

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

BARTLETT FUNER HOME, INC., and)
ALFRED THOMAS TACKER,)

Petitioners,)

VS.)

TENNESSEE DEPARTMENT OF)
COMMERCE AND INSURANCE,)

Respondent.)

FOOT
NO. 11-203-III

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FUNERAL BOARD
BURIAL SERVICES

MEMORANDUM AND ORDER

This administrative appeal was filed by a funeral home and its director ("Petitioners") seeking reversal of a \$500 civil penalty against each of the Petitioners and \$2,340 in hearing costs assessed by the Tennessee Board of Funeral Directors and Embalmers (the "Board"). The grounds for the assessments were that the Board found that the Petitioners, in furnishing funeral goods and services for a December 2008 burial, engaged in (1) unprofessional conduct violative of Tennessee Code Annotated section 62-5-317(a)(4), and (2) unfair or deceptive acts in relation to the itemized written statement of funeral goods and services in violation of Tenn. Comp. R. & Regs. 0600-06-.02(1)(b). Counsel for the parties submitted the case to the Court to be decided on the papers.

After reading the record, researching the law and considering briefing of counsel, the Court dismisses the Petitioners' challenges and affirms the Board's decision. The facts and conclusions of law on which the Court bases its decision are as follows.

Administrative Proceedings

The factual background that is contained below is taken from the record.

This lawsuit derives from the Petitioners' furnishing funeral goods and services to 83-year-old Wanda Coleman for the burial of her son. The Federal Trade Commission-required "Statement of Funeral Goods and Services Selected" ("Statement") shows that among the goods and services Ms. Coleman purchased from the Petitioners was a grave vault to be provided at the 10:00 a.m., December 4, 2008 interment. On that date and time, however, no grave vault was present. The burial started but, due to the absence of a vault, the son's casket was dented and damaged by backfill. The burial was halted, and the Petitioners were contacted. At 1:30 p.m. that same day, the Petitioners had a vault delivered, and it was used in the interment of the son. The only writing documenting the funeral goods and services Ms. Coleman selected is the Statement. No subsequent amendment, letter, or documentation of a change of her selection was sent to her.

From the foregoing undisputed facts there exist these disputed facts. The Petitioners assert that subsequent to being provided the Statement and after paying for the vault, on November 29, 2008, thereafter, Ms. Coleman changed her mind, on December 3, 2008 (a day before the burial), and orally withdrew the selection of the vault. Then, when the casket was damaged at the burial site, Ms. Coleman, the

Petitioners contend, reverted back to her original request for a vault and the Petitioners provided it. Petitioner Tacker claims he made a note of the change on his file when Ms. Coleman allegedly called on December 3, 2008, but he admits no documentation of the alleged change was delivered to Ms. Coleman. Ms. Coleman's version is that she never withdrew her selection for a vault. Instead, she contends that the Petitioners did not furnish a vault at the burial as required by the Statement and her payment for the same. It was only when the casket was damaged and the Petitioner contacted, that a vault was delivered.

The Petitioners were charged initially by the Board with immoral or unprofessional conduct, and fraudulent conduct. An amendment to the charges added a cause of action for unfairness and deception with reference to the Statement.

Prior to the contested case hearing, there were several pretrial matters. These included that the Petitioners' motion for summary judgment was denied as well as a motion to dismiss. Six separate motions, filed by the Petitioners, to quash the State's witnesses, subpoenas, exhibits, depositions and documents, were denied. The Petitioners' motion in limine to exclude the State's expert testimony and another motion for summary judgment and motion to dismiss were denied.

On November 9, 2010, the contested case hearing was conducted with an Administrative Law Judge presiding, and the Board considering the proof, deliberating and deciding the case. The proof consisted of Ms. Coleman's deposition, the expert testimony of William Appleton a funeral director at Woodbine Funeral Home in Nashville, and the testimony of Petitioner Tacker. Documents as well were admitted.

