STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Alston Blankenship and Ruby Burns,
Plaintiffs Below, Petitioners

vs) No. 11-1136 (Greenbrier County 10-C-15)

Stephanie Mendelson, Jessica Mendelson,
and Noah Mendelson, Defendants Below,
Respondents

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioners, Alston Blankenship and Ruby Burns, by counsel Barry L. Bruce and Jesseca R. Church, appeal the order of the Circuit Court of Greenbrier County entered July 20, 2011, granting summary judgment to the respondents. The respondents filed a response by their counsel, William D. Turner. The petitioners have filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

This appeal involves allegations of restriction of access to and desecration of an alleged cemetery. The petitioners assert that several relatives were buried more than fifty years ago on land now owned by the respondent Stephanie Mendelson. According to the petitioners, the graves were once marked by field stones which are no longer present. Petitioner Alston Blankenship who had been granted oral permission to visit the graves by Respondent Stephanie Mendelson, had a grave monument made and placed it on the site. Upon discovery of the monument, Stephanie Mendelson revoked the oral permission to visit the property. After notifying Blankenship to remove the monument, Mendelson had the monument removed. The petitioners brought suit against the respondents seeking a declaratory judgment as to their right of access, as well as damages due to the removal of the monument. The circuit court entered summary judgment in favor of the respondents.

The standard of review of a circuit court's entry of summary judgment is de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va.189, 451 S.E.2d 755 (1994). Further, this Court has recognized:

> "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Syl. Pt. 2, *Minshall v. Health Care & Retirement Corp. of America*, 208 W.Va. 4, 537 S.E.2d 320 (2000).

The Court has fully reviewed the issues raised by the petitioners. The Court concludes that the circuit court's entry of summary judgment, under the facts and circumstances of this case, was proper. The Court adopts and incorporates by reference the well-reasoned final order granting summary judgment that is attached hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

11-1136

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

ALSTON BLANKENSHIP and
RUBY BURNS,
Plaintiffs/ Counterclaim Defendants

v.

10-C-15

A True Copy:
ATTEST:
Lavonne Arbuckle
Clerk, Circuit Court
Greenbrier County, WV
By_____ Deputy

STEPHANIE MENDELSON,
JESSICA MENDELSON, and
NOAH MENDELSON,
Defendants/Counterclaim Plaintiffs

ORDER GRANTING SUMMARY JUDGMENT

On July 5th, 2011, this matter came before the Court for a hearing on a Motion for Summary Judgment filed by the defendants/counterclaim plaintiffs. The following people were present: Plaintiffs Alston Blankenship and Ruby Burns, represented by Barry Bruce, Esq.; Defendant Stephanie Mendelson, represented by Bill Turner, Esq.

HISTORY:

1. Plaintiffs Alston Blankenship and Ruby Burns, cousins, filed the Complaint against Defendants, landowners, seeking Declaratory Judgment against Defendants for ingress and egress for the purpose of visiting grave sites alleged to be on their property, in accordance with West Virginia Code §37-13A-1. The Plaintiffs further sought Damages, alleging the Defendant, Stephanie Mendelson, unlawfully desecrated the grave site by removing a Memorial placard set by Plaintiff. Plaintiff is seeking both compensatory and punitive damages. Said Complaint was filed January 20th, 2010.
2. Plaintiffs filed an Answer, Motion, and Counterclaim on February 17th, 2010, denying that a cemetery existed, Counterclaiming Trespass, Invasion of Privacy, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and seeking Declaratory Judgment against the Plaintiff, as well as Damages.
3. Plaintiffs filed an Answer to Defendants' counterclaims on March 17th, 2010.

4. On May 19th, 2011, Defendants' filed "Defendants' Motion for Summary Judgment on Plaintiffs' Claims and Defendant's Motion for Partial Summary Judgment on Liability on Counts 1, 2 & 5 of Defendants' Counterclaims."
5. On June 21st, 2011, Plaintiffs filed a Response to Defendants' Motion for Summary Judgment.
6. A Reply Memorandum in Support of Defendants' Motions was filed on June 29th, 2011.
7. This hearing took place, and the Court took the matter under advisement. Defendants were Ordered to file a Reply as to Hearsay arguments which were raised in the Motion and Response, and heard during oral arguments.
8. Defendants' Supplemental Reply Memorandum of Law Concerning Plaintiffs' Reliance on Rule 804(b)(4) was filed on July 8th, 2011.

