

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. Nos. TA-21963 (A.G. File No. 10-00670); ROSALEEN G. YOUNG, Plaintiff v. N.C. DEPT. OF CRIME CONTROL & PUBLIC SAFETY, AND N.C. DEPT. OF HEALTH AND HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21642 (A.G. File No. 10-00671); ROBERT H. YOUNG, Plaintiff v. N.C. DEPT. OF CRIME CONTROL & PUBLIC SAFETY, AND N.C. DEPT. OF HEALTH AND HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21643 (A.G. File No. 10-00672); JANUARY YOUNG, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21644(A.G. File No. 10-00673); EDWARD M. YOUNG, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21645 (A.G. File No. 10-00674); CYNTHIA MUNOZ, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21646 (A.G. File No. 10-00675); ANTHONY YOUNG, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

DECISION AND ORDER, by Stephen T. Gheen, Deputy Commissioner.

Filed: May 01, 2014

This matter was heard by the undersigned on April 9, 2012, September 27, 2012, December 3-6, 2012 and April 29-30, 2013 and May 1, 2013 in Hillsborough, North Carolina. The record closed on December 10, 2013.

A P P E A R A N C E S

Plaintiffs: Charles H. Rabon, Jr. Charlotte, North Carolina; Michael Maggiano, Ft. Lee, New Jersey, appearing. (Facsimile 704-208-4645)

Defendant: North Carolina Department of Justice, Raleigh, North Carolina; Special Deputy Melody R. Hairston, appearing on behalf North Carolina Department Of Crime Control & Public Safety; and North Carolina Department of Justice, Raleigh, North Carolina; Assistant Attorney General John Barkley, appearing on behalf of North Carolina Department of Health and Human Services . (Facsimile 919-716-6759 and 919-716-0124)

The pleadings, Contentions of the parties and the evidence adduced at trial engender the following:

ISSUES

1. In an apparent issue of first impression in North Carolina, what, if any, duty of care is owed by a Trooper of the North Carolina Highway Patrol to the next of kin of a deceased motorist to correctly determine and report the identity of the deceased as a result of the Trooper's investigation of a motor vehicle accident?
2. If a Trooper of the North Carolina Highway Patrol owes a duty of care to the deceased's next of kin, how should the court define the nature and extent of that legal duty?
3. In an apparent issue of first impression in North Carolina, what, if any, duty of care is owed by a North Carolina Medical Examiner to the next of kin of a deceased motorist to correctly determine and report the identity of the deceased as a result the Medical Examiner's investigation following a motor vehicle accident?
4. If a Medical Examiner owes a duty of care to the deceased's next of kin, how should the court define the nature and extent of that legal duty?

5. Did Trooper Steven Hurley (hereinafter “Trooper Hurley”) breach a duty of care to properly identify the remains of Lorraine Young (hereinafter “Young”) as a part of his investigation of a motor vehicle accident on September 15, 2008?

6. Did Medical Examiner Ronald Key (hereinafter “Key”) breach a duty of care to properly identify the remains of Young as a part of his investigation following a motor vehicle accident on September 15, 2008?

7. If not, was Trooper Hurley’s negligence a proximate cause of injury and damage to each Plaintiff for negligent infliction of emotional distress?

8. If Trooper Hurley breached a duty of care and was negligent, was Medical Examiner Key’s negligence, if any, a superseding and intervening cause constituting negligence and an independent proximate cause of injury and damage to each Plaintiff?

9. Conversely, if Key breached a duty of care and was negligent, did Defendant Trooper Hurley’s negligence, if any, join and concur with that negligence and was a proximate cause of injury and damage to each Plaintiff?

10. If not, was Key’s negligence a proximate cause of injury and damage to each Plaintiff for negligent infliction of emotional distress?

11. If either or both Defendants have committed actionable negligence, was the conscious and intentional decision of certain Plaintiffs not to exhume the putative corpse of Young to conduct private scientific tests to conclusively determine the identify of the corpse a failure to mitigate damages and thereby negate consideration of alleged emotional injuries stemming from the remaining uncertainty as to the identity of the body buried as Young?

12. If one or more Plaintiffs are entitled to damages for negligent infliction of emotional distress from either or both Defendants, in what amount has each Plaintiff been damaged?

13. In an apparent issue of first impression in North Carolina, and assuming that the Plaintiffs have proven the elements for an award of punitive damage, does the Industrial Commission have jurisdiction to hear punitive damage claims under N.C. Gen. Stat. § 1D-1, *et. seq.*

14. Is the prevailing party entitled to an award of costs against either or both Defendants?

* * * * *

The following documents were proffered as evidence. Many of the documents are marked as Plaintiff's exhibits, however, the Defendants stipulated to the admission of most documents in the interests of justice and judicial economy. Several documents not stipulated were admitted into evidence after appropriate foundation and relevance had been established by testimony in accordance with the North Carolina Rules of Evidence. A small number of documents were proffered but not stipulated or otherwise admitted into evidence. They are clearly denoted.

Documents admitted into evidence were considered as:

EXHIBITS

A. Stipulated Exhibits

Stipulated Exhibit 0: Pre-trial Agreement.

B. Plaintiffs' Exhibits

Plaintiff's Exhibit 1: Crash Report of accident dated 9/15/2008.

Plaintiff's Exhibit 2: Report of Investigation by Medical Examiner for Lorraine Young.

Plaintiff's Exhibit 3: Report of Investigation by Medical Examiner for Gina Johnson.

Plaintiff's Exhibit 4: Report of Investigation by Medical Examiner for Jessica Gorbey.

Plaintiff's Exhibit 5: Medical Examiner's Certificate of Death of Lorraine Young.

Plaintiff's Exhibit 6: Report of Investigation by Medical Examiner for Lorraine Young (Corrected).

Plaintiff's Exhibit 7: Report of Investigation by Medical Examiner for Gina Johnson (Corrected).

Plaintiff's Exhibit 8: Narrative report by Det. Edward Young dated September 24, 2008.

Plaintiff's Exhibit 9: Supplemental Report by Det. Edward Young dated October 16, 2008.

Plaintiff's Exhibit 10: Photo of crash scene taken by Sgt. Webb.

Plaintiff's Exhibit 11: Photo of crash scene taken by Sgt. Webb.

Plaintiff's Exhibit 12: Photo of crash scene taken by Sgt. Webb.

Plaintiff's Exhibit 13: Photo of crash scene taken by Sgt. Webb.

Plaintiff's Exhibit 14: Photo of crash scene taken by Trooper Hurley.

Plaintiff's Exhibit 15: Photo of crash scene taken by Trooper Hurley.

Plaintiff's Exhibit 16: Photo of crash scene taken by Trooper Hurley.

Plaintiff's Exhibit 17: Photo of crash scene taken by Trooper Hurley.

Plaintiff's Exhibit 18: Photo of crash scene taken by Trooper Hurley.

Plaintiff's Exhibit 19: Photo of Gina Johnson incorrectly identified as Lorraine Young.

Plaintiff's Exhibit 20: Photo of Gina Johnson incorrectly identified as Lorraine Young.

Plaintiff's Exhibit 21: Photo of Gina Johnson incorrectly identified as Lorraine Young.

Plaintiff's Exhibit 22: Photo of Gina Johnson incorrectly identified as Lorraine Young.

Plaintiff's Exhibit 23: Photo of Gina Johnson incorrectly identified as Lorraine Young.

Plaintiff's Exhibit 24: Photo of Jessica Gorbey taken at crematorium in NC.

Plaintiff's Exhibit 25: Photo of Lorraine Young taken by Sgt. Provenzano at Macagna Funeral Home.

Plaintiff's Exhibit 26: Photo of Lorraine Young taken by Sgt. Provenzano at Macagna Funeral Home.

Plaintiff's Exhibit 27: Photo of Lorraine Young taken by Sgt. Provenzano at Macagna Funeral Home.

Plaintiff's Exhibit 28: Photo of Lorraine Young taken by Sgt. Provenzano at Macagna Funeral Home.

Plaintiff's Exhibit 29: Photo of Lorraine Young taken by Sgt. Provenzano at Macagna Funeral Home.

Plaintiff's Exhibit 30: Photo of Lorraine Young taken by Sgt. Provenzano at Macagna Funeral Home.

Plaintiff's Exhibit 31: Photo of Lorraine Young taken by Sgt. Provenzano at Macagna Funeral Home.

Plaintiff's Exhibit 32: Handwritten note found in green pocketbook with the body of Gina Johnson.

Plaintiff's Exhibit 33: Photos of prescription medications found in green pocketbook.

Plaintiff's Exhibit 34: **(Not Admitted)** Julie Wien Narrative Report of Edward Young.

Plaintiff's Exhibit 35: **(Not Admitted)** Julie Wien Narrative Report of January Young.

Plaintiff's Exhibit 36: **(Not Admitted)** Julie Wien Narrative Report of Rosaleen Young.

Plaintiff's Exhibit 37: **(Not Admitted)** Julie Wien Narrative Report of Robert Young.

Plaintiff's Exhibit 38: **(Not Admitted)** Alison Hammonds Narrative Report of Cynthia Munoz.

Plaintiff's Exhibit 39: Young family photograph.

Plaintiff's Exhibit 40: Photo of Loraine Young and siblings

Plaintiff's Exhibit 41: Photo of Lorraine Young with mother, Rosaleen Young.

Plaintiff's Exhibit 42: Contract for services for Lorraine Young, Macagna Funeral Home.

Plaintiff's Exhibit 43: Mausoleum Agreement for Lorraine Young, Madonna Cemetery & Mausoleum.

Plaintiff's Exhibit 44: Funeral and Visitation Notice for Lorraine Young (9/18/2008).

Plaintiff's Exhibit 45: Funeral and Visitation Notice for Lorraine Young (9/20/2008)

Plaintiff's Exhibit 46: North Carolina State Highway Patrol Manual Directive L.1.

Plaintiff's Exhibit 47: North Carolina State Highway Patrol Manual Directive H.1 and H.2.

Plaintiff's Exhibit 48: North Carolina State Highway Patrol Internal Affairs Investigation -- Trooper Steven Hurley.

Plaintiff's Exhibit 49: Copies of Drivers' Licenses of Lorraine Young, Gina Johnson, and Jessica Gorbey.

Plaintiff's Exhibit 50: Two page handwritten note by Ronald Key.

Plaintiff's Exhibit 51: Email chain within the OCME dated September 26, 2008.

Plaintiff's Exhibit 52: OCME Guidelines.

Plaintiff's Exhibit 53: Death Investigation: A Guide for the Scene Investigator, Published by U.S. Dept. of Justice.

Plaintiff's Exhibit 54: CV of Dr. Donald Jason.

Plaintiff's Exhibit 55: CV of Major David Munday.

Plaintiff's Exhibit 56: NC State Highway Patrol Accident Investigation File.

Plaintiff's Exhibit 57: Letter from Dr. Butts, OCME Chief, to Edward Young, dated January 7, 2009.

Plaintiff's Exhibit 58: **(Not Admitted)** North Carolina State Highway Patrol Manual, Directive J.4.

Plaintiff's Exhibit 59: Interrogatory Answers of NC DHHS.

Plaintiff's Exhibit 60: Interrogatory Answers of NC DCCPS.

Plaintiff's Exhibit 61: Guilford County EMS Reports produced to NC DCCPS per subpoena.

Plaintiff's Exhibit 62: Copies of Guilford County EMS Reports contained within Document Production by NC DHHS with handwritten corrections.

Plaintiff's Exhibit 63: Pages of handwritten notes from NC DHHS Document Production marked as Exhibit I and Exhibit J.

Plaintiff's Exhibit 64: Edward Young's letter sent to Office of the Chief Medical Examiner, dated September 26, 2008.

Plaintiff's Exhibit 65: Transcript of deposition of Ronald Key.

Plaintiff's Exhibit 65A: Video deposition of Ronald Key.

Plaintiff's Exhibit 66: NC Highway Patrol Policy Manual revision 17

Plaintiff's Exhibit: 67A: Video deposition of Robert Young.

Plaintiff Exhibit: 68A: Video deposition of Rosaleen G. Young.

Plaintiff's Exhibit 69: Deposition transcript of Lee Cavanaugh.

Plaintiff's Exhibit 69A: Video deposition of Lee Cavanaugh.

Plaintiff's Exhibit 70: Deposition transcript of Dennis Conway.

Plaintiff's Exhibit 70A: Video deposition of Dennis Conway.

Plaintiff's Exhibit 71: Deposition transcript of Joseph M. Cullen.

Plaintiff's Exhibit 71A: Video deposition of Joseph M. Cullen.

Plaintiff's Exhibit 72: Deposition transcript of Brian M. Gill.

Plaintiff's Exhibit 72A: Video deposition of Brian M. Gill.

Plaintiff's Exhibit 73: Deposition transcript of Dr. Julie Wien.

Plaintiff's Exhibit 73A: Video deposition of Dr. Julie Wien.

Plaintiff's Exhibit 73B: Video deposition of Dr. Julie Wien.

Plaintiff's Exhibit 73C: Video deposition of Dr. Julie Wien.