The Board concluded that the Petitioners' conduct violated Tennessee Code Annotated section 62-5-317(a)(4) and Tenn. Comp. R. & Regs. 0660-06-.02(1)(b) which respectively preclude unprofessional conduct, and unfairness or deception in connection with a statement of funeral goods and services. A \$500 penalty was imposed on each Petitioner and \$2,340 in costs were assessed. The Board's conclusions were based on the following findings of fact quoted from the Final Order:

1. Respondent Alfred Thomas Tacker was at all relevant times licensed as a funeral director by the Board, having been issued license number 2773.
2. Respondent Bartlett Funeral Home was at all relevant times licensed as a funeral establishment by the Board, having been issued license number 1005.
3. On or about November 26, 2008, Respondent Alfred Thomas Tacker, on behalf of Respondent Bartlett Funeral Home, entered into a contract with Wanda M. Coleman wherein she agreed to pay a sum of money to Bartlett Funeral Home, and Bartlett Funeral Home agreed to furnish a casket for \$995, an outer burial container for \$900, and an immediate burial for \$1,010, plus cash advances and tax, for a total of three thousand two hundred five dollars and twenty-nine cents (\$3,205.29) for the burial of her son, Larry Wade Corder.
4. The above terms were reflected in a written statement of funeral goods and services and signed by both parties.
5. Ms. Coleman paid the consideration required by the contract in full on November 29, 2008.
6. The Respondents arranged for burial to take place on December 4, 2008.
7. The Respondents failed to procure an outer burial container until after the casket had been placed in the grave and damaged by backfill and Ms. Coleman had complained due to Complainant

saying she changed her mind and did not want an outer burial container.

8. The Respondents provided no itemized written statement to Ms. Coleman other than the statement of funeral goods and services executed on November 26, 2008.
9. The Statement of Funeral Goods and Services Selected does not correspond with the Respondent's General Price List.

From the Final Order of the Board, the Petitioners filed this petition for judicial review.

Petitioners' Challenges

Reference to the petition reveals that it provides no detail about the grounds for reversal but simply generally alleges the grounds stated in Tennessee Code Annotated section 4-5-322(h). Quoted from the "Table of Contents" of the Petitioners' brief is the list of Petitioners' grounds for reversal:

1. Whether the Judge erred in denying Appellants Motion for Summary Judgment.
2. Whether the Judge erred in denying Appellants' Motion to Strike Expert Testimony of William Appleton or Limit Testimony.
3. Whether the Judge erred in denying Appellants Motion to Dismiss or in the Alternative, Motion for Summary Judgment.
4. Whether the Board erred in holding Appellants violated Teen. [sic] Code Ann. § 62-5-317(a)(4).
5. Whether the Board erred in holding Appellants violated Tenn. Comp. R. & Regs 0660-06-02 and incorporating by reference Title 16, Code of Federal Regulations, section 453.2(b)(5).

6. Whether the policy statement stated in the final order should be held invalid, and the Final Order vacated.
7. Whether it is unconstitutional for Appellants to be assessed administrative costs pursuant to Tenn. Code Ann. § 56-1-311.

Ruling

Grounds 4 and 5: The Board Erred in Concluding Tennessee Laws Were Violated

The Court shall first address grounds 4 and 5 listed above as disposition of several of the other grounds hinges upon disposition of grounds 4 and 5.

Tennessee Code Annotated section 62-5-317(a)(4) and Tenn. Comp. R. & Regs. 0660-06-.02 respectively provide in pertinent part:

(a) The board may refuse to grant, or may suspend, revoke or refuse to renew, any license granted to any person under the provisions of this chapter if:

(4) The applicant therefore or holder thereof has been guilty of . . . unprofessional conduct.

Tenn. Code Ann. § 62-5-317(a)(4).

- (1) No funeral director, embalmer, or funeral establishment shall:
 - (a) engage in any unfair or deceptive acts or practices defined in Title 16, Code of Federal Regulations, Part 453; or
 - (b) fail to comply with any preventative requirements specified in Title 16, Code of Federal Regulations, Part 453.