FINDINGS OF FACT:

1. That Defendant did comply with §37-13A-1 by allowing the Plaintiffs to visit on foot.
2. That the Plaintiff did violate §37-13A-1, by not complying with the notice portions of the statute.
3. That the Plaintiff's conduct in "substantiating a cemetery" and erecting the monument far exceeded his rights.

CONCLUSIONS OF LAW:

1. That Summary Judgment for the Defendants is proper in regard to the Plaintiff's common law desecration claim, because §29-1-8a preempts the common law and applies to this case, and further because the Plaintiffs abandoned the grave site in regards to maintenance.

Summary Judgment Standard

In determining whether a motion for summary judgment should be granted, the Supreme Court has held that "[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 law." Syllabus Pt. 3, Aetna Casualty and Surety Company v. Federal Insurance Company of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only

where the moving party shows that there is no genuine issue as to any material fact and that such party is entitled to judgment as a matter of law. W. Va. R. Civ. P. 56(c). Nevertheless, the party opposing summary judgment must satisfy the burden of proof by offering evidence sufficient for a reasonable jury to find in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986). While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some "concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [his or her] favor or other significant probative evidence tending to support the complaint." Wriston v. Raleigh County Emergency Services Authority, 518 S.E.2d 650, 662 (1999) (citations omitted). It is through the lens of these principles that this Court must examine this motion for summary judgment.

DISCUSSION:

In Defendants' Motion for Summary Judgment, the Defendant requests this Court to rule in favor of Summary Judgment for the following reasons:

1) That Defendants were entitled to Summary Judgment because Plaintiffs could not establish the existence of a grave site through any admissible evidence, because said evidence was Hearsay.
2) That Plaintiff's claims are controlled by §29-1-8a, in which the Defendants have complied, because the graves were unmarked before Mr. Blankenship placed the memorial stone there, far exceeding his rights under the circumstances, and causing Ms. Mendelson to remove the stone. Further, because the complaint falls under §29-1-8a, the Plaintiff would be precluded from damages.
3) The area which is the subject of the suit does not classify as a Cemetery.
4) That Plaintiffs have abandoned the said "cemetery"
5) Even applying §37-13A-1, the Plaintiff's rights have not been violated.
6) *Three other claims were raised which are not going to be addressed by this Order.*[1]

[1] Defendants raise that the Mendelson children are entitled to Summary Judgment because they were never served with process, and as admitted by the Plaintiffs, have caused no harm to the plaintiffs. Plaintiffs, in their answer, state that the Motion should be denied because they, along with Stephanie Mendelson, filed an Answer. Plaintiffs then raise that any claims arising before January 20th, 2008 are Barred by the Statute of Limitations, under the "ancient history rule" in West Virginia Code §55-2-12(a). The Granting of the Summary Judgment Motion should sufficiently deal with these claims.

In support of the Motion, the Defendant asserts these facts:

1. Plaintiffs' claims that there are at least four persons buried on Ms. Mendelson's property, and claims relation to two of them, a Doctor Bates Blake, who died "in or around 1900," and a Samuel Newton Blake, who died "in or around 1888." Said persons allegedly buried there are the Plaintiffs' great uncles.
2. Plaintiffs were aware of the alleged cemetery by stories from a grandfather and mother. A Doctor Deny Blake recalled that a Virginia Boggs may have been buried there.[2]
3. Plaintiff Alston Blankenship was born in 1941. Plaintiff Ruby Burns was born in 1934.
4. Plaintiffs claim that they recall unimproved field stones marked the graves before Ms. Mendelson purchased the property in 1974.
5. Plaintiff Alston Blankenship lived out of state throughout his adult life, and moved back to the area in approximately 2007. He claims to have visited the grave site "never going more than two [2] years" between visits.
6. The Deed in which Defendants purchased their property does not reference a cemetery, and refers to the area that the Plaintiffs refer to as "Blake Knob" as "Big Knob."
7. From 1974-2004, Defendant was not aware that any actions, including visitation that took place. In 2004, Plaintiff Alston Blankenship called the Defendant, Stephanie Mendelson, at her place of employment, and advised the Defendant that adults were buried on her property, and requested to visit and fix up the cemetery.
8. Ms. Mendelson gave him permission to visit the area on foot.
9. In April 2008, Ms. Mendelson noticed that a large stone was placed on her property, at that time, leaning against a tree, which far exceeded her verbal permission to visit the property.[3]