Plaintiff's Exhibit 73D: Video deposition of Dr. Julie Wien.

Plaintiff's Exhibit 74: Deposition transcript of Dr. Alison Prince Hammonds.

Plaintiff's Exhibit 74A: Video deposition of Dr. Alison Prince Hammonds.

Plaintiff's Exhibit: 75: Deposition transcript of Deborah L. Margulies.

Plaintiff's Exhibit 75A: Video deposition of Deborah Margulies.

Plaintiff's Exhibit 76: Deposition transcript of Richard J. Margulies.

Plaintiff's Exhibit 76A: Video deposition of Richard Margules.

Plaintiff's Exhibit 77: Deposition transcript of Michael Onorato.

Plaintiff's Exhibit 77A: Video deposition of Michael Onorato.

Plaintiff's Exhibit 78: Deposition transcript of Raquel Pierro.

Plaintiff's Exhibit 78A: Video deposition of Raquel Pierro.

Plaintiff's Exhibit 79: Deposition transcript of Thomas Provenzano.

Plaintiff's Exhibit 79A: Video deposition of Thomas Provenzano.

Plaintiff's Exhibit 80: Deposition transcript of Sgt. Anthony Webb.

Plaintiff's Exhibit 80A: Video deposition of Sgt. Anthony Webb.

Plaintiff's Exhibit 81A: Video deposition of Trooper Steven Hurley.

Plaintiff's Exhibit 81B: Video deposition of Trooper Steven Hurley.

C. Defendant NC Department of Public Safety's Exhibit

Defendant DPS Exhibit 1: Deposition transcript of Trooper Steven Hurley

D. Defendant Department Health and Human Services' Exhibits

Defendant DHHS Exhibit 1: CV of Dr. David Marks.

Defendant DHHS Exhibit 2: Letter from Dr. Butts to Edward Young dated January 7, 2009.

* * * * *

The parties entered into the following Findings of Fact and Conclusions of Law by:

STIPULATIONS

1. All parties are properly before the court and the court has jurisdiction of the parties and the subject matter.
2. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.
3. Lorraine Young of Lawnside, New Jersey, Jessica Gorbey, of Media, Pennsylvania (hereinafter "Gorbey"), and Gina Johnson, also of Media, Pennsylvania (hereinafter "Johnson"), were three friends who went together on a vacation to Cancun, Mexico, the weekend of September 12-15, 2008. Returning from their trip, the women flew from Cancun to Charlotte on Monday, September 15, 2008, but were unable to continue their connecting flight

home to Philadelphia and therefore decided to rent a vehicle and drive home that night. Their journey that night began by their driving north on Interstate 85.

4. Shortly after 11:00 p.m. that night, when Gorbey was driving and the women were traveling on Interstate 85 through Guilford County, North Carolina, the vehicle left the roadway on the inside median of I-85 and crashed down onto U.S. 29, where it passes underneath I-85 [near Exit 118]. The vehicle crashed into the concrete barrier, overturned, and skidded upside down along the barrier separating the two lanes of U.S. 29 at that point. All three women were killed in the accident.

5. A call was placed to “911,” and numerous agencies responded, including the North Carolina Highway Patrol and Guilford County EMS. The fire in the engine compartment was put down, and the North Carolina Highway Patrol began its accident investigation.

6. The North Carolina Highway Patrol Troopers that were on the scene and participated in the investigation were Sgt. Anthony Webb, Trooper Steven Hurley, Trooper P. J. Mitchell, and Trooper Greg Lunsford. U.S. 29 was shut down in this area for about 4 hours while the accident was investigated and before the scene was cleared.

7. Both Sgt. Webb and Trooper Hurley took photographs at the scene.

8. The investigation of the deaths of Lorraine Young, Jessica Gorbey, and Gina Johnson was determined to be within the jurisdiction of the Guilford County Medical Examiner, pursuant to Chapter 130A, Article 16 of the North Carolina General Statutes. The Medical Examiner on call that night was Ronald Key.

9. Trooper Hurley attempted to identify the bodies of the three victims of the crash by comparing the photographs in the U.S. Passports found in the vehicle with each body after it was extracted from the vehicle and placed on the ground.

10. Information gathered at the scene by a paramedic with Guilford County EMS was given to a woman named "Ginger," who transported the bodies to the morgue at Moses Cone Hospital, for delivery along with the bodies to the Guilford County Medical Examiner.

11. Upon learning of his sister's death, Detective Young contacted Trooper Hurley on the morning of September 16, 2008, to speak about the details of the matter. During that conversation, Trooper Hurley referred Edward Young to the Medical Examiner's Office.

12. Detective Young then called the telephone number for the office of the Guilford County Medical Examiner, but had to leave a message for Key to return his call.

13. Later that morning (on September 16, 2008), Detective Young spoke with Guilford County Medical Examiner Ronald Key about whether or not Detective Young needed to come to North Carolina to identify his sister's body. Key told Edward Young that he did not need to travel to North Carolina to make a positive identification.

14. Key completed the Reports of Investigation By Medical Examiner for each of Lorraine Young, Jessica Gorbey, and Gina Johnson on September 16, 2008. The Reports of Investigation By Medical Examiner completed by Key included the forms that had been initially partially filled out at the scene of the crash by EMS personnel, and were then given by EMS to the body transport service and ultimately sent with the bodies to the morgue.

15. Key did not order and did not conduct an autopsy upon the body of Lorraine Young, or either of the other women killed in the September 15, 2008 crash.

16. The Young family made arrangements with the A.K. Macagna Funeral Home in Cliffside Park, New Jersey, to handle the funeral and burial services for Lorraine Young. A.K. Macagna Funeral Home, in turn, coordinated with the Guilford County Medical Examiner with

regard to the transportation of Lorraine Young's body from Moses Cone Hospital in Greensboro, North Carolina, to New Jersey.

17. Key contacted Michael Onorato, Funeral Director at A.K. Macagna Funeral Home in Cliffside Park, New Jersey, on Tuesday, September 16, 2008, to inform him that the Medical Examiner's investigation as to the death of Lorraine Young would be completed within a day or two, and that Onorato should arrange for the shipment of the body from North Carolina to New Jersey.

18. Onorato, Funeral Director at A.K. Macagna Funeral Home, was later notified by Key that the body of Lorraine Young had been shipped by air transport and would be arriving at Newark airport in New Jersey on a Delta Airlines flight the late afternoon or early evening of September 17, 2008. Employees of A.K. Macagna Funeral Home then picked up the body that had been identified as Lorraine Young and transported the remains to the funeral home.

19. Onorato contacted Detective Young on the afternoon of September 17, 2008, to ask whether he wanted to come to the A. K. Macagna Funeral Home to view the body of his sister, Lorraine Young. Detective Young replied that he did wish to come to the Funeral Home, along with his fiancée, Raquel Pierro, and his sister, Cynthia Munoz, to view the remains. Detective Young, along with his fiancée, Raquel Pierro, and his sister, Cynthia Munoz, went to the A.K. Macagna Funeral Home on the evening of Wednesday, September 17, 2008, to view the body of Lorraine Young.

20. The body that had been released to the A.K. Macagna Funeral Home by Guilford County Medical Examiner Ronald Key was contained within a Delta Airlines human remains shipping container, and was labeled as being the body of Lorraine Young. The body was

contained within the shipping container and was wrapped in a clear plastic liner. Also found within the container (outside of the plastic liner) was a woman's green pocketbook.

21. The body that had been released to the A.K. Macagna Funeral Home by Guilford County Medical Examiner Ronald Key as being the body of Lorraine Young was not Lorraine Young, but in fact was the body of Gina Johnson.

22. Detective Young and Cynthia Munoz then proceeded to inspect the body labeled as Lorraine Young. They saw that all of the paperwork sent with the body, as well as the shipping container, identified those remains as being Lorraine Young. They also saw that contained within the human remains shipping container was a green pocketbook. Within the green pocketbook were three U.S. Passports – which were the passports for Lorraine Young, Gina Johnson and Jessica Gorbey.

23. Detective Young then made numerous phone calls to the Guilford County Medical Examiner Ronald Key to determine what had happened and where his sister's body was. Detective Young was not able to reach Key. Detective Young did reach a nursing supervisor at Moses Cone Hospital and explained the situation, and requested that Key call him as soon as possible.

24. Cynthia Munoz made phone calls to try and reach a family member of Gina Johnson. Munoz was ultimately able to reach Gina Johnson's stepfather, Robert Margulies. Her brother, Detective Young, then spoke with Margulies to explain the circumstances and to ask for his help in locating Lorraine Young's body. Using his cellphone camera, Detective Young took photographs of the body of Gina Johnson and the shipping container. Detective Young emailed a photograph of the body of Gina Johnson to her stepfather, Robert Margulies. Margulies was able to identify the body in the photograph as Gina Johnson.

25. Margulies then provided Detective Young with the name of Brian Gill, an employee of Cavanaugh Funeral Home in Pennsylvania. Cavanaugh Funeral Home had been engaged by the family of Gina Johnson to handle her funeral and burial arrangements. At some point after midnight on September 17, 2008, Detective Young contacted Gill, and in the early morning hours Gill in turn contacted the Forbis & Dick Funeral Home in North Carolina, which had been retained to assist the Cavanaugh Funeral Home in facilitating the cremation of Gina Johnson's body and then to return the remains to Cavanaugh Funeral Home in Pennsylvania.

26. After having been informed of the body misidentifications as to Lorraine Young and Gina Johnson that night, Gill as able to reach an employee of Forbis & Dick and demanded that the cremation of the body thought to be Gina Johnson (but that was in fact the body of Lorraine Young), immediately be halted. This call was made in time, and the body of Lorraine Young was not cremated.

27. Medical Examiner Ronald Key returned Detective Young's call at about 12:00 noon on September 18, 2008, to discuss the misidentification of the bodies of Lorraine Young and Gina Johnson that had occurred in North Carolina.

28. In the afternoon of Friday, September 19, 2008, Detective Young was notified by A.K. Macagna Funeral Home that the body of Lorraine Young had arrived at the funeral home.

29. At around 5 p.m. on the afternoon of September 19, 2008, Detective Young, along with his fiancé, Raquel Pierro, and his sister, Cynthia Munoz, went to the A.K. Macagna Funeral Home to view the body of Lorraine Young. Accompanying them were Sgt. Joe Cullen and Sgt. Thomas Provenzano of the Ft. Lee Police Department.

30. The body that came to the A.K. Macagna Funeral Home on Friday, September 19, 2008, and that was viewed and inspected by the foregoing persons and photographed by Sgt. Provenzano was labeled as the body of Gina Johnson.

31. At some point after he was notified that the bodies to two of the crash victims had been misidentified, Key corrected the Reports of Investigation By Medical Examiner that had been prepared with regard to Lorraine Young and Gina Johnson. The information on the original reports as to the physical characteristics of each body, and the information shown on the Body Diagrams page, was transposed onto a new report for the correct victim.

* * * * *

Considering and weighing all the competent evidence of record, passing upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom, and pursuant to North Carolina Rule of Civil Procedure 52(a), a judgment is rendered on the merits and engenders the following:

FINDINGS OF FACT

1. On the night of September 15, 2008, Young, Johnson, and Gorbey, the sole occupants of the vehicle in which they were travelling, were killed in a violent single car crash where Interstate 85 crosses over US Highway 29 in Guilford County. The vehicle caught fire after the accident.

2. Emergency services responded to the scene, including fire department personnel, Guilford County EMS, and the North Carolina Highway Patrol. Troopers Hurley, P.J. Mitchell, Greg Lunsford and Sgt. Anthony Webb investigated the accident on behalf of the Highway Patrol. Trooper Hurley assumed the primary investigatory role.

3. Trooper Hurley was given three United States passports by a first responder, the passports discovered among the contents of the vehicle. The passports bore the names of Young, Johnson and Gorbey. After the bodies had been removed from the vehicle, Trooper Hurley attempted to identify each of the bodies, one by one, using only the passport photographs.

4. U.S. passports do not have significant other identifying information based upon physical features. For example, passports do not bear information on height and weight.

5. One body was severely burned from the mid-chest upward through the crown of the head. The face was covered in blood and the facial features burned beyond recognition. The remaining two bodies were not significantly burned, but both faces were bruised and bloodied. The features on one of the two remaining bodies were marred to an appreciable degree.

6. There were no streetlights at the scene of the accident, only spotlights erected by the fire departments. In addition, Trooper Hurley used his flashlight while identifying the bodies.

7. Trooper Hurley attempted first to identify Gorbey, then Johnson, and finally Young using only the passport pictures and relying on the process of elimination to identify the severely burned corpse. He also attempted to determine the seating positions of the vehicle occupants.

8. As Trooper Hurley was identifying each victim, he was closely accompanied by a Guilford County EMS worker who recorded Trooper Hurley's identifications. He was aware that the EMS worker was recording his conclusions, and while he may not have known the specific subsequent uses of the information being recorded, the totality of the evidence compels a finding that Trooper Hurley knew the EMS worker was relying on his identifications for EMS's purposes.