Tenn. Comp. R. & Regs. 0660-06-.02. The latter incorporates by reference the preventative requirement specified in Title 16, Code of Federal Regulations, Section 453.2(b)(5) which reads, in pertinent part, as follows:

(b) Preventative Requirements. To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(b)(1), funeral providers must:

(5) Statement of Funeral Goods and Services Selected

(i) Given an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

As to these two laws, the Petitioners argue that the Board erred in concluding that the Petitioners violated the laws because:

- The Board's conclusions that the Petitioners violated these laws are unsupported by the evidence and are arbitrary and capricious.
- Under *Martin v. Sizemore*, expert testimony was required to assess a penalty, and the expert testimony presented by the State in this case was insufficient to establish violations of these laws.
- The Board's deliberations are inconsistent with and did not conclude that these violations occurred.

The Court begins with Petitioners' challenges that the Board's decision of violations of Tennessee Code Annotated section 62-5-317(a)(4) (unprofessional conduct)

and Tenn. Comp. R. & Regs. 0660-06-.02 (deception in connection with the Statement) is arbitrary, capricious and unsupported by substantial and material evidence, and that the decision below does not comply with *Martin v. Sizemore*.

A prominent feature of the Petitioners' argument on the alleged absence of evidence in the record to support the Board's decision is that competing inferences can be drawn from the Petitioners' testimony and Ms. Coleman's testimony as to whether she withdrew her selection of the vault prior to the 10:00 a.m. December 4, 2008 burial. The evidence of record, however, shows that the Board's decision is reasonable and the evidence rationally supports the Board's decision when considered in light of the entire record.

A significant aspect of the Board's findings is the Statement. As to that evidence the Board provided the expert testimony of a Nashville funeral director, Mr. Appleton. It is clear from the expert testimony of Mr. Appleton that the Statement is not, simply, a private contract negotiated between the parties. At page 88 of the transcript, Mr. Appleton provides the expert information that the Statement's existence, provisions and delivery to the family member are required by the Federal Trade Commission. The quotation above of Tennessee regulation 0660-06-.02, and its incorporation of the Code of Federal Regulations, explicitly provides that "an itemized written statement for retention" by the family member "must at least list . . . the funeral goods and funeral services selected" to "prevent unfair or deceptive acts or practices." From this *per se* industry standard, the expert's testimony goes on to establish, at pages 88-102, several corollaries that further inform the standard of care for the industry under the facts of this

case: (1) if you sell an item, you must furnish it, (2) material changes (the vault was a \$900 item which performs the important function of protecting the casket) to the Statement must be documented in a fashion to reflect the family member's approval, and (3) a violation of these corollaries is a violation of the FTC regulations. incorporated into Tennessee law, which also constitutes unprofessional conduct. Under the standard of care testified to by the expert, the Board's findings of fact established that the Petitioners' failure was either: (1) not providing a vault at the 10:00 a.m. burial as per the Statement or (2) not providing documentation to the family member of her alleged withdrawal of the vault.

Further as stated at page 9 of the State's June 6, 2011 Brief, a finding of unprofessional conduct does not require a finding of fraud. Failure to demonstrate efficacy, accuracy and fidelity constitute unprofessional conduct. *Anderson v. Carter*, 512 S.W.2d 297, 305 (Tenn. Ct. App. 1974).

Thus, the Board's findings of fact filtered through the expert opinions and analysis of Mr. Appleton support violations of the laws cited. Therefore, the Petitioners' challenge that the Board's conclusions of law are arbitrary and capricious, and unsupported by substantial and material evidence is dismissed.

The above analysis, as well, shows that the testimony of Mr. Appleton amply provides an expert opinion to support the Board's decision and satisfies the requirements of *Martin v. Sizemore*. Nevertheless, the Court also adopts the State's argument at pages 10-14 of its June 6, 2011 Brief that most of the charged misconduct in this case was obvious and self-evident, and did not require expert proof. It was not necessary for Mr.