They further raise that Summary Judgment should be granted as to Liability for their Counterclaims of Trespass, because the Plaintiff admits to several trespasses, and as to Invasion of Privacy. These matters will be addressed by further hearing before being ruled upon.

As to Count 5 of their Counterclaims, they seek a declaratory judgment that §29-1-8a controls, and that Defendant has complied, that the Plaintiff Alston Blankenship had no right to place the stone where, at most, unmarked graves existed; that he had no right to access the property by means of ATV, and violated §37-13A-4, and in the alternative, to declare that the Plaintiff's right to ingress and egress were limited to travel on foot. The Granting of the Summary Judgment Motion should sufficiently deal with these claims.

[2] Affidavits supplied by the Plaintiffs, and Plaintiff's Exhibit IX show that both the Blake boys were very young at their death. Samuel Blake was supposedly only two (2) years old.

10. On May 5th, 2008, Ms. Mendelson sent a letter to the Plaintiff, requesting that he remove the stone from the property, and rescinding her permission for him to have access to her property, including by ATV. See Defendant's exhibit F1.
11. On May 12th, 2008, Plaintiff Alston Blankenship sent a letter stating that "by law, I have the right to maintain(e) and visit [the] [c]emetery at will..." See Defendant's exhibit F2. The letter further stated that he would hold Plaintiff responsible for any damage to the stone.
12. Sometime after having received the request to remove the stone, Plaintiff Alston Blankenship then set the stone in concrete.
13. On August 22nd, 2008, legal counsel for the Defendant, Stephanie Mendelson, did send a letter advising Mr. Blankenship that the stone would be removed. See Defendant's exhibit H.
14. Thereafter, on August 29th, 2008, Alston Blankenship filed a criminal complaint against Ms. Mendelson, visiting "a dozen times maybe" in an attempt to have Ms. Mendelson prosecuted for removal of the stone. See Defendant's Motion for Summary Judgment, page 13.
15. In June 2009, Ms. Mendelson received a letter stating that the Greenbrier County Prosecutor's office was closing its case against her.
16. Throughout 2008 and 2009, Plaintiff continued to enter the property, by way of ATV, and attempt to "substantiate a cemetery." He did so by placing orange tape on the trees, placing steel posts into the ground with "No Trespassing" signs, and other presumptuous conduct. See Motion for Summary Judgment, pages 14 and 15, and footnote 13.
17. Alston Blankenship then filed his civil complaint.

In the Plaintiffs' Response, it is argued that a central issue to this case is whether are not there are graves there, and they assert Hearsay exception Rule 803(19) of the West Virginia Rules of Evidence, as well as Affidavits asserting that graves are present. The Plaintiffs then dispute the claim that the Plaintiffs abandoned the grave site, claiming they visited for the last 50 years. They also claim that they have a way by necessity because of the rough terrain, and the lack of public access.[4]

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[3] The stone read: "Blake Knob Cemetery, In Remembrance of William Mathews, Samuel N. Blake, Doctor Bates Blake, Virginia Boggs"

[4] Plaintiffs' Response further assert that the Defendant's Counterclaims of Trespass and Invasion of Privacy are only material if the Plaintiff's have no right to visit the graves. They attempt to assert that Counterclaims cannot be asserted due to the Defendant's "unclean hands" (referring to

Defendants filed a Reply memorandum in support of their motion, asserting that Hearsay exception raised by the Plaintiffs is a "family pedigree" exception and does not apply to the location of alleged graves, or identity of persons buried there. They again assert that the area cannot be defined as a "cemetery" because there were no "identifiable boundaries or limits." They re-asserted all other claims.

