, 36 W. Va. 165, 14 S.E. 465 (W. Va. 1892).

As to the instant case, the denial of the jury's viewing of the remote local and condition of the area surrounding the grave sites made the subject of this action certainly "worked probable injury to the moving party" and was prejudicial to the interests of justice. While photographs were shown to the jury, these were necessarily a flat, unidirectional, two-dimensional rendition of a the three-dimensional steep hillside in which the overall nature of the site and the relationship of the various elements – the trees, bushes and weeds, the pipeline, the graves, the steepness of the hillsides, the

distance to the nearest roadway, the isolation of the area from the nearest houses, the appearance of the few grave markers, the apparent lack of any care of the area, etc., – had to be viewed one at a time. All was all extremely important and persuasive evidence which could not be presented to the jury in any other meaningful manner.

The jury's view and the appearance of the area, even such a long time after the alleged desecration, would have, if not been determinative of many of the issues which the jury was asked to decide in this matter as to any common law claim, would certainly have been helpful, not only in understanding the testimony but in determining the truth of that testimony.

- e. **It was error for the Court to deny this Defendant's Motion for Judgment as a Matter of Law and allow the case to go to the jury without admissible evidence having been presented proving or tending to prove the elements of a common law cause of action.**

The effect of the failure of the trial court to make a determination, with or without the jury's assistance, of whether or not West Virginia Code § 29-1-8a applied to any or some or all of the claims asserted in this matter are discussed above in Section 1. This Section will focus on the common law claims which could have been prosecuted by Plaintiffs in this matter if West Virginia Code § 29-1-8a was found not to apply.

This Court in *Hairston* opinion, *supra*, clearly identified the elements of a common law claim for desecration, specifying them in six numbered paragraphs. The trial court instructed the jury on those elements at least three different times. (App. at 1426-37). But the trial court erred in allowing the case to go to the jury when insufficient evidence had been presented in support of almost all of those required elements.

(1) the grave site in question must be within a publicly or privately maintained cemetery, clearly marked in a manner which will indicate its use as a cemetery, with identifiable boundaries and limits. *Hairston*, Syllabus Point 8.

The trial court focused on whether the area was “maintained” and allowed Mr. Updike to testify that this meant that the area had been put to no other purpose. (App. at 717-18).

The actual requirement, however, is that the grave site be located within “a publically or privately maintained cemetery,” a phrase that, it is submitted, reasonably defined uses the word “maintained” to mean “kept up,” “ repaired,” “cleaned and mowed,” and would include all “cemeteries” because if maintained as required the maintenance must be done by either a public or private entity. There is no other type of entity. So, absent the appearance of the area as a “publically or privately maintained cemetery” resulting from the area being maintained as a cemetery (an element also addressed in 3, below), this element fails.

However, the requirement continues that the “publically or privately maintained cemetery” be “clearly marked in a manner which will indicate its use as a cemetery.” There was no evidence of such marking.

Finally, this element concludes that the locale claimed to be a “cemetery” have “identifiable boundaries and limits.” The trial court interpreted this as meaning that there was an area with graves and an area without graves and where the one ended and the other began was the boundary of the cemetery. (App. at 1230). This was clearly wrong.

(2) Dedication of the area to the purpose of providing a place of burial by the owner of the property or that the owner acquiesced in its use for burial.

There was no testimony or evidence that the owner of the property in its history had dedicated the property for the purpose of burial. In fact, the current owner of the property did not know, as testified by its employee who at the time investigated the site, that there were graves located there. (App. at 367). Marc Lazenby testified that he had conducted a title search which revealed no mention of any such deed or dedication of the property for burial. (App. at 839).

(3) the area was identifiable as a cemetery by its appearance prior to the defendant's entry or that the defendant had prior knowledge of the existence of the cemetery.

There was no evidence of any knowledge by anyone not now or previously a resident of Crystal Block Hollow that graves existed at this site. While Plaintiffs and several local residents testified as to the appearance of the area many years before, at the time of burials they remember in the 1950's and 60's, evidence of the appearance of the area, the lack of maintenance, and the lack of any signs or marking when this incident occurred shows this element not to have been proven.

(4) the decedent in question is interred in the cemetery by license or right.

There was no supporting evidence produced.

Plaintiffs, neither individually nor collectively, produced any evidence that any prior or current owner or lessee of the land granted permission for the decedents to be interred there.

(5) the plaintiff is the next of kin of the decedent with the right to assert a claim for desecration.

No dispute is made as to this element at this time by this Defendant; and;

(6) the defendant proximately caused, either directly or indirectly, defacement, damage, or other mistreatment of the physical area of the decedent's grave site or common areas of the cemetery in a manner that a reasonable person knows will outrage the sensibilities of others.

No evidence was presented, and the jury did not find, that there was even so much as a mark left at any grave site. (App. At 1908-16). William Updike, Plaintiffs' expert archeologist, testified that the bulldozer has not moved any soil in tramping down the hill except the indentations left by the tractor treads and that even these did not mar any identifiable graves. So while it was asserted that gravestones were displaced or had fallen over, this could not have been the result of any act of Defendant. When specifically asked about graves under the path of the bulldozer, he stated he found no such indications but asked, as an element of damages, that he be hired to search for graves. (App. at 722-24, 731, 750, 754).