9. After examining the facial features of each victim, and comparing them to the U.S. passport photographs, Trooper Hurley believed he had correctly identified the individuals who were involved in the accident. The body Trooper Hurley had identified as Young was not burned.

10. Sergeant Webb, Trooper Hurley's superior who was at the accident scene, testified that he would not have attempted identification with the passports under the circumstances. There is no evidence that he communicated his doubts to Trooper Hurley.

11. Because the occupants were dead at the scene, the Medical Examiner's office was notified of the accident, and a driver arrived to transport the bodies to the morgue at Moses Cone Hospital.

12. Trooper Hurley placed the passports back into the green purse where they had been discovered initially and transferred the purse to the transport operator for use by the Medical Examiner in his investigation. During this process, he noticed that the EMS worker who had recorded his identifications was providing that information to the transport driver.

13. As a consequence, the bodies and bags were tagged with Trooper Hurley's identifications. As a further consequence, the "Report of Investigation by Medical Examiner" (hereinafter "ME Report") for each body was also filled out using Trooper Hurley's identifications.

14. Subsequent to Trooper Hurley's identification, but while the bodies remained at the scene, he was handed drivers' licenses of the three deceased women. He retained the licenses in order to make copies and to make contact with other state police agencies to perform family death notifications.

15. At approximately two o'clock in the morning, on Tuesday, September 16, 2008, while back at his office following the accident, Trooper Hurley noticed in looking at the three licenses that there was a substantial height difference between Johnson, 5'00", and Young, 6'00", and he made a "mental note" of it. Despite momentarily questioning his own identification based on the discrepancies in height, he notified neither the EMS worker nor the person transporting the bodies to the Medical Examiner's office. The licenses were never provided to the Medical Examiner.

16. Trooper Hurley began the process of notifying the victims' next of kin. As part of the standard death notification process, Trooper Hurley contacted appropriate law enforcement in New Jersey, who then in turn notified Young's next of kin. New Jersey law enforcement officers notified Young's brother, Edward Young, of her death at approximately 6:45 a.m. on the morning of September 16, 2008.

17. The New Jersey officers provided Edward Young with Trooper Hurley's phone number which Edward Young called shortly thereafter. Trooper Hurley explained the details of the motor vehicle accident, including the fact that a fire had occurred. Trooper Hurley attempted to answer Edward Young's questions based on the information he had at the time, including the identifications he had made during the course of the accident investigation. Edward Young specifically inquired as to the condition of Young's body to which Trooper Hurley responded, "fine" and that he had been able to identify her by passport.

18. The evidence establishes that Detective Young offered to travel to North Carolina to identify his sister, but Trooper Hurley declined the offer because Young's body had been "positively identified." Trooper Hurley directed Edward Young to Key, who had assumed jurisdiction over the bodies, and gave Detective Young the appropriate telephone number.

Detective Young unsuccessfully attempted to call Key, but left a message requesting a return phone call.

19. Detective Young subsequently notified his siblings of Young's death.

20. Although Key is a Medical Examiner, he is not a pathologist or a medical doctor.

Key, after graduating high school, started working for Moses Cone Hospital in 1971 as a "diener." That job involved such tasks as assisting pathologists by preparing bodies for autopsies, assisting in performing autopsies, and cleaning after autopsies. Key was first appointed as a Medical Examiner by Dr. John Butts.

21. Key returned a call to Detective Young, on a speaker phone with several family members and others, at approximately 9:00 a.m. the same morning. Detective Young's testimony is credible and compelling that Key asserted that while he had completed a preliminary examination, he identified Young's body through the use of her passport, and there was no difficulty in making the identification. He reassured the family that members need not travel to North Carolina to confirm the identification and affirmatively represented that Young's body was suitable for open casket viewing. Key provided other reassuring details: Young's body was the only one that was identifiable, with only a few minor scrapes and cuts; and "the other *two* girls" were severely burned.

22. Key qualified his oral report noting that he needed to conduct examinations beyond his preliminary investigation and would call Detective Young back once those examinations had been completed. Despite the preliminary nature of his report, his identification of Young was not subject to any specific qualification.

23. Key understood at the time of his initial call with Detective Young that the latter was serving a role as the *ad hoc* representative of the family, including his aged mother and father.

24. The compelling weight of the evidence establishes that at the time of his initial telephone call, Key had not independently identified any of the three bodies, and had not used the passports that accompanied the bodies. Subsequent discovery of the purse containing all three passports with the body shipped to New Jersey circumstantially establishes that Key never considered the passport photographs, and his affirmative representations to the contrary were false at the time of his preliminary report. A rudimentary examination of “the other *two* girls” would have revealed that only one of the two bodies was badly burned, the other marginally marred. The circumstantial, but compelling conclusion, is that Key intentionally misrepresented the extent of his “preliminary investigation.” It is more likely than not that he relied on nothing more than the “ME Report,” completed by the individual who transported the bodies from the scene of the accident and that was based on Trooper Hurley’s identification at the scene of the accident.

25. It is undisputed that Trooper Hurley unintentionally misidentified Young’s corpse for that of Johnson.

26. After a thorough investigation, including the interview of ten witnesses, the Highway Patrol concluded that:

Trooper S. D. Hurley, did violate State Highway Patrol Policy Directive H-1, Section VI (Unsatisfactory Job Performance) in that he . . . by his own admission *failed to positively identify victims* involved in a fatal collision in which he was investigating and *failed to take the steps to ensure proper identification* of these victims *which resulted in two of the bodies being shipped to the wrong families.*

27. The overwhelming probative force of the evidence readily supports a finding that had Key, a highly experienced Medical Examiner, simply compared the passports with the bodies in the more pristine conditions for examination permitted in his autopsy room it would have been readily apparent that Trooper Hurley may have misidentified two of the three bodies and that scientific identification of the respective corpses was required. A commonly used dental comparison would most likely have conclusively corrected misidentification of the two bodies by Trooper Hurley. DNA testing was available if dental comparison was not possible.

28. The compelling weight of both direct and circumstantial evidence supports a further finding that had Key actually compared the passports with the bodies within his custody and control as he represented, the misidentification and the need for scientific identification would have been known within hours of Trooper Hurley's conveying the misidentification to Detective Young. As a result, the macabre subsequent events, described hereinafter in these Findings of Fact, leading to the proper identification of the bodies and the emotional trauma resulting from the initial misidentification of the bodies by Trooper Hurley would have been almost entirely avoided.

29. Key's omission is further highlighted by contacts instigated as a result of concerns by Detective Young's superiors who had fellow Fort Lee Detective Sergeant Joseph Cullen contact both Trooper Hurley and Key to confirm that a member or members of the Young family did not need to travel to North Carolina to identify the body of Young. Both Trooper Hurley and Key advised that identification by a family member was not needed.

30. Edward and January Young broke the news of Young's death to her mother and father, Rosaleen and Robert Young. Both parents questioned the condition of Young's body and specifically whether or not they would be able to view her body. Based on the assurances made

by Trooper Hurley and Key, both parents were told that they would be able to view their daughter's body.

31. Detective Young and his siblings then began the process of planning for the visitation, funeral, and burial of their sister.

32. The next morning, September 17, 2008, Key called Detective Young and told him that he had finished his examination and that Young's body was ready for release to the family. Arrangements were made to send the body of Young to Macagna Funeral Home in New Jersey.

33. Funeral home visitations with family were scheduled for the evening of Thursday, September 18, 2008, and the afternoon and evening of Friday, September 19, 2008, with the burial service scheduled for Saturday morning, September 20, 2008. The Young family notified their friends and family members about the arrangements, including family members in Ireland who would be travelling to New Jersey for Young's funeral. The Young family placed formal announcements for these services in the local newspaper as well.

34. Later on Wednesday, September 17, 2008, Edward Young was notified Young's body had been picked up at the airport and that it was on the way back to the funeral home. The funeral service needed a burial outfit and Edward Young was told that he could view his sister's remains. Detective Young, his sister, Cynthia Munoz, and his fiancée at the time, Raquel Pierro, traveled to Macagna Funeral Home. At the funeral home, they were led to a box with a shipping label and information indicating the box contained the body of Young.

35. Upon opening the shipping container, only the corpse's face was viewable, the remainder of the body covered by a sheet within a plastic bag. Both Youngs immediately realized the body was not that of their sister.

36. Macagna's funeral assistant assured the Youngs that the body before them was indeed the body that had been picked up from the airport and suggested Edward Young just was not recognizing his sister's body due to numerous cuts, scrapes and loss of bodily fluids. The Youngs became extremely upset; both continuing to insist the body was not their sister. Detective Young requested that the assistant contact the funeral services' owner, Michael Onorato, which was done.

37. Detective Young and Munoz exposed the body from its protective wrappings. The uncleansed body was impregnated with rocks and glass and fluid covered the legs. Munoz, knowing that she and her sister had the same size shoe, compared one of her shoes to that on the corpse by lifting the corpse's left leg. Upon lifting the leg, it "flopped", presumably because it was severely broken. The unexpected occurrence reduced Munoz to screams.

38. Both Youngs noticed a green purse sticking out from underneath the other foot of the body. The toe of the overriding foot had a toe tag attached that identified the corpse as Young. The Youngs opened the purse and immediately saw three passports, among other items. Detective Young looked at each of the passports and saw that they were the passports of Gorbey, Young, and Johnson. Upon looking at Johnson's passport, Edward Young was immediately able to identify the body before him as Johnson and not Young. Munoz and the funeral home assistant also readily identified the body as that of Johnson.

39. The presence of Johnson's remains sparked the recollection from previous conversations with the families of Gorbey and Johnson that they were cremating the remains of their family members. Now, one of those bodies would probably be Young's. Young's family is Catholic and fervently opposed to cremation of human remains.

40. Munoz experienced heart palpitations accompanied with difficulty in breathing. Edward Young responded by calling Key's office in an attempt to halt Young's cremation. Unable to reach Key, he left a message explaining the emergency situation.

41. Hoping that perhaps somehow his sister might actually still be alive, Edward Young called her cell phone. He received no answer.

42. Edward Young and Munoz called Johnson's parents, who were in the middle of a service for Johnson. Johnson's step-father, Richard Margulies, confirmed that Johnson's family had directed that her body be cremated earlier that day and Margulies assumed the cremation was complete.

43. Munoz asked Margulies if Johnson had any tattoos or birthmarks, the latter reporting a large birthmark on her back. Edward Young and Munoz frantically lifted and turned the body to discover the birthmark. Edward Young photographed the birth mark and transmitted it by cell phone to Margulies who positively identified the mark as Johnson's.

44. Margulies then provided Edward Young with the name of the funeral service that Johnson's family had hired for the cremation, Cavanaugh Funeral Home in Pennsylvania. A conversation with an employee of Cavanaugh Funeral Home revealed that a funeral service in North Carolina had been subcontracted to perform Johnson's cremation.

45. Edward Young and Munoz experienced extreme anxiety and panic as efforts to stop the cremation became more protracted.

46. Edward Young placed another call to reach Key without success. He then contacted the Gorbey family and explained the possibility that the body they had ordered to have cremated was actually Young's. By fortuity, the same funeral service performing Johnson's cremation had been employed. Edward Young's call to the crematorium inquiring about

Gorbey's disposition did not generate any affirmative information but did invoke a promise to attempt to hold the cremation if it had not been performed. To fulfil that promise, the employee who lived an hour or two away from the crematorium, drove to the facility in the middle of the night because no one at the crematorium was answering the phone.

47. During this period, news of Young's misidentification traveled throughout the rest of the siblings.

48. January Young became sick to her stomach and started vomiting after receiving her call, and she paced around throughout the night. Anthony Young credibly recounts that he could hear Edward Young screaming in the background of the call he received and described his brother as in "utter hysteria."

49. Anthony's initial response was shock and then panic. Cynthia Munoz graphically describes Anthony Young as "flipping out," and pacing back and forth for an hour after the call. Anthony's wife gave him something to relax, and he finally fell asleep. At four o'clock in the morning on Thursday, September 18, 2008, Anthony's wife who was due to give birth to their first child, awakened him saying that she was in labor and needed to go to the hospital. Anthony testified that he took his wife to the hospital. His preoccupation with the effort to find Young's body and the outward expression of his mental state resulted in his wife asking him to leave the delivery room.

50. The crematorium informed Detective Young in the early morning hours of Thursday, September 18, 2008 that a body labeled as Gorbey was found prior to cremation. The remains were not burned. A picture was taken and sent to Detective Young. He was able to clearly identify the body in the emailed picture as that of Gorbey.

51. Detective Young requested that the body tagged as Johnson be located. The body was scheduled for cremation but the employee could not transmit a picture of the body because it was not under his jurisdiction. He could not promise that he could stop the cremation.

52. Detective Young was told that the body was badly burned.

53. At around four o'clock in the morning on Thursday, September 18, 2008, Key called Detective Young. He stated that he had "put an administrative hold on all three girls" to stop the cremations.