Appleton to furnish the information that the Statement is mandated by the FTC. Tennessee Regulation 0660-060.02 and its incorporation of section 453.02(b)(5) of the Federal Regulations states that the Statement "must list at least . . . [t]he funeral goods and services selected" The logical extension of that explicit rule to the facts of this case is the corollary that to effect a material change in the selections listed on the Statement, documentation must be provided by the funeral home to the family member or, alternatively, the change can not be effected and the goods, as per the Statement, must be provided. Thus, while it is helpful for Mr. Appleton to have testified in this regard, it was not necessary. This standard of care comes straight from the Tennessee regulation and its corollaries. Accordingly, the Petitioners' *Martin v. Sizemore* challenge is dismissed.

As to the Board's deliberations, the Court dismisses this challenge because deliberations are just that. They are the thoughts and discussion of the Board members deciding the case. Comments that are inconsistent with, random or aberrant in terms of the final order issued by the Board are not grounds for reversing the final order. Individual views expressed by Board members during deliberations do not constitute findings of fact and conclusions of law. *Robertson v. Tn. Bd. Of Social Worker Certification*, 2005 WL 307157 at *6 (Tenn. Ct. App., Nov. 15, 2005). "As is true with respect to courts, what is of greatest importance is the order of the Board. The appellant must carry a heavy burden to show that the Board's findings were arbitrarily made. It would be difficult to carry that burden by merely pointing out that statements made by the agency members during deliberations failed to address all of the essential points in the case. We hold that the statements made by the individual members during their

deliberations do not show, as a matter of law, that their decision was arbitrary and capricious. See Tenn. Code Ann. § 4-5-322(h)(4)." *Sierra Club v. Tennessee Dept. of Health & Environment*, 1992 WL 288870 at *2 (Tenn. Ct. App. October 16, 1992). For these reasons, the Court dismisses the Petitioners' challenge that the final order is erroneous because it deviates from the Board's deliberations.

For all of these reasons, the Court affirms the Board's conclusions that the Petitioners violated the Tennessee laws specified in the Final Order.

Grounds 1-3: Errors By the Board In Denying Petitioners' Motions

The foregoing determination that the Board did not err in finding a violation of Tennessee Code Annotated section 62-5-317(a)(4) and Tennessee Regulation 0660-06-.02, in turn, requires dismissal of Petitioners' grounds numbered 1, 2 and 3 quoted *supra* at 5.

Starting with grounds 1 and 3, alleging that the Board erred in denying the Petitioners' summary judgment motions, those grounds are moot:

When summary judgment is denied due to the existence of a genuine issue as to a material fact, the parties proceed to try the issue and "the question of the validity of the denial of summary judgment in effect becomes moot." *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 353 n. 55 (7th Cir. 1988). The denial of summary judgment due to the existence of a genuine issue regarding a material fact merely decides that a trial is necessary. Once that trial has occurred, there is no need to reexamine the denial of summary judgment:

* * *

Furthermore, and more fundamentally, to allow such review would not provide proper respect for the judicial process. Unlike a summary

judgment, a matter that is decided at trial has been through the true test of the adversarial process where witnesses are presented, cross-examined, and subjected to the credibility assessment of the court or jury. Each party has had the most complete hearing it can have. No good reason exists to disregard that process and substitute our judgment based on facts presented via affidavits, pleadings, and discovery documents at an earlier point in the litigation.

Alex Lyon & Son Sales Managers and Auctioneers, Inc. v. Boles, 2010 WL 3895520 at *1 (Tenn. Ct. App. October 5, 2010). Pages 107-08 of the Record reflect that summary judgment was denied based on the existence of a genuine issue of material fact, and at the final hearing the State prevailed.

As for grounds 2 and 3—that the Board erred in denying the Petitioners' motion to dismiss and motion to strike or limit the expert testimony—those are dismissed as well based on the Court's explanation above, *supra* at 9-10, regarding the application of *Martin v. Sizemore* to this case.

Lastly, with respect to the alleged error of the Board in denying Petitioners' Motion to Strike Expert Testimony of William Appleton or Limit Testimony because of the unfairness of learning of additional expert opinions one week before trial, the Petitioners assert at page 11 of the May 6, 2011 brief:

The State subsequently identified William Appleton as an expert on its behalf. The disclosure offered one expert opinion. "Mr. Appleton can be expected to testify as to the procedures used in veterans cemeteries, including West Tennessee Veteran's Cemetery as well as the requirements regarding veteran's burial rights." (Appendix, p. 22) Appellants filed a motion to strike Mr. Appleton as an expert as this case had nothing to do with cemetery procedure. (HR, Vol. 1, p. 68) Further, it did not offer any opinion on whether Mr. Tacker complied with the standard of professional conduct as a funeral director. However, in the event Mr. Appleton was allowed to testify, then he should be strictly limited to the expected testimony provided in the disclosure.