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

“It is a fundamental principle of law that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence.” *Tracy v. Cottrell*, 206 W. Va. 363 at 371, 524 S.E.2d 879 (1999).

Based on this rule of law, Plaintiffs sought and were granted an instruction:

. . . that the Crystal Block Cemetery at issue in this litigation partially was destroyed during the construction of the subject pipeline . . . . Consequently, the expert witnesses retained by the Plaintiffs did not have an opportunity to inspect the cemetery as it existed before the pipeline construction.

Where Defendants . . . had evidence in their possession, under their control or in their authority and they fail to preserve that evidence which should properly be part of the Plaintiffs’ case, you may infer that the evidence, if it had been available, would have been unfavorable to Defendant’s case.

(App. at 1905).

Hence, according to the trial court, physical damage to property can not only be the basis for a monetary claim for that damage but the change in the condition of the property resulting from the physical damage, preventing a pre-physical damage inspection by a post-physical damage expert, allows a spoliation inference although how the pre-physical damage condition could be unfavorable to the defendant is unclear. Although no case on point has been found, such a rationale must be wrong because it would make a spoliation instruction automatic in every personal injury or physical damage case, a result that can hardly have been intended by this Court in its earlier decisions.

This is show by the requirement in considering before giving a spoliation instruction of “the reasonableness of anticipating that the evidence would be needed for litigation.” *Tracy, supra*, at 374. A requirement that a party make such a determination during the event and, at the cost of spoliation liability, reverse the action so as to cure the physical damage goes beyond reason. Logic would also dictate that in any case in which the property damage is the result of negligence, the

aspects of intent or recklessness implied by spoliation is missing. Such a result cannot have been the intent of this Court.

“ ‘ “An erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudiced by such instruction.” Syllabus Point 2, *Hollen v. Linger*, 151 W. Va. 255, 151 S.E.2d 330 (1966).’ syllabus point 3, *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001).”

Syl. Pt. 4, *Matheny v. Fairmont Gen. Hosp.*, 212 W. Va. 740, 575 S.E.2d 350 (2002).

- g. It was error for the trial court to accept from the jury a verdict for emotional distress without a finding of physical damage to a grave or to the common area.**

In *Hairston*, this Court noted in footnote 10 that:

A question will inevitably arise concerning whether mental distress damages are available in the absence of damage to the grave site. The answer lies in the elements of the common law action of grave desecration, as enumerated above. No action may be brought if there is no defacement, damage, or other mistreatment of the physical area of the decedents’ s grave site or of common areas of the cemetery in a manner that a reasonable person knows will outrage the sensibilities of others.

In arguing the content of the Verdict Form this was raised but overruled. (App. at 1305-10).

In its verdict, the jury awarded no nominal damages or compensatory damages but did award damages for mental anguish. (App. at 1913-15). Pursuant to this Court’s earlier ruling, the award for mental anguish cannot be sustained.

Even as to Cora Hairston, the handwritten note from the jury, in place of a finding for compensatory damages, was to her as “Overseer of restoration of cemetery.”(App. at 4). The rationale of the jury or its intent in making such an award is unknown and cannot now be ascertained. The most that can be done is to guess.

It is clear that the jury made its award due to sympathy, awarding each Plaintiff exactly the same amount of money regardless of the time what had passed since that Plaintiff had last visited the grave site of his or her decedent; regardless of the age of Plaintiff at the time of the decedent’s

death; regardless of whether or not Plaintiff had resided with the decedent at the time of the decedent's death; regardless of whether that Plaintiff claimed to have performed any upkeep of a grave; regardless of whether Plaintiff had more than one decedent upon which claim was being made in this action; or any other factor, and regardless whether that Plaintiff was appearing in his or her own right or as the representative of a deceased parent and, hence, regardless of the number of beneficiaries who would share in that award.

- h. And for such other and further relief from the errors which are apparent in the transcript included in the Appendix or otherwise apparent in the record to which Petitioner is justly entitled.**

### VIII. CONCLUSION

For the reasons stated above, this Defendant moves, that the verdict be set aside and judgment entered in favor of Defendant or, in the alternative, that the verdict be set aside and the matter remanded with directions.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

\_\_\_\_\_  
No. 13:0933  
\_\_\_\_\_

GENERAL PIPELINE CONSTRUCTION, INC.,  
Defendant Below, Petitioner,

v.

Circuit Court of Logan County  
Consolidated Civil Action No.: 06-C-238

CORA PHILLIPS HAIRSTON, et al.,  
Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of December 2013 I served by U.S. mail to:

Kevin W. Thompson (WVSB #5062)  
David R. Barney, Jr., (WVSB #7958)  
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a copy of the foregoing *Petitioner's Brief* and *Appendix Volumes I and II*.



\_\_\_\_\_  
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