54. Detective Young questioned Key to explain how the transposition of bodies had occurred. Key specifically acknowledged that he had not seen any passports. He responded that he had used the ME Report which had accompanied the body and the toe tags to identify the corpse. Detective Young's testimony is credible and convincing, and Key's explanation more likely than not represents the true state of the facts leading to the incorrect transposition of the bodies. Key's own statements support a finding that the green handbag containing the passports accompanied the bodies to the morgue, but were not referenced by Key. As a result, the purse simply continued on with Johnson's mislabeled body to New Jersey with all three passports. The presence of all three passports circumstantially supports Young's account of his conversation with Key as logic and common sense compel a finding that had Key referenced the passports they would have been divided between the shipping containers to be returned to the respective family of each deceased.

55. Detective Young emphasized to Key that the family scheduled a wake for seven o'clock p.m. that night, and that family members were arriving from Ireland. Key promised that he would do what he could when he arrived at his office at approximately nine o'clock a.m.

Detective Young insisted he receive a return call later that morning as soon as Key returned to work.

56. Key's observation that Detective Young had correctly identified the bodies by questioning family members and exchanging photographs of tattoos over the internet is correct. The fact that Detective Young had been able to do so reinforces a previous Finding of Fact that Key made no independent inspection designed to identify the bodies within his care and strongly supports the previous Finding of Fact that even a cursory attempt to identify the bodies would have likely disclosed Trooper Hurley's error.

57. Detective Young did not receive a return call and he had to repeat a call to Key. The later reported that he was working on a "high priority" examination, not Young's identification. Key encouraged Young to contact the respective funeral directors and have them exchange the bodies since Detective Young had derived a proper identification of the bodies.

58. Detective Young demanded that Key examine the bodies and made a positive identification. Key agreed to call for Young's body to be returned back to his office for an examination.

59. By Thursday afternoon, September 18, 2008, Johnson's body, misidentified and mislabeled as that of Young, remained in New Jersey.

60. In the afternoon, Detective Young received a return call from Trooper Hurley. During the call, Hurley realized that Young was six feet tall, a fact confirmed by Detective Young. Trooper Hurley commented that he had seen that information on Young's driver's license and that Johnson was five feet tall. He regretted not having given that information to anyone.

61. Trooper Hurley also acknowledged that he knew in looking at the height discrepancy between Johnson and Young that he had likely made a mistake in the identification but that he thought that the Medical Examiner would correct the mistake. Trooper Hurley also told Detective Young, "If you want to blame anyone, you can blame me."

62. Around six o'clock Thursday night, September 18, 2008, Key called and informed Detective Young that he finished his investigation and examination of Young's body, which could now be released. Detective Young specifically asked if the Medical Examiner conducted an examination of the body. Key responded affirmatively.

63. Defendant DHHS now stipulates that Key never examined Young. Instead, he called and directed the funeral director holding Young's burned remains to contact the Margulies' funeral director and exchange the remains. This is exactly the course of action that Key encouraged Detective Young to undertake before the former was rebuffed with a demand that Young's body be positively identified.

64. In sworn responses to discovery interrogatories in this case, Defendant DHHS responded that "Ronald Key reexamined the bodies using additional information provided by . . . Young and corrected the identification of the bodies." That statement was patently false when made. Key's deception was not discovered until 2011 during the preparation for trial in this civil action.

65. Due to the misidentification and delivery of the wrong body, the Young family was unable to conduct the planned wake Thursday night. Family members from Ireland had already arrived, and Detective Young had to tell his elderly parents that there had been a delay. Young's father, Robert Young, did not understand why there had been a delay and repeatedly

questioned it. The evidence is particularly compelling that the father was emotionally distraught because Edward Young had assured him he could view his daughter.

66. Later on Thursday night, September 18, 2008, Robert Young went to Macagna Funeral Home to view Young's body. He drove his motorized chair some five miles. Edward Young went to the funeral home and made excuses to keep his father from attempting to view Young's remains.

67. Edward Young described his mother, Rosaleen Young, as "frantic." She too was emotionally distraught at not being able to view her daughter. She had specifically questioned Edward Young, "Is she okay? Am I going to be able to see her?"

68. The decision to keep Young's parents initially protected from the true state of the facts regarding misidentification and condition of Young's remains was a family decision conceived to protect these senior citizens who are in declining health throughout the time frame of events relevant to this civil action.

69. Anthony Young's distress is exemplified by occurrences on Friday, September 19, 2008. He is described as distraught, particularly as he received a "constant barrage of phone calls" from family members and friends who were at the funeral home trying to attend the first scheduled visitation that was cancelled. The evidence also supports a finding that Anthony Young, now a new father, was forced to go over the same story over and over to explain the altered funeral plans. Anthony's emotional state is best framed by his call to Cynthia Munoz asking her to take over responsibility for answering all of the questions because "I can't handle this."

70. On Friday, September 19, 2008, Detective Young was contacted by Kevin Gerity and Pat Barnes, both of whom are Autopsy Facility Managers within the Office of the Chief

Medical Examiner. Detective Young provided Gerity and Barnes with all of the details of their interactions with Key, particularly the experience in obtaining a proper examination to correct the mistake in identification.

71. Later on Friday, Detective Young was informed that Young's body had arrived in New Jersey. Accompanied by Munoz, he went to the funeral home to view the remains. Although the name "Lorraine Young" was written on the outside of the transport container, the body inside was still mislabeled as "Gina Johnson." The body itself, in addition to being badly burned, had not been cleaned at all. Rocks and glass were embedded in the skin and the body was stained, dirty with soot and ash, and horribly charred. Detective Young could not identify any of his sister's facial features because the face had been completely burned away.

72. Edward Young and Munoz frantically inspected the corpse, trying to find some sign confirming that this corpse was their sister's body. Munoz located a recently crafted tattoo thought to be consistent with Young's, although she did not know its exact appearance. A jewelry bag that came with the body contained toe rings consistent with those worn by Young. Another bag with the body contained a watch, which was charred practically beyond recognition, but it was consistent with Young's practice of wearing a watch.

73. Based on the tattoo, the personal accessories and Key's putative physical examination, Edward Young and Munoz believed the remains before them were Young's. Based on these beliefs, they did not seek any further independent verification as to the body's identity.

74. Because of the condition of Young's body, the funeral home determined that an open casket wake and funeral services would be impossible as had been planned, and so both were conducted with a closed casket.

75. The Young family was unable to conduct the wake services as planned on Friday, September 19, 2008. The wake services were moved to Saturday night and Sunday afternoon and evening, with the funeral on Monday. The “viewing” on Saturday night was with a closed casket and shattered the expectation that Key had created that they would be able to view their sister’s body one last time.

76. Many of the close family members who had flown over from Ireland had to return before the funeral because of flight schedules.

77. Throughout the wake, Young’s mother and father continually questioned Edward Young about what had happened and why there was a closed casket.

78. The evidence also compels a finding that the grieving process was disrupted for the other Plaintiffs as a result of the misidentification and mishandling of Young’s body.

79. In addition to their own testimony regarding the substantial and detrimental effects the misidentification has had on them and on each other, Plaintiffs presented testimony of therapists Julie Wien and Alison Hammonds.

80. The Defendant DHHS countered the evidence from Wien and Hammonds with the testimony of Dr. David Marks, who was qualified as an expert witness in the field of psychiatry for the Defendant DHHS. He conducted a “records review” of each Plaintiff’s alleged medical condition.

81. Dr. Marks conducted a review of the mental health records of the Plaintiffs, their depositions, interrogatories, letters written by the therapists in the case, and other preexisting medical records for the Plaintiffs, to evaluate whether there was support for the diagnoses made by their respective providers. His review is limited to determine whether there was support for the diagnoses given by various mental health providers.

82. For the purposes of the remaining Findings of Fact related to alleged psychological damages of the Plaintiffs, Findings from treating health care providers are set out seriatim followed by Dr. Marks' record evaluation.

83. Edward Young sought counseling from therapist Julie Wien, to help him regarding his emotional distress from the misidentification starting in early 2009. Edward projected that his engagement was terminated because he became distant and constantly angered of what happened to his sister's body. He expressed a loss of interest in his work, with decline in rate of arrests as an undercover narcotics detective. Even though he told his parents, after the funeral, about the misidentification of Lorraine's body, Edward still has to deal with their questions regarding what happened to her body.

84. Wien diagnosed Edward with post-traumatic stress disorder (PTSD) and recurrent severe depression as a result of the trauma he experienced involving the misidentification of Young's body.

85. Dr. Marks' review partially supports Edward Young's diagnosis of PTSD, including flashbacks and vomiting and heart palpitations when confronted with reminders of events in the morgue. He finds no support for diagnosis of an obsessive compulsive disorder (OCD) as he concludes that the behaviors supporting Wien's diagnosis are actually attributable to grief, not OCD. The totality of Dr. Marks' expert opinion reinforces the intricate intersection of normal symptoms of grief and bereavement with symptoms of PTSD. In its Contentions filed in this case, Defendant DHHS avers that "DHHS still denies an underlying duty to provide the grounds for a finding of negligence on the part of Key. However, if liability is found on that count, DHHS accepts Dr. Marks' findings as to Edward Young.

86. Moreover, Wien's credible opinions compel at least a finding that Edward Young's suffers from PTSD: exemplified by constant anger, continual negative remembrances and depression. These are severe conditions with likely permanent consequences.

87. Munoz avoids visiting her sister's burial site because whenever she thinks about her sister she sees Johnson's corpse. She continues to answer repeated questions from her parents as to what happened to Young. Upon seeing television coverage regarding the devastating 2010 earthquake in Haiti where there were "pictures in the background of fire and people . . . searching for people," Cynthia experienced a panic attack with trouble breathing.

88. Munoz received treatment from therapist Alison Hammonds, with some forty-five sessions over seventeen months. Hammonds diagnosed Munoz with an anxiety disorder, PTSD, and depression. Hammonds bases Munoz' disorder on her encounter with the body of Johnson, the stress associated with her sister's potential cremation, and from seeing the burned body of her sister.

89. Dr. Marks concludes that Munoz' diagnoses of PTSD and major depression are not supported in the records. He attributes her psychological symptoms to internal family dynamics unleashed by Young's untimely and horrific death, grief and bereavement and anger over the misidentification. Yet, Dr. Marks allows that in or about January, 2010, Cynthia Munoz demonstrates some symptoms that would qualify as trauma. Her reported "flashbacks" while watching the coverage of the earthquake in Haiti are long delayed and described as atypical, but he does not exclude the possibility that they support Hammonds' diagnoses. In particular, Dr. Marks concedes that a diagnosis of depression may be supported even though he believes that it is more likely that it is triggered by bereavement.

90. While Dr. Marks' testimony credibly supports a finding that some of Munoz' behaviors are related to normal grief and bereavement of a loved one, the probative weight of the evidence, especially the measured opinions of Hammonds, supports a finding that Munoz suffers from depression and PTSD stemming from Key's negligence. These conditions are severe with appreciable permanent consequences.

91. January Young generally reports depression that includes nightmares about the experiences of Edward Young and Munoz at the morgue and the misidentification of Young's body in Greensboro. She recounts an incident while working at the Jewish Home Assisted Living Home in River Vale, New Jersey, as a chef. After Young's misidentification had occurred, January Young suffered second degree burns on her leg after she became distracted by the thought of her sister going into a crematorium. She contends that she was subsequently terminated because she could not, in the eyes of her supervisor, adequately perform her job duties due to the effect the mishandling of her sister's body had on her. January Young also reports she cannot stay for long periods at her sister's burial site because she does not believe that her sister is interred there.

92. January Young, after her sister's burial, also sought treatment from Wien. Wien referred her to a psychiatrist for medication and diagnosed PTSD, obsessive compulsive disorder, and major depression. Wien opines that January Young's conditions are permanent in nature.

93. As to January Young, Dr. Marks carefully analyzed the "flashbacks" which were a factor in the diagnosis of her PTSD. He concludes that as she was not at the scene of the accident that "flashbacks" back to Young's burning car are not "flashbacks" that are associated with PTSD, which are flashbacks related to events a person actually experiences. Based upon

the same reasoning, Dr. Marks opines that the incident leading to her injury and the loss of her job is not related to PTSD flashbacks. He believes the injury was not a “flashback” but being upset because her employer made her take down pictures of Young, which made her think about her loss and she “spaced out.” He also rules out OCD because the activities of looking at Young’s Facebook page are more of an issue of grief for a sister that she loved and idealized. He also believes that her concern about her aging parents, who are not in good health, attributes to her depression.

94. Dr. Marks opines that he would not be surprised if January Young had major depression, but he does not believe that depression would be related to Young’s misidentification. He attributes significant stress from family strife and from her elderly, ailing parents’ health as contributing to her overall mental state. He concluded that there is no support for PTSD, OCD, major depression and other diagnoses.

95. Wien adroitly observes that the clinical notes can be “misleading” and notes do not paint the “full picture” of the Plaintiffs and the bases for her diagnoses. January Young’s testimony was credible and compelling. Given the impact of her testimony, coupled with Wien’s diagnosis based on actual treatment, the greater weight of the evidence supports a finding that January Young at least suffers from depression that is attributable in part to Key’s negligence.