The Judge heard Appellants motion the week before trial. Appellants argued that it would be unfair for them to learn of additional opinions one week prior to trial. The Judge told the State to make Mr. Appleton available for deposition on Friday. The hearing was scheduled for the following Tuesday, November 9, 2010.

Appellants object to allowing new disclosures the week before trial. The State had since January to disclose an expert and comply with Tennessee Rule of Procedure 26. It was completely unfair for Respondent to receive new opinions. Furthermore, at that time, it was clear that the State had failed to comply with *Martin v. Sizemore*, and the Appellants would entitled to dismissal as a matter of law.

The Court rejects this argument as well. Repeating from pages 9-10 *supra*, the Court determines that the standard of care is explicitly provided in Tennessee Regulation 0660-06-.02 regarding documentation of funeral goods and services selected and furnishing that documentation to the family member. The logical extension of this Rule, to facts such as these where there is an alleged subsequent change in selection, is that there must be documentation of the change delivered to the family member. While Mr. Appleton did so testify, his testimony was unnecessary because this Rule and its corollary come straight from the explicit wording of the Regulation. Thus, there was no harm to the Petitioners if the expert testimony at trial deviated from answers to discovery or the expert's deposition because the testimony stated the obvious.

Ground 6: Board's Policy Statement

The Court adopts the Respondent's argument at page 21 of its June 6, 2011 brief that "'policy reasons' are not findings of fact, but statements of the reasons for the action taken by the Board as a result of the facts found." *Slatton v. Tenn. State Board of*

Architectural & Eng'g Examiners, 1988 WL 74619, at *3 (Tenn. Ct. App. July 20, 1988). Nor is the policy statement required to take a particular form. *Wright v. Tennessee Board of Examiners in Psychology*, 2004 WL 3008881, at *9 (Tenn. Ct. App., August 3, 2004).

Applying this standard to the Board's policy statement in this case, the Court concludes that the policy statement does not constitute grounds for reversal. The Board stated, "It is the policy of the Tennessee Board of Funeral Directors and Embalmers to protect the public from negligence, incompetence and deceptive practices." This statement is consistent with the Board's decision that the Petitioners had engaged in unprofessional conduct and deceptive practices with respect to the funeral products and services listed in the Statement. Further, the policy statement is consistent with the assessment of a fine to the Petitioners. Lastly, the policy statement is consistent with the Board's findings of fact that the Petitioners failed to provide a vault at the 10:00 a.m. interment, as per the parties' Statement.

Ground 7: Assessment of Costs Is Unconstitutional

As to the Petitioners' claim that Tennessee Code Annotated 56-1-311, allowing for an administrative agency to assess and collect costs, is unconstitutional as a violation of the Petitioners' fourteenth amendment right to due process and equal protection and eighth amendment right to protection from excessive fines, the Court dismisses this claim. The Petitioners fail to demonstrate how assessment of costs constitutes an undue burden. Nor have they demonstrated a deprivation required to state a due process claim. As to substantive due process rights, the assessment of administrative costs is directly

related to the services provided to the Petitioners in this case by the State and recoupment of these costs is a legitimate State purpose.

Based upon the foregoing analysis, the Court dismisses all of the Petitioners' challenges to the Board's decision.

It is therefore ORDERED that the petition is dismissed with prejudice, and the decision of the Respondent Board is affirmed. Court costs are assessed against the Petitioners.


ELLEN HOBBS LYLE
CHANCELLOR

cc: Thomas J. Long
Cheryl P. Long
Gregory O. Nies
Wanda Coleman

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

CS
Deputy Clerk and Master
Chancery Court

2-3-12
Date