This Court heard oral arguments on July 5th, 2011. Defendants argued that §29-1-8a preempts the common law in regard to the Plaintiffs' desecration claim, and argue that the graves were unmarked. Plaintiffs argued that the real issue comes to whether graves are there or not, and that the affidavits provided proved that graves were present, and those statements should be admissible. They argued hearsay exception 804(b)(4), citing *Moore v. Goode, 375 S.E.2d 549, 180 W. Va. 78 (W. Va., 1988).* This Court took all matters under advisement. The Court gave Defendants time to file a brief in answer to the hearsay exception rule 804(b)(4) argument which had not been raised before the hearing. In their Supplemental Reply Memorandum, the Defendants argue that applying 804(b)(4) to where two decedents are allegedly buried go far beyond establishing family relationships. It is with this information that the Court reaches its conclusion and grants Summary Judgment for the Defendants.

This Court agrees that, for purposes of Summary Judgment, the Defendants' concession that the Plaintiffs are descendants of the two Blake men supposedly buried on the Mendelson property is sufficient. Using the affidavits and statements to prove that the bodies were buried there in 1888 and in the 1900s would be inadmissible hearsay. Such evidence is unreliable when it is given so many years later. Given that the area is not designated as a "cemetery" except by word of mouth makes it even less likely that the statements are reliable.

The Court does not feel it necessary to delve into the arguments raised pertaining to "kinship" and "authorized persons," given that Mr. Blankenship was not denied access when he informed the property owner. Further, whether the land is a "cemetery" is not necessarily a required argument, given that §37-13A-1 allows visitation for "a cemetery or grave site." It seems that, by giving

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the letter which denies Mr. Blankenship access "for any reason") and lack of proof as to damages. These matters will be addressed by the hearing on the Counterclaims.

permission to Mr. Blankenship to visit the area, Ms. Mendelson has at least acquiesced that Mr. Blankenship was an "authorized person," and that the area was at a minimum, a grave site.

Plaintiff Alston Blankenship claims to have visited the area for over fifty years. Ms. Mendelson has owned the property since 1974, but had no notice of the visits until 2004. The Plaintiffs raised the argument that field stones served as grave markers, and went missing, presumably removed my Ms. Mendelson "sometime in the 90s." However, the definition of "grave marker" which is found in §29-1-8a, states "any tomb, monument, stone, ornament, mound or other item *of human manufacture* that is associated with a grave. Therefore, the Plaintiffs' reliance on this argument is unfounded. At most, the area consists of at least two unmarked graves. "Unmarked grave," as defined in §29-1-8a, "means any grave *or location* where a human body or bodies have been buried or deposited for at least fifty [50] years and the grave or location is not in a publicly or privately maintained cemetery or in the care of a cemetery association..." It is argued by the Defendants that, because the area cannot be classified as a "cemetery" because it does not have identifiable boundaries and limits, in accordance with *Hairston v Gen. Pipeline Construction Inc.*, (W. Va. 2010), Plaintiffs' common law desecration claim cannot stand, because §29-1-8a preempts the common law in that regard. *Hairston* holds that the code does preempt the common law claims involving "historic or prehistoric ruins, burial grounds, archaeological site, or human skeletal remains, *unmarked grave*, grave artifact or grave marker of historical significance." See *Hairston*. Here, because the alleged unmarked graves are over fifty years old, §29-1-8a does preempt the common law in regard to the desecration claim. This is not to say that aspects of §37-13A-1 does not apply as well.