96. Anthony Young wanted to be present to support his wife and coach her for the birth of their first child, who was born on Thursday, September 18, 2008. Because of the circumstances of the misidentification of his sister’s body and the effect that this event had on him, Anthony was unable to do so. Young does not believe that the second body that came back and is interred in the mausoleum is his sister. He sought the help of a psychiatrist, but he did not think it helped him deal with these issues.

97. Dr. Marks notes that Anthony Young only went to three therapy sessions and spent very little time in the sessions discussing Young's death or the misidentification of her body. There was no expert testimony to establish that Anthony suffered severe emotional distress and no diagnosis by a mental health professional of any condition constituting severe emotional distress. Young's own testimony shows stress due to the death of his sister at the same time his wife was giving birth to his child; however, his testimony does not establish a basis for severe emotional distress related to Key's misidentification.

98. Rosaleen Young sought the counsel of Wien. Wien diagnosed PTSD and major depression. She expresses significant emotional upset because her daughter could not have an open casket and generally refuses to accept that Young's body has come back to New Jersey. Because of this, she does not go to the mausoleum where her daughter is interred. Her testimony reveals that she "question[s] everything" and has "no closure."

99. Dr. Marks opines that Rosaleen Young's diagnosis of PTSD is not supported in the records. She has a preexisting condition of depression that was certainly deepened by the death of her daughter. He clearly notes that Rosaleen Young has substantial grief at the death of her daughter, and she was very affected by having to have a closed casket. But, Dr. Marks finds no primary criterion are met here for the diagnosis of PTSD or major depressive disorder, but the evidence indicates profound loss related to the death of her daughter in a horrible way.

100. Robert Young also sought treatment from Wien due to the events that transpired with his daughter's body. Robert Young is not certain that his daughter is in the mausoleum. He cannot "get over" what happened to his daughter's body. Wien diagnosed Robert with PTSD and recurrent severe major depression. Wien's opinion is these conditions are permanent.

101. Dr. Marks finds no record support for an ongoing severe psychological condition with Robert Young. He expressed anger at being "lied" to but discontinued his therapy after a few sessions. Anger over being "lied to" is understandable but does not equal severe emotional distress. Dr. Mark finds no primary criterion for a diagnosis of PTSD.

102. Lingering doubts about the true identity of the remains interred is shared by some of the family members. There is disagreement among the family as to whether to exhume the body to independently verify if it is the body of Lorraine Young. The main reason the family has not chosen to exhume her body is out of concern for her parents, Robert and Rosaleen Young, their advanced age and fragile health, and how they would be affected if the body in the vault proved not to be Young's.

* * * * *

The foregoing Stipulations and Findings of Fact engender the following:

CONCLUSIONS OF LAW

A. Jurisdiction and Predicate Legal Standards

1. Plaintiffs filed this action pursuant to N.C. Gen. Stat. § 143-291, *et seq.*, "the Tort Claims Act," (hereinafter "Act") which permits suit against State departments or agencies for injuries caused by the negligence of State employees.

2. Plaintiffs' claims against the Department of Crime Control & Public Safety and the North Carolina Department of Health and Human Services, two State agencies, appear to raise issues of first impression in North Carolina as to the legal duty, if any, of a Highway Patrolman in making the identification of persons killed in traffic accidents upon the highways of this State and the nature and scope of the legal duty of a State Medical Examiner in identifying

such bodies. The State agencies here are amendable to civil action only as is provided in the Act. N.C. Gen. Stat. § 143-291.

3. Negligence under the Act is determined by the same rules that are applicable to private parties. *Bolkhir v. N.C. State University*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Under current law, the State is liable for negligent omissions, as well as negligent actions. *Phillips v. N.C. Dept. of Transportation*, 80 N.C. App. 135, 136–37, 341 S.E.2d 339, 340–41 (1986)(excellent history of Act’s coverage of negligent omissions.)

4. To establish actionable negligence under the Act, Plaintiffs must show that one or both employees of Defendants (a) failed to exercise due care in the performance of some legal duty owed to Plaintiffs under the circumstances; and (b) the negligent breach of such duty was the proximate cause of the injury. *Turner v. North Carolina Dept. of Transp.*, ___ N.C. App. ___, 733 S.E.2d 871, *review denied*, 366 N.C. 418, ___ S.E.2d ___ (2012).

5. Plaintiffs have the burden of proof. *Griffis v. Lazarovich*, 161 N.C. App. 434, 443, 588 S.E.2d 918, 924 (2003) (Negligence is not presumed from the “mere happening” of an accident).

B. Duty of Care Generally

6. Whether either Defendant owes Plaintiffs a duty of care is a question of law. *See Pinnix v. Toomey*, 242 N.C. 358, 87 S.E.2d 893 (1955). Where the duty, if any, has not previously been defined by the appellate courts of this State, established principles of tort law in our State are applied to the facts in the instant case and those principles are authoritative and control. *Pinnix*, 242 N.C. at 362, 87 S.E.2d at 897.

7. A duty may arise by statute, or other regulations or guidelines. *Pinnix*, 242 at 362, 87 S.E.2d at 898 (citations omitted); *Mosteller v. Duke Energy Corp.*, 207 N.C. App. 1, 698 S.E.2d 424 (2010).

8. In addition, a duty “may arise by operation of law under application of the basic rule of common law which imposes on every person engaged in the prosecution of *any undertaking* an obligation to use due care, or to so govern his actions as not to endanger the person or property of others.” *Pinnix*, 242 N.C. at 362, 87 S.E.2d at 898 (emphasis added); *see also Toone v. Adams*, 262 N.C. 403, 409, 137 S.E.2d 132, 136 (1964) (“The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm and a violation of that duty is negligence.”); *Jacobsen v. McMillan*, 124 N.C. App. 128, 132, 476 S.E.2d 368, 370 (1996) (“one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care.”)

9. North Carolina has “consistently recognized” that even a voluntary undertaking, or assumption of duty, creates a duty of care. *Davidson v. Univ. of North Carolina at Chapel Hill*, 142 N.C. App. 544, 558, 543 S.E.2d 920, 929 (2001).

10. North Carolina law, however, imposes no actionable duty unless the injury to the plaintiff was foreseeable and avoidable through due care. Whether a plaintiff's injuries are foreseeable depends on the facts of the particular case. *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 505 S.E.2d 131 (1998).

C. Duty: Trooper Hurley

11. In motor vehicle accidents where victims are either hospitalized or dead, N.C. Gen. Stat. § 90-603 imposes the following duty upon Highway Patrolmen:

A State or local law enforcement officer shall make a reasonable effort to notify the next of kin of an accident-trauma victim if the individual is hospitalized or dead. Whenever possible, the notification should be delivered in person and without delay after ensuring positive identification. If appropriate under the circumstances, the notification may be given by telephone in accordance with State and local law enforcement departmental policies. In addition to the notification of next of kin made by law enforcement personnel, other emergency rescue or hospital personnel may contact the next of kin, or the nearest organ procurement organization, in order to expedite decision making with regard to potential organ and tissue recovery.

The proscription that a Highway Patrolman “shall make a reasonable effort” to report a death “after ensuring positive identification” is clear and unambiguous as to the importance of notice to next of kin only when capable of reporting correct identification information. *Pinnix*, 242 at 362, 87 S.E.2d at 898 (citations omitted); *Mosteller*, 207 N.C. App. at 1, 698 S.E.2d at 424.

12. The policies governing a Highway Patrolman’s duties under the statute are contained in the Highway Patrol Manual. The Highway Patrol administratively mandates that Troopers “use extreme caution in notifying relatives or in releasing names of deceased persons before positive identification of the deceased person is made.” The appellate courts of this State have relied on The Highway Patrol Manual to establish standards that create a duty of care. *Estate of Curran v. N.C. Dept. of Crime Control & Public Safety*, 195 N.C. App. 130, 672 S.E.2d 102 (2009) (Patrolman’s use of stop sticks evaluated in context of standards set by Highway Patrol Manual.)

13. The duty created by Highway Patrol administrative policies are entirely consistent with the common law of this State that creating a duty of reasonable care when an individual acts, and the individual will be held liable for injuries proximately caused by failure to use such care. *E.g., Jacobsen v. McMillan*, 124 N.C. App. at 128, 476 S.E.2d at 368.

D. Duty of Medical Examiner Key

14. Key's duty to make a positive identification and release the body to the next of kin is statutorily derived. N.C. Gen. Stat. §130A-383(c)(emphasis added) mandates: "Upon completion of the investigation and in accordance with the rules of the Commission, the medical examiner *shall release the body to the next of kin* or other interested person who will assume responsibility for final disposition." In order to release the body to the next of kin, the Medical Examiner has to correctly determine both the identity of the decedent and the decedent's next of kin. N.C. Gen. Stat. § 143-291.

15. The statutory provisions governing the Medical Examiner's responsibility to release the body to next of kin is consistent with the case law of this State expressed in *Dumouchelle v. Duke University*, 69 N.C. App. 471, 317 S.E.2d 200 (1984), where the court held that as a general rule, the next of kin have the right to possess decedent's body for the purpose of burial. The *Dumouchelle* court's rationale that next of kin are entitled to the corpse logically requires application of the common law of this State creating a duty of reasonable care when a Medical Examiner charged with delivery of those remains acts, and a Medical Examiner will be held liable for injuries proximately caused by failure to use such care. *E.g., Jacobsen v. McMillan*, 124 N.C. App. at 128, 476 S.E.2d at 368.

16. Dr. Donald Richard Jason and Dr. John Butts, both Medical Examiners, opined that a Medical Examiner in the State of North Carolina has a legal duty to make positive identification of a body and release the body to the next of kin. Key admitted that he had a duty to make a positive identification of the body of Young and to release her body to her next of kin. N.C. Gen. Stat. § 130A-383(c).

17. Persuasive authority that a legal duty of care is appropriate in this present civil action is found in law of the Commonwealth of Massachusetts. That State has a statute

similarly requiring delivery of human remains to next of kin and the courts of that State have held that such laws dictating that the Medical Examiner release a body to the “next of kin” creates a duty to properly identify that body. *LeBlanc v. Commonwealth*, 75 Mass. App. Ct. 419, 422, 914 N.E.2d 937, 939 (2009), *aff’d*, 457 Mass. 94, 927 N.E.2d 1017 (2010) (“It is implicit in that duty [to release the body to the next of kin] that there is a duty to properly identify the body.”).

E. Breach of Duty: Trooper Hurley

18. North Carolina law rightfully imposes a legal duty upon North Carolina Highway Patrol Troopers to exercise reasonable care in the release of the identity of a deceased individual and injury to plaintiffs may be foreseeable as determined under the facts of each case. Plaintiff must prove a breach of that duty by the greater weight of the evidence and that Plaintiffs were damaged within the meaning of law. *E. g., Kientz v. Carlton*, 245 N.C. 236, 96 S.E.2d 14 (1957).

19. Ordinarily, a defendant's negligence may not be inferred from the mere fact of an occurrence which injures a plaintiff. On the contrary, in the absence of evidence on the subject, freedom from negligence will be presumed. *E.g., Kekelis v. Whittin Mach. Works*, 273 N.C. 439, 160 S.E.2d 320 (1968).

20. Plaintiffs advance several theories denoting Trooper Hurley’s breach of the duty of care imposed. The first theory is that Trooper Hurley was negligent in attempting to use the three passport photographs found at the accident scene to make the identifications under the artificial lighting conditions in darkness when one body, later correctly identified as Young’s, was burned beyond recognition. Plaintiffs support their position with the testimony of senior Troopers who were on the scene of the accident that they would not have attempted identification under the physical conditions at the scene; nighttime with suboptimal lighting

conditions and one badly burned corpse. While Troopers more senior to Trooper Hurley testified that they would not have attempted identification of the bodies given the circumstances, there is no evidence that anyone of these officers expressed their concerns to Trooper Hurley at the accident scene. Trooper Hurley used a systematic approach attempting to identify the bodies. He compared each passport to the two cognizable bodies aided by the emergency lighting present and employing his personal flashlight. As he made the identifications, an EMS worker followed him. There is no evidence that the trailing EMS worker expressed any reservations with his identifications. Given the totality of the circumstances surrounding the identifications, Trooper Hurley's actions demonstrate a mindset and implementation of procedures denoting the exercise of care and responsibility in undertaking his duty to identify the bodies. Trooper Hurley's attempt at identification, although later proved as incorrect, was not, in itself, unreasonable and his systematic attempt at identification was reasonable under the circumstances. *Kekelis*, 273 N.C. at 439, 160 S.E.2d at 320.

21. Plaintiffs further contend that Trooper Hurley was negligent because he came into possession of three drivers' licenses after identifying the bodies with passport photographs and before the bodies were removed from the accident scene, but he failed to forward these licenses to or advise Key of their existence. The drivers' licenses contained appreciably more identifying information than the passport pictures upon which identification can be made. Upon returning to his duty station, and before his telephone conversation with Detective Young, he specifically noted a distinct height difference between Young and Johnson. He made a "mental note" of the difference and questioned his identification, but failed to notify Key of his "mental note" or to report his subsequent observation to his ranking supervisor. Trooper Hurley's testimony is both credible and compelling that despite his mental note that the height difference

raised a question as to the correctness of his identification, he maintained a belief that his original identification was correct. In perfect hindsight, Trooper Hurley's failure to explore his mental note appears as an appreciable lost opportunity to correct the misidentification and misinformation transmitted to others. From the view point of circumstances at the time Trooper Hurley formed a "mental note," the events that later transpired were not reasonably foreseeable. Specifically, Trooper Hurley cannot be held to have anticipated Key's complete abrogation of his duties. The law of North Carolina only requires a reasonable prevision, and a defendant is not required to foresee events that are merely possible but only those which are reasonably foreseeable. N.C. Gen. Stat. § 143-291; *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972).

F. Breach of Duty: Medical Examiner Key

22. Key's inexplicable conduct throughout the incidents leading to this civil action constitutes a breach of his duty of care in the following respects:

- a. He failed to conduct any meaningful independent examination of the bodies presented to him. He did not use the passports transmitted with the bodies to identify the respective remains. Instead, the direct and circumstantial evidence establishes that Key abdicated his responsibility to identify the bodies, relying solely on the identifications made at the accident scene without understanding what impediments to identification; both natural and human, may have influenced the identification process.
- b. Key failed to inspect the contents of the purse accompanying the bodies, which contained the passports. Dr. Butts' testimony and common logic are compelling that Key should have located the passports. It is reasonable to anticipate that an inspection of the passports would have revealed Trooper Hurley's misidentification of Johnson, calling all of Trooper Hurley's identifications into question requiring more certain identification of the bodies.

- c. With one body before him burned beyond visual identification, the failure to reference the passports is a core violation of the duty of care owed.
- d. Even after informing Detective Young that he had completed only a “preliminary” investigation but would complete a more comprehensive investigation, Key undertook no meaningful effort to perform any further examination or to utilize the passports that accompanied the bodies.

23. Dr. Jason’s competent, probative and compelling opinion that Key’s conduct fell “well below the standards for a Medical examiner in North Carolina” further supports a conclusion that Key breached his duty to identify the body of Young and release her body to her next of kin. N.C. Gen. Stat. 143-291.

24. Plaintiffs contend more specifically that Key had a duty to go to the accident scene and his failure to do so is negligence. This alleged duty is fashioned on Dr. Jason’ opinion that a prudent and reasonable Medical Examiner would “have gone to the scene and taken charge of the bodies” when notified that there had been a crash with multiple fatalities and a fire. N.C. Gen. Stat. §130A-383(c) and the administrative regulations implementing the statutory schema imposes no such duty, and this court declines to impose such prophylactic duties. Key admitted that following this incident he changed his policy to go to accident scenes when there is more than one victim, but his change of policy is a subsequent remedial measure that is excluded from consideration in determining negligence. N.C. Gen. Stat. § 8C-1, Rule 407 (“[M]easures . . . taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.”) The fact that Detective Young and Munoz correctly identified the bodies from photographs transmitted to them over the internet demonstrates the fact that imposition of such a duty is not always necessary. The bedrock of the law of negligence is reasonable conduct under

the individualized facts of every case. One can envision circumstances under which a reasonable Medical Examiner must attend the scene of a death and instances where a reasonableness standard does not require attendance. The formulation of the legal standard applied to a Medical Examiner should be the same as applied to all individuals, namely, actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions, nothing more. *Stoganik ex rel. Estate of Woodring v. R.E.A.C.H of Jackson County, Inc.*, 193 N.C. App. 585, 688 S.E.2d 786 (2008), *review denied*, 363 N.C. 380, 680 S.E.2d 711 (2009).

25. Additionally, Plaintiff's evidence supports a conclusion that Key breached a duty of reasonable care in failing to confirm Trooper Hurley's identification. Dr. Jason's expert opinion is compelling that Medical Examiner Key, knowing that one of the bodies was burned beyond recognition, should have contacted Trooper Hurley to determine how the latter made the identifications on scene. At the time that the bodies first came before Key, and without having located the passports accompanying the bodies, he could not have known how the bodies had been identified. If Key was to rely on the identifications performed in the field by Trooper Hurley, rather than his own independent judgment, a reasonable standard of care dictated that he at least understand the basis for the identifications and exercise his judgment to determine the propriety of accepting those identifications. N.C. Gen. Stat. § 143-291.

26. Plaintiff appears to contend that given the condition of Young's body, Key should have sought the assistance of the Office of the Chief Medical Examiner and transported Young's body to Chapel Hill to identify her body from her dental records or other methods. Dr. Jason testified some scientific method of identification of Young's body was necessary and that a dental identification of Young's body was the method that should have been attempted first.

Dr. Butts testified that dental record identification is a procedure the Office of the Chief Medical Examiner does on a regular basis. The duty advocated does not require resolution under the facts of this case because Key's negligence emanates from his failure to perform any meaningful identification techniques. *Stoganik ex rel. Estate of Woodring*, 193 N.C. App. at 585, 688 S.E.2d at 786, *review denied*, 363 N.C. at 380, 680 S.E.2d at 711.

G. Intervening and Superseding Negligence: Key

27. Plaintiffs' further contend that Trooper Hurley's alleged negligence concurred with and was a proximate cause of Plaintiffs injuries. Having previously concluded that Trooper Hurley was not negligent, but assuming that there was negligence on his part; Key's negligence was a new and independent cause of any damages to the Plaintiffs. Our Supreme Court has defined proximate cause as:

[A] cause which in the natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiffs injuries, and without which, the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984).

28. As specifically applied to the facts in the present case, Trooper Hurley is not held to a standard of anticipating Key's multiple acts of negligence. There is no evidence that Trooper Hurley knew or should even have suspected that Key would so completely abrogate his duties of identification. The totality of the evidence warrants a conclusion that had Key undertaken a proper examination and identification process that Trooper Hurley's misidentification would have been discovered and corrected within hours of his error and well before the full impact of the misidentification had been inflicted upon Plaintiffs. "One is not under the duty of anticipating

disobedience of law or negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary a person is entitled to assume, and to act on the assumption, that others will obey the law and exercise ordinary care.” *Cox v. Hennis Freight Lines*, 236 N.C. 72, 72 S.E.2d 25 (1952)(citations omitted).

H. Proximate Cause and Foreseeability

29. Having found that Key failed to exercise proper care in the performance of his legal duties under the circumstances, Plaintiffs must prove by the greater weight of the evidence that the breach of duties is the proximate cause of the injuries alleged. Within the context of negligent infliction of emotional distress claims (hereinafter “NIED”) the appellate courts have addressed proximate cause in terms of a) the class of individuals who may claim damages and b) the requirement of proof of emotional injury. In *Dumouchelle*, 69 N.C. App. at 474, 317 S.E.2d at 102–03(citations omitted)(emphasis added), the appellate court addressed the class of individuals who may claim damages:

A person entitled to possession of a body may recover damages for mental suffering caused by negligent or intentional mishandling or mutilation of the body. . . . *As a general rule*, only the person entitled to possession and disposition of a body may maintain an action for mishandling or mutilation of the body.

The *Dumouchelle* decision implies only one Plaintiff may bring a civil action as a general rule, obviously concerned with the number of claims that could arise in such cases.

30. Defendant DHHS advances adoption of a prophylactic rule consistent with the limitation of the class of plaintiffs discussed in *Dumouchelle* and the persuasive authority of *Gostkowski v. Roman Catholic Church*, 263 NY 320, 189 N.E. 2d (1934) holding that it is inconceivable that every member of a family could maintain a separate cause of action. In

Gostkowski, the court held that upon the father of a deceased child had filed an action other family members were restricted from filing.

31. The Defendant's suggestion of such a rule is not well taken under the specific facts of the instant case. *Kyles v. Southern Ry. Co.*, 147 N.C. 394, 61 S.E. 280 (1908)(citations omitted) is instructive and weighs against a prophylactic rule:

The right to the possession of a dead body for the purpose of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband, or wife, or next of kin While a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal right, which the courts will recognize and protect, and any violation of it will give rise to an action for damages. While the common law does not recognize dead bodies as property, the courts of America and other Christian and civilized countries hold that they are quasi property, and that any mutilation thereof is actionable. . . . Where the rights of one legally entitled to the custody of a dead body are violated by mutilation of the body or otherwise, the party injured may in an action for damages recover for the mental suffering caused by the injury. . . . That mental suffering and injury to the feelings would be the ordinary and proximate result of knowledge that the remains of a deceased . . . had been mutilated is too plain to admit of argument.”

In order to discern the statutory use of “next of kin,” the guiding principle in all statutory construction is discerning the intent of the legislature. *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978). Black's Law Dictionary (9th ed. 2009) subscribes two meanings to next of kin: “1. The person or persons most closely related to a decedent by blood or affinity [and] 2. An intestate's heir – that is, the person or persons entitled to inherit personal property from a decedent who has not left a will. Nothing in N.C. Gen. Stat. §130A-383(c) suggests that the General Assembly was attempting to order a priority among next of kin. In fact, the General Assembly's grant of discretion to the Medical Examiner to release bodily remains to an “other interested person” supports a conclusion that in the context of this statute that next of kin is synonymous with

“heirs.” “Heir” is a technical term with a specific meaning. *Rawls v. Rideout*, 74 N.C.App. 368, 370, 328 S.E.2d 783, 785 (1985). It refers to “any person entitled to take real or personal property upon intestacy.” Applying these rules, Plaintiffs; parents and siblings of the deceased, all fall within the class of next of kin. N.C. Gen. Stat. § 29–2 (1984).

32. Under the facts of this case, it would be an injustice to limit damages in accordance with the “general” proposition of *Dumouchelle*. Key’s negligence resulted in Edward Young and Munoz having to inspect, manipulate and photograph Gorby’s body in an attempt to determine the correct identity and then frantically try to locate Young’s remains. In addition, the parents and siblings of the deceased were affected by Key’s negligence. The image of Anthony Young’s emotional reaction, including vomiting, upon learning of the delivery of the incorrect corpse to New Jersey; or his plea for his sister to come and explain to family members the events of the past several days because he could no longer shoulder the emotional burden. In sum, at a time when it is entirely foreseeable that a family seeks and has reason to expect certainty, peace, decorum, and closure in order to bury a loved child and sibling with dignity and honor, Key’s negligence disrupted every aspect of the interment experience and inalterably interrupted the normal progression of the emotional states of loss associated with the death of loved ones. N.C. Gen. Stat. § 143-291.

33. Defendants general averments that a) Plaintiffs’ cases fail because the nexus between the Medical Examiner’s acts and proximate cause is too remote to warrant actionable negligence, b) the New Jersey Plaintiffs were not in proximity to the negligent acts, c) it is not foreseeable that an entire family would suffer severe emotional distress, including PTSD, and d) *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 542 S.E.2d 346, *disc. rev. denied*, 353 N.C. 725, 551 S.E.2d 437 (2001) precludes the fact of a parent-child relationship standing alone as sufficient

to overcome a plaintiff's proximity to or observation of the alleged negligent act are not well taken under the facts of this case. Defendants are correct that specific instances of emotional reaction are not, within themselves, proof of NIED. For two examples, the image Young's father commuting miles in his motorized chair in an attempt to view his daughter's body one last time, which unbeknown to him and contrary to Key's initial representation, was not in condition for public viewing. Second, an equaling compelling example is Edward Young, upon seeing that the body shipped to New Jersey was not Young, calling his sister's phone grasping for the faintest hope that she may still be alive. With regard to foreseeability in NIED claims, the Supreme Court of North Carolina has stated a common sense approach that is far broader than Defendant DHHS' narrow view:

Factors to be considered on the question of foreseeability in cases such as this *include* the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act.

Ruark, 327 N.C. 283 at 305, 395 S.E.2d at 98 (emphasis added). The Supreme Court of North Carolina reiterates that these factors are just *some of the factors* to be considered and that, in making the foreseeability determination, courts "*are not limited to*" those factors. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (quoting *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97). The *Sorrells* court explained:

[S]uch factors *are not* mechanistic *requirements* the absence of which will inevitably defeat a claim for negligent infliction of emotional distress. The presence or absence of such factors simply is not determinative in all cases. Therefore, North Carolina law forbids the mechanical application of any arbitrary factors - - such as a requirement that the plaintiff be within a "zone of danger" created by the defendant or a requirement that the plaintiff personally observe the crucial negligent act.

Id. at 672–73, 435 S.E.2d at 320 (citing *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993)).