The Defendants also argue under *Hairston* that the Plaintiffs abandoned the unmarked graves, a contention the Plaintiffs deny because they claim to have visited, although the Defendant had no notice of any visitation before 2004. It is clear that the area in question was not identifiable as an area containing graves, with identifiable boundaries or limits. In this regard, Hairston quotes in footnote 6 a Massachusetts case "[t]he mere passage of time of time does not extinguish the rights of descendants in a family burial ground; but where family has ceased to visit the cemetery, and *where they have so long neglected to care for it that the ground is no longer recognizable as a cemetery*, the family burial ground has been

abandoned, and with it the private standing of the descendants to require that those who own the land abstain from using the land for other purposes." Id. Here, the Defendant had no knowledge that the Plaintiffs were visiting before the phone call in 2004. There were no grave markers, and the area was not identifiable as an area containing graves. Further, it was not until 2008 that the Plaintiff sought to create a cemetery by marking off the area and bringing in the monument. Although this argument in *Hairston* was made in order to show that it was a requirement to show that a cemetery existed for purposes of maintaining a common law claim for damages for desecration, and this matter is preempted by §29-1-8a, the issue of abandonment is still pertinent to this case in regard to the facts as stated above. Without making the distinction that the area is a cemetery, because the area remained in an unidentifiable state until well after Ms. Mendelson owned the property (1974-2008), and even fairly well after the Plaintiff gave notice to the Defendant that he wished to visit (2004-2008), the grave site was abandoned, at least as to the Plaintiff's ability to create a cemetery so many years later. At most, from 2004 until 2008 (the time notice was at least given to the landowner, so as to minimally comply with §37-13A-1) the Plaintiffs' purpose for ingress and egress was for visiting the grave site, not for "maintenance."

Once she was notified, in 2004, the Defendant did not deny access. The Plaintiff has relied, and continues to rely on §37-13A-1, to argue that he has been denied reasonable ingress and egress. However, that statute also states that the right shall be had "after providing the owner of the privately owned land with reasonable notice." ""Reasonable access" means access to the cemetery or grave site within ten [10] days of the receipt of **written** notice of the intent to visit to visit the cemetery or grave site." See §37-13A-2(3). No notice was given, aside from his phone call in 2004, of any time he or Ms. Burns supposedly visited.

There was not a visible traditional access route at the time, and Plaintiffs claim they have a right of necessity to use an ATV, and that Defendant is in violation of §37-13A-5. However, §37-13A-4 clearly shows that the right of ingress or egress does not include the right to operate motor vehicles on the private lands, unless there was a road or adequate right of way that permits access, and the owner has given **written** permission to use the road or right of way. The Defendant allowed visitation on foot, which was reasonable given that

the area did not already contain the right of way. She therefore complied with §37-13A-1.

The Plaintiff then in 2008 installed a monument on the property, and continued other egregious conduct in an attempt to create a cemetery where unmarked graves existed before, without notice, without permission, and without even caring to give or get either. However, erecting a monument on the unmarked graves far exceeds maintenance.[5] In that regard, it is the Plaintiff who has violated §29-1-8a(c)(1), by otherwise disturbing the unmarked grave without first having a permit issued to him by the Director of the Historic Preservation Section. The Plaintiff operated under the assumption that he had a right to "maintain(e) the cemetery at will." See his letter written in August 2008. He then cites whatever laws he wishes in order to support his claim of desecration, in complete disregard of the laws he himself violated, and his assumptions and mistakes of the law are no defense. It is for these reasons that the Court rules for the Defendant, and grants their Motion for Summary Judgment in regard to the Plaintiffs claims.

The Court therefore **ORDERS** that:

1. The Defendant's Motion for Summary Judgment on Plaintiff's Claims is hereby GRANTED.
2. That the parties shall set this matter for further hearing in regard to Defendants Counterclaims.

ENTERED this the 20th day of July, 2011.

CIRCUIT COURT GREENBRIER CO., W.VA.
JUL 20 2011
LOUVONNE ARBUCKLE, CLERK

J. C. Pomponio Jr.

Honorable Joseph C. Pomponio, Jr.
Chief Circuit Court Judge

[5] At the hearing, Plaintiff raises the amendments made to §37-13A-1, which came into effect on June 10th, 2011, which allows access for the purposes for installation of monuments or grave markers. Even the amendments require written notice, including a description of the monument to be installed. The installation of a monument is under "maintenance," but provides that a property owner may deny access if the property owner objects to the type or style of the monument. Because no written notice was given, the Plaintiff would still be in violation of the statute.