34. Defendant DHHS specifically summarizes its argument that Key could not be held to foresee that an entire family would exist where each one of them would claim to suffer severe emotion distress as a result of the misidentification. The argument advanced relies on the lack of foreseeability that in Key's conversations with Edward Young that practically the entire family and Edward's fiancée were listening in to the conversations. Defendant DHHS also questions the foreseeability of Key's misidentification would result in multiple family members into "highly agitated states and cause them to question their own sister's/daughter's identify when the correct body arrived. Defendant DHHS's arguments ignore common experiences involving the death of close family members. As in the instant case, it is entirely foreseeable that one member of a family, in this case Edward Young, was receiving and communicating information he received from Key to all family members. It was the family that expected their loved one to be returned for a burial consistent with their religious practices. Key's negligence resulted in Edward Young and Munoz undertaking the role Key should have properly played to determine the identity of the body before them. This included manipulating the remains of an unidentified corpse, transmitting photographs electronically to individuals to determine the true identify. Upon learning that Young's body may be cremated, these family members were left to frantically start the search to find and communicate with the North Carolina crematorium to stop destruction of Young's body. It is entirely foreseeable that every family member heard, discussed and emotionally shared these experiences. Anthony Young's testimony surrounding events from the delayed wake for his sister was heart rendering. The images are poignant off non-immediate family members repeatedly asking for Anthony Young to recount the events

surrounding the events relating to Young's identify to the point that he had to call his sister to come answer the repeated requests for the story because he could not "take it" any longer. These examples are not so unusual or unnatural as to be unforeseeable. N.C. Gen. Stat. § 143-291.

I. Compensatory Damages

35. Plaintiff's claims for compensatory damages for negligent infliction of emotional distress has three elements: (1) defendant engaged in negligent conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress; and (3) defendant's conduct, in fact, caused plaintiff severe emotional distress. *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Having held that Plaintiffs have offered sufficient proof of the first and second elements of their claims, the third element emerges.

36. In case law analogous to the facts in the instant civil action, the North Carolina Supreme Court, in *Byers v. Express Co.*, 165 N.C. 542, 81 S.E. 741 (1914) (Clark, C.J.), *rev'd on other grounds*, 240 U.S. 612, 36 S.Ct. 410, 60 L.Ed. 825 (1916), affirmed a money judgment against a railway for mental anguish caused by the defendant's negligent misrouting of the casket and burial clothes to be used for his wife's funeral in South Carolina. Seventy-six years later, in *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990), the State Supreme Court approvingly quoted *Byers* that damages for mental anguish are compensatory damages:

"Upon all the authorities, damages for mental anguish are compensatory damages.... 'Wounding a man's feelings is as much actual damages as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical. At common law, compensatory damages include, upon principle and upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them."

It makes no difference, as this Court has always held, whether the action or claim to recover damages for mental suffering is based upon breach of contract or upon tort.

Byers v. Express Co., 165 N.C. at 545-46, 81 S.E. at 742 (citations omitted).

37. Our courts have defined “severe emotional distress” to “**mean[] any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.**” *Ruark Obstetrics*, 327 N.C. at 304, 395 S.E.2d at 97 (emphasis added). Put more succinctly, a plaintiff must “present [] evidence ... of diagnosable mental health conditions.” *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 274, 542 S.E.2d 346, 352, *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001). “Although severe emotional distress is defined in terms of diagnosable emotional or mental conditions, ‘proof of severe emotional distress does not require medical expert testimony.’” *Williams v. HomEq Servicing Corp.*, 184 N.C. App. 413, 419, 646 S.E.2d 381, 385 (2007) (quoting *Coffman v. Roberson*, 153 N.C. App. 618, 627–28, 571 S.E.2d 255, 261 (2002)). NIED claims can be sufficiently supported by “[t]estimony of friends, family, and pastors.” *Id.* (citing *Coffman*, 153 N.C. App. at 627–28, 571 S.E.2d at 261).

38. As a common element of damage, Plaintiffs allege emotional anguish stemming from the uncertainty that their sister is actually the individual they interred. The uncertainty arises from Key’s deception in claiming that he had recalled Young’s body and scientifically determined her identity upon learning of the misidentification. The representation was false when made, and he perpetuated the falsity, swearing to discovery responses that perpetuated the deception for an extended period during the discovery process. While advancing claims related

to the uncertainty, Plaintiffs have intentionally foregone exhumation of the remains to privately conduct scientific tests to bring certainty to the matter. If considered by the greater weight of the evidence, the remains interred are those of Young. However, scientific identification of the remains has not brought a conclusion to the miniscule risk that the remains are not Young. Plaintiffs contend that if the remains are not those of their sister, which is not a probable outcome, the emotional pain would be more unbearable than simply foregoing scientific tests, especially for Young's parents. While such family decisions in such matters should be respected, the law of North Carolina imposes duty upon Plaintiffs to mitigate damages. The failure to mitigate damages is a *defense* which "preclude[s] recovery for those consequences of the tortfeasor's act which could have been avoided by acting as a reasonable prudent man" *Radford v. Norris*, 63 N.C. App. 501, 502, 305 S.E.2d 64, 65 (1983). As with other defenses, the burden is on Defendant to prove by the greater weight of the evidence that Plaintiffs neglected to mitigate damages. *Gibbs v. Western Union Telegraph Co.*, 196 N.C. 516, 522, 146 S.E. 209, 213 (1929).

39. Unlike a plaintiff's failure to establish the *element* of proximate cause, the failure to mitigate damages is *not* an absolute bar to all recovery; rather, a plaintiff is barred from recovering for those losses which could have been prevented through the plaintiff's *reasonable efforts*. The rule of mitigation is inapplicable where a plaintiff could not possibly have avoided the loss. Furthermore, plaintiff need not pursue a particular corrective measure if a reasonable person would conclude the measure was imprudent, impractical, or would likely be unsuccessful. Defendants have proven by the greater weight of the evidence that exhumation and scientific confirmation of the remains interred are reasonable measures under the facts of this case. The Plaintiffs' failure to mitigate precludes consideration of their respective claim of mental anguish

associated with the uncertainty of the remains interred. *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.*, 98 N.C. App. 543, 551, 392 S.E.2d 128, 133, *disc. review denied*, 327 N.C. 144, 393 S.E.2d 909 (1990).

40. As an actual and proximate cause of Key's negligence, the Plaintiffs Edward Young, Cynthia Munoz and January Young have proven by the greater weight of the competent evidence of record that they have several severe emotional conditions. N.C. Gen. Stat. § 143-291.

41. As a predicate to the basis of the awards of damages in this case and the denial of awards for several Plaintiffs, it must be acknowledged that Key's negligence deprived the Young family generally of the socially expected rites of interment that facilitate the processes of grief and bereavement. The evidence leaves an indelible impression that the Young family was closely knit emotionally. Key's negligence in misidentification injected the error into a situation that is inherently filled with emotional lability. Each of the family members has been emotionally affected and each has responded uniquely. This Decision and Order documents only a few of the more salient examples and renders money awards for those who have met the requirements for several emotional distresses and those who have suffered the indignities they experienced without classifiable emotional disorders that can be compensated. N.C. Gen. Stat. § 143-291.

42. The damage awards for Edward Young and Cynthia Munoz recognize an appreciable element of their emotional conditions include the mental anguish of undertaking the identification of the corpse sent to them in error, and the frantic search for Young's body before probable cremation. Expert testimony for both leads to a conclusion that these two individuals have exhibited more and more consistent symptoms of protracted and classifiable emotional

distress. Defendant's own expert supports Edward Young's claim of several emotional conditions. The compelling weight of the evidence establishes that both of these individuals will suffer emotional injury permanently. N.C. Gen. Stat. § 143-291.

43. January Young's award recognizes that she has proven at least one classifiable emotional condition; depression. Many of her emotional symptoms are founded in natural grief and bereavement and distinguishing between these symptoms has proven a formidable challenge. Yet, the difficulty in separating the damages cannot leave the Plaintiff without remedy:

The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, as above stated, and it is better it should be left to them, under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy.

Young v. Telegraph Co., 107 N.C. at 386, 11 S.E. 1049.

44. Plaintiff's Anthony Young, Rosaleen Young and Robert Young have not proven by the greater weight of the evidence that they have not suffered severe emotional distress as a proximate cause of Key's negligence. These Plaintiffs have assuredly suffered emotional upset as a result of Key's negligence, but they have not proven that the level of emotional distress rises to the degree compensable. Anthony Young stopped treating for his condition after three visits. Much of the anguish from Young's parents is directed to their lingering doubts that Young is not the individual they interred. As previously held, damages for this aspect of Plaintiffs' claim is not compensable because of Plaintiffs' failure to mitigate their potential damages. As N.C. Gen. Stat. § 143-291.

J. Punitive Damages

45. In an issue of apparent first impression, Plaintiffs contend that the Tort Claims Act permits awards of punitive damages. The basis of Plaintiffs' argument is the statutory language providing that "the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct payment of *damages*" N.C. Gen. Stat. §143-291(a) (emphasis added). The Tort Claims Act does not limit the term "damages" or the type of damages that can be ordered to be paid in any way. *See* N.C. Gen. Stat. §143-291–300.1A.

46. In *Long v. City of Charlotte*, 306 N.C. 187, 208, 294 S.E.2d 101, 115 (1982), the Supreme Court of North Carolina held:

We believe that public policy consideration[s] mitigating against allowing assessment of punitive damages are compelling and are applicable to the actions of municipal corporations We hold that in the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages.

The Supreme Court reiterated its rule in *Long* but noted an exception to the rule in *Jackson v. The Housing Authority of the City of High Point*, 316 N.C. 259, 341 S.E.2d 523 (1986) holding specific statutory provisions permit punitive damages against a municipal corporation in a wrongful death case. The *Jackson* Court predicated its holding on construing N.C. Gen. Stat. §12-3 (1981), in conjunction with the North Carolina Wrongful Death Act, N.C. Gen. Stat. § 28A-18-2 (1984). The Court noted that the Wrongful Death Act establishes that a "*person or corporation . . . shall be liable to an action for damages*" when they have wrongfully caused the death of another. *Jackson*, 316 N.C. at 263, 341 S.E.2d at 526 (emphasis added) (quoting N.C. Gen. Stat. §28A-18-2(a)). The act also provides that punitive damages are a type of damages that are recoverable in a wrongful death action. *See id.* at 263–64, 341 S.E.2d at 526 (quoting

N.C. Gen. Stat. §28A-18-2(b)(5)). Interpreting the word “person,” N.C. Gen. Stat. §12-3 specifically states that, “unless such construction would be inconsistent with the manifest intent of the General Assembly, . . . (6) . . . The word ‘person’ shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary.” *Jackson*, 316 N.C. at 263, 341 S.E.2d at 526 (quoting N.C. Gen. Stat. §12-3) (internal quotation marks omitted); *see also Sharpe v. Worland*, 137 N.C. App. 82, 89; 527 S.E.2d 75, 80 (2000) (citation omitted) (“[T]he general rule of statutory construction holds that, absent a clear legislative intent to the contrary, “person” should be defined pursuant to G.S. §12-3(6) (1999)). Because “person” extends to “bodies politic,” the Court assumed “that at the time the General Assembly enacted N.C.G.S. §28A-18-2, it was aware of the rules of statutory construction contained in N.C.G.S. §12-3(6), and that if it had intended a limitation on the word ‘person’ at any place in N.C.G.S. §28A-18-2, it would have so provided.” *Jackson*, 316 N.C. at 264, 341 S.E.2d at 526. Therefore, because municipal corporations, as “bodies politic,” are subject to the Wrongful Death Act, and because the Wrongful Death Act provides for the recovery of punitive damages, the Court held that the act “does contain a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations.” *Id.* at 264, 265, 341 S.E.2d at 526.

47. In 1995, nine years after the holding in *Jackson*, the General Assembly enacted N.C. Gen. Stat. §1D-1, *et seq.*, the Punitive Damages Act (hereinafter “PDA”). The Act explicitly speaks to the awarding of punitive damages against a “person.” *See* N.C. Gen. Stat. §§1D-15(c), 1D-15(d). The word “person” is not specifically defined within the Act, and the Act does not provide clear intent that would exclude a State agency. The only other term used in the Act to refer to those against whom punitive damages may be awarded is “defendant.” *See, e.g.,*

N.C. Gen. Stat. §1D-15(a) (“Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages”). “Defendant” is defined broadly as “a party . . . from whom a claimant seeks relief with respect to punitive damages.” N.C. Gen. Stat. § 1D-5(3). Further, the statute neither explicitly nor implicitly precludes the recovery of punitive damages against governmental bodies. *See* N.C. Gen. Stat. §§ 1D-1 to -50.

48. Applying the *Long* and *Jackson Courts*’ logic in interpreting the Punitive Damages Act, Plaintiffs contend that the General Assembly has expressed its intention to subject state agencies, such as the North Carolina Department of Health and Human Services, to punitive damages where appropriate. Plaintiffs’ argument is logical and is not without merit. The Department of Health and Human Services is a “body politic” as defined by the courts in this State. *See Student Bar Association Board of Governors v. Byrd*, 293 N.C. 594, 601, 239 S.E.2d 415, 420 (1977) (stating that “the term ‘body politic’ connotes a body acting as a government; *i.e.*, exercising powers which pertain exclusively to a government”). The PDA expressly refers to a “*person*,” *i.e.*, “bodies politic,” as being subject to punitive damages. Further, the Act’s definition of “defendant” is undoubtedly broad enough to include a “person” as defined under N.C. Gen. Stat. §12-3(6) and, therefore, the North Carolina Department of Human Services. As the holding in *Jackson* indicates, we must assume that at the time the General Assembly enacted N.C. Gen. Stat. §1D-1, *et seq.*, it was aware of the statutory rules of construction, and that if it had intended any limitation on the words “person” or “defendant” in the statute, it would have put forth such a limitation. That the General Assembly did not do so, in light of the fact that the Tort Claims Act does not prohibit the award of punitive damages, clearly demonstrates the General Assembly’s intention that punitive damages are recoverable in actions under the Tort Claims Act.

49. Plaintiffs correctly note that they did not initially plead a cause of action for punitive damages under N.C. Gen. Stat. § 1D-1, *et. seq.* Plaintiffs point to case precedent prior to the enactment of the Act, *Holloway v. Wachovia Bank & Trust Company*, 339 N.C. 338, 452 S.E.2d 233 (1994), for the proposition that a plaintiff is not required to specially plead punitive damages in order to recover punitive damages. The Supreme Court of North Carolina expressly held that “a plaintiff need not specially plead punitive damages as prerequisite to recovering them at trial.” *Id.* at 347, 452 S.E.2d at 238. So long as the “pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered” *Id.* The PDA, however, specifically provides that a defendant may demand a bifurcated trial on the issues of “compensatory damages and the amount of compensatory damages, if any, shall be tried separate from the issues of liability for punitive damages and the amount of punitive damages, if any.” N.C. Gen. Stat. § 1D-30. The logical implication arising from defendant’s right to bifurcation is that a plaintiff must now specifically plead punitive damages in order that the a defendant may exercise its right to demand bifurcation and a court may affix issues to be tried in accordance with mandates of bifurcation prior to the presentation of plaintiff’s case in chief. In the instant case, Plaintiffs have raised punitive damages post-trial, depriving Defendants of their statutory rights. As the PDA admonishes, it applies to “every claim for punitive damages,” and “[i]n an action subject to this Chapter, in whole or in part, the provisions of this Chapter prevail over any other law to the contrary.”

50. Even assuming that the State in the present controversy can be defined as a party for a punitive damage claim under the PDA and further assuming that the Plaintiffs’ failure to plead for such damages is not fatal to their respective punitive damage claims, Plaintiffs’ assertion that the Industrial Commission has jurisdiction to hear the claim is not well taken. The

PDA precisely proscribes the factual circumstances under which punitive damages may be awarded. As a predicate to punitive damages, a defendant must be held liable for compensatory damages *and* one aggravating factor must be present: (1) fraud; (2) malice, or (3) willful and wanton conduct. N.C. Gen. Stat. § 1D-15.

51. The General Assembly defines each of these terms, in whole or in part:

- (1) “Fraud” does not include constructive fraud unless an element of intent is present.
- (2) “Malice” means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.
- (3) “Willful or wanton conduct” means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.
“Willful or wanton conduct means more than gross negligence.

N.C. Gen. Stat. § 1D-5.

52. “While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) *made with intent to deceive*, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568–69, 374 S.E.2d 385, 391 (1988) (citation omitted)(emphasis added). The PDA’s provision for “intent” as an essential element of “constructive fraud” sufficient to award punitive damages ensures the intent of the General Assembly to require “intent” as an element by foreclosing possible exceptions to the legislative schema.

53. “Malice” is classically defined in the non-criminal context as “not necessarily ill will, anger, resentment, or a vengeful spirit, but simply a wrongful act *knowingly and intentionally done* to the complaining party, without just cause or excuse. . . . It may be no more than the opposite of good faith.” *Motsinger v Sink*, 168 N.C. 548, 84 S.E. 847 (1915)(emphasis added). The Act clearly modifies *Motsinger’s* classical legal definition by adding an explicit element of “ill will,” N.C. Gen. Stat. § 1D-5, the equivalent of intent.

54. “Willful or wanton” conduct as defined in the statute requires intent and appears to follow the formulation of “willful or wanton” in *Hinson v. Dawson*, 244 N.C. 23, 28 92 S.E.2d 393, 397 (1956)(“Conduct is wanton when in conscious and *intentional disregard* of and indifference to the rights and safety of others.” (emphasis added)) The *Hinson* formulation should be compared with the articulation of the elements of “willful, wanton and reckless” negligence in *Woodson v. Rowland*, 329 N.C. 330, 341, 407 S.E.2d 222, 229 (1991) finding “degrees of negligence [where] willful, wanton, and reckless conduct does not rise to the level of intent for an injury to occur.”

55. As each of the three statutory predicates to any award of punitive damages now requires an intentional act with intent to inflict harm: “fraud,” intent to deceive; “malice,” knowing and intentionally done, and “willful and wanton,” more than gross negligence with conscious and intentional conduct, the statutorily mandated element of intent precludes jurisdiction of the Industrial Commission. *Collins v. North Carolina Parole Com’n*, 344 N.C. 179, 473 S.E.2d 1 (1996). The *Collins Court* held that the State’s sovereign immunity is not waived only for acts of ordinary negligence, but also for other degrees of negligence, including willful, wanton and reckless conduct that does not rise to a level of indicia of intent. *Id.*, 344 N.C. at 182, 473 S.E.2d at 3. The hornbook law of the State Tort Claim Act, however, precludes

jurisdiction for intentional acts. *Jenkins v. N.C. Dept. of Motor Vehicles*, 244 N.C. 560, 94 S.E.2d 477 (1956). Therefore, while Key's conduct may support a cause of action and award of punitive damages, the claim is not within the jurisdiction of the North Carolina Industrial Commission. N.C. Gen. Stat. § 143-291.¹

56. The Industrial Commission may tax costs to a prevailing party. N.C. Gen. Stat. § 143-291.2.

* * * * *

Based on the foregoing Stipulations, Findings of Fact, and Conclusions of Law, the undersigned enters the following:

ORDER

1. All Plaintiffs' claims against Defendant Department of Crime Control & Public Safety for damages under the North Carolina Tort Claims Act predicated upon the conduct of Trooper Hurley are hereby DENIED and DISMISSED WITH PREJUDICE. All Plaintiffs shall

¹ This Decision and Order does not attempt to address potential issues stemming from a conclusion that Plaintiffs' remedy, if any, for punitive damages would be within the jurisdiction of the General Court of Justice. Several questions are immediately envisioned if the conclusion of this Decision and Order that the Industrial Commission lacks jurisdiction over a PDA claim is correct law. Does a cause of action for punitive damages exist at all in the context of a case within the State Tort Claim Act? If so, does a plaintiff have to file a PDA claim independently in the General Court of Justice simultaneously with the State Tort Claim? Must the State Tort Claim be decided on its merits first in time as the PDA requires an award of compensatory damages as a condition precedent to an award of punitive damages? If a PDA claim is expressly, but mistakenly filed in the Industrial Commission, or, if a PDA claim can arise on the pleadings even if not expressly pled as contended by Plaintiffs, does it toll the statute of limitations for the PDA case within the jurisdiction of the General Court. Consideration of the potential issues by the General Assembly and appropriate legislation may forestall extensive litigation of these issues and ensures that the State's judiciary decides cases consistent with the policy directives of the legislative branch of government.

have and recover nothing from the Defendant Department of Crime Control & Public Safety and the Defendant Department of Crime Control & Public Safety shall pay nothing to Plaintiffs.

2. All Plaintiffs' claims against Defendant Department of Health and Human Services for punitive damage predicated upon the conducted of Medical Examiner Key are DENIED and DISMISSED WITH PREJUDICE.

3. Plaintiff Edward Young shall have and recover from Defendant Department of Health and Human Services the sum of ONE HUNDRED AND EIGHTY-FOUR THOUSAND AND SEVEN HUNDRED AND FIFTY DOLLARS EVEN (\$184,750.00) as compensatory damages and Defendant Department of Health and Human Services shall pay said sum to the Plaintiff.

4. Plaintiff Cynthia Munoz shall have and recover from Defendant Department of Health and Human Services ONE HUNDRED AND THIRTY-SEVEN THOUSAND AND FIVE HUNDRED DOLLARS EVEN (\$137,500.00) in compensatory damages and Defendant Department of Health and Human Services shall pay said sum to the Plaintiff. .

5. Plaintiff January Young shall have and recover from Defendant Department of Health and Human Services SEVENTY-FIVE THOUSAND FIVE HUNDRED DOLLARS EVEN (\$75,500.00) in compensatory damages and Defendant Department of Health and Human Services shall pay said sum to the Plaintiff. .

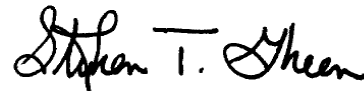
6. Plaintiff Robert Young shall have and recover nothing from the Defendant Department of Health and Human Services and the Defendant Department of Health and Human Services shall pay nothing to the Plaintiff.

7. Plaintiff Rosealeen Young shall have and recover nothing from the Defendant Department of Health and Human Services and the Defendant Department of Health and Human Services shall pay nothing to the Plaintiff.

8. Plaintiff Anthony Young shall have and recover nothing from the Defendant Department of Health and Human Services and the Defendant Department of Health and Human Services shall pay nothing to the Plaintiff.

9. Defendant Department of Health and Human Services shall pay the costs of this civil action. Plaintiffs shall file a bill of costs with the Industrial Commission within thirty days of date the decision of the Industrial Commission in this civil action becomes a final judgment.

10. This case is REMOVED from the hearing docket.



Stephen T. Gheen
Deputy Commissioner

NORTH CAROLINA INDUSTRIAL COMMISSION

DOBBS BUILDING

4336 MAIL SERVICE CENTER

RALEIGH, NORTH CAROLINA 27699-4338

N. C. Gen. Stat. § 97-85

IMPORTANT NOTICE TO ALL PARTIES

ATTACHED HERETO IS A COPY OF THE OPINION AND AWARD IN YOUR CASE PREVIOUSLY HEARD BY THE COMMISSION. THE LAW ALLOWS ANY PARTY FIFTEEN (15) DAYS FROM THE DATE OF RECEIPT OF THIS OPINION AND AWARD WITHIN WHICH TO APPEAL (G.S. 97-85) IN WRITING FOR REVIEW IN RALEIGH, NORTH CAROLINA, BY THE FULL COMMISSION.

THE NOTICE OF APPEAL SHOULD BE DIRECTED TO THE ATTENTION OF LINDA LANGDON, DOCKET DIRECTOR, 4336 MAIL SERVICE CENTER, RALEIGH, NORTH CAROLINA, 27699-4338

SHOULD AN APPEAL NOT BE FILED WITH THE COMMISSION WITHIN THE TIME PRESCRIBED BY LAW, THE ATTACHED OPINION AND AWARD SHALL BE FINAL AND BINDING.

THE ABOVE NOTICE ALSO APPLIES TO A DECISION AND ORDER OR ORDER OF DISMISSAL, IF APPLICABLE.

**NORTH CAROLINA INDUSTRIAL COMMISSION
DOBBS BUILDING
430 NORTH SALISBURY STREET
RALEIGH, NORTH CAROLINA 27603
(919) 807 - 2541**

**SERVICE ACKNOWLEDGEMENT
(Important Notice – Immediate Action Required)**

The document attached is being served by facsimile transmission. The document is being transmitted by Deputy Commissioner Stephen T. Gheen (Wendy Lotfi, Legal Assistant)

DATE: May 01, 2014

The attached document is: DECISION & ORDER by Stephen T. Gheen, Deputy Commissioner

I.C. Nos. TA-21963 (A.G. File No. 10-00670); ROSALEEN G. YOUNG, Plaintiff v. N.C. DEPT. OF CRIME CONTROL & PUBLIC SAFETY, AND N.C. DEPT. OF HEALTH AND HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21642 (A.G. File No. 10-00671); ROBERT H. YOUNG, Plaintiff v. N.C. DEPT. OF CRIME CONTROL & PUBLIC SAFETY, AND N.C. DEPT. OF HEALTH AND HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21643 (A.G. File No. 10-00672); JANUARY YOUNG, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21644(A.G. File No. 10-00673); EDWARD M. YOUNG, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21645 (A.G. File No. 10-00674); CYNTHIA MUNOZ, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

I.C. FILE NO.: TA-21646 (A.G. File No. 10-00675); ANTHONY YOUNG, Plaintiff v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.

APPEARANCES

Plaintiffs: Charles H. Rabon, Jr. Charlotte, North Carolina; Michael Maggiano, Ft. Lee, New Jersey, appearing.

Defendant: North Carolina Department of Justice, Raleigh, North Carolina; Special Deputy Melody R. Hairston, appearing on behalf North Carolina Department Of Crime Control & Public Safety; and North Carolina Department of Justice, Raleigh, North Carolina; Assistant Attorney General John Barkley, appearing on behalf of North Carolina Department of Health and Human Services .

The person receiving this notice by facsimile transmission is (1) required to complete and sign this Service Acknowledgement and (2) return the Service Acknowledgement by facsimile transmission to the North Carolina Industrial Commission. You are requested to complete the information below and return the Service Acknowledgment immediately upon your receipt of the Service Acknowledgment. Send the return transmission to:

Fax to: (919) 715-0281, 0282 or 0283 Or email to wendy.lotfi@ic.nc.gov

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Law Firm Name: _____

If Solo Practitioner, Name of Attorney: _____

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