

99-013

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FILED BY CLERK
K.S. DISTRICT COURT
3RD JUDICIAL DISTRICT

MAY 19 3 25 PM '99

TOPEKA, KANSAS

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
Division 4

STATE OF KANSAS, *ex rel.*
CARLA J. STOVALL, Attorney General,

Plaintiff,

vs.

EARL HOLMES, d/b/a HOLMES BROTHERS CONSTRUCTION,

Defendant.

Case No. 99 C 317

Pursuant to K.S.A. Chapter 60

JOURNAL ENTRY OF CONSENT JUDGMENT

NOW on this 7th day of May, 1999, comes before the Court the Journal Entry of Consent Judgment entered into between the parties, pursuant to K.S.A. 50-632(b). Plaintiff, State of Kansas, *ex rel.* Carla J. Stovall, Attorney General, appears by and through James J. Welch, Assistant Attorney General. Defendant appears pro se.

WHEREUPON, the parties advise the Court they have stipulated and agree to the following matters:

1. Carla J. Stovall is the Attorney General of the State of Kansas.
2. The Attorney General's authority to bring this action is derived from statutory and common law of Kansas, specifically, the Kansas Consumer Protection Act, K.S.A. 50-623, *et seq.*
3. Defendant Earl Holmes, d/b/a Holmes Brothers Construction, is a resident of the State of Missouri. Defendant may be served with process at his last known address, RR 5, Box 50C, Carthage, Missouri 64836.

4. Defendant is a supplier within the definition of the Kansas Consumer Protection Act, K.S.A. 50-624(i).

5. Defendant has engaged in consumer transactions in Kansas within the definition of K.S.A. 50-624(c).

8. Defendant admits the Court has personal and subject matter jurisdiction over the parties.

9. Venue is proper in Shawnee County because an act or practice declared to be a violation of the Kansas Consumer Protection Act occurred in the State of Kansas and because Defendant has no principal place of business in the State of Kansas.

10. The Attorney General alleges Defendant engaged in the following acts and practices which are deceptive and violate the Kansas Consumer Protection Act:

a. Defendant failed to provide to the Kansas consumer the written notice of cancellation required by K.S.A. 50-640(b)(2). The failure to provide the required notice constitutes a deceptive act in violation of K.S.A. 50-626 as enumerated in K.S.A. 50-640(b).

b. Defendant failed to inform Kansas consumers the oral notice of cancellation required by K.S.A. 50-640(b)(5). The failure to provide the required oral notice constitutes a deceptive act in violation of K.S.A. 50-626 as enumerated in K.S.A. 50-640(b).

c. In the above-described solicitation and sale to a Kansas consumer, Defendant left a proposal/contract with the consumer. A true and correct copy of said contract is attached hereto and marked as Exhibit A. The contract includes the clause: "If for any reason customer decides not have said job done after signing this agreement, thirty percent of the above price will be charged for services rendered." This is in

violation of K.S.A. §50-640(b)(6), in that it is a misrepresentation of such consumers' right to cancel under Kansas law which prohibits such penalties.

- d. Defendant made at least one solicitation and sale to Kansas consumers in the city of Concordia (county of Cloud), leading such consumer(s) to believe that Defendant had a transient merchant's license in the city of Concordia and/or the county of Cloud, Kansas; when, in fact, Defendant had no such license. Defendant's representation by implication is in violation of K.S.A. §50-626(b)(3), in that it is the willful failure to state and the willful concealment, suppression, and omission of the material fact that Defendant was conducting business in Concordia/Cloud County, Kansas without a transient merchants license.
- e. Defendant's representation by implication that Defendant had obtained a transient merchant's license also violates of K.S.A. §50-626(b)(1)((B), in that it is the representation that Defendant had a sponsorship, approval, status, affiliation and connection that the Defendant did not have - specifically, approval by the city of Concordia and/or by the county of Cloud, to make transient sales.
- f. Defendant represented to at least one consumer that Defendant had performed work at the direction of a business local to such consumer and that, as a result of that job, Defendant had extra materials and would perform work for the consumer with the same materials for a special price. Defendant had not, in fact, performed any work for the local business, as represented to the consumer. This is in violation of K.S.A. §50-626(b)(7), in that it is the making of false or misleading representations, knowingly and with reason to know, of fact concerning the existence of and amounts of price reductions, or the price in comparison to prices of competitors at a past or future time. This is also in violation of K.S.A. §50-626(b)(2), in that its is

the willful use of exaggeration, falsehood, innuendo, and ambiguity as to a material fact.

- g. Defendant represented to at least one consumer that Defendant would perform asphalt paving and patching services to such consumer at a cost of \$1.42 per square foot; however, Defendant gave said consumer no indication of the total cost of such job until after the work had been performed. After completion of the services, Defendant demanded and collected \$5,572.00 from the consumer. This is in violation of K.S.A. §50-626(b)(3), in that it is the willful failure to state a material fact and the willful concealment, suppression and omission of a material fact. Failure to inform the consumer of the substantial total cost prior to completing such work is also in violation of K.S.A. §50-627(b)(1) in that the Defendant took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's inability to determine the size and/or approximate cost of the services.
- h. Defendant cashed checks given to Defendant by at least one consumer as payment for services within three days upon receipt thereof. This is in violation of K.S.A. §50-640(b)(8), which provides that a note or other evidence of indebtedness incurred as a result of a door-to-door sales may not be negotiated, transferred, sold or assigned prior to midnight of the fifth business day following the day the contract was signed or the services were purchased.
- i. Defendant made the solicitation and sale described above to at least one consumer who is an elderly persons (60 years of age or older), as defined by K.S.A. §50-676(a) [Ms. Madeline Wright, Date-of-birth: 11-03-22].
- j. Defendant's violations committed against at least one elderly consumer subject Defendant to enhanced penalties, pursuant to K.S.A. §50-677.

11. Defendant agrees to this Consent Judgment without trial or adjudication of any issue of fact or law.

12. Defendant agrees to refrain from and to be permanently enjoined from engaging in consumer transactions as a supplier within the State of Kansas. Defendant agrees that engaging in such consumer transactions after the date of this Consent Judgment shall constitute a willful violation of this Order.

13. The provisions of this Consent Judgment will be applicable to Defendant, and every employee, agent or representative of Defendant.

14. Defendant agrees to resolve any future complaints filed with the Office of the Attorney General regarding Defendant after the date of this Consent Judgment to the satisfaction of the Attorney General within thirty (30) days of the date such complaint is forwarded to Defendants for resolution.

15. Defendant agrees to be permanently enjoined from entering into, forming, organizing or reorganizing into any partnership, corporation, sole proprietorship or any other legal structures, for the purpose of avoiding compliance with the terms of this Consent Judgment.

16. Defendant agrees to pay \$5,500.00 in restitution to Ms. Madeline Wright, the above-referenced consumer who is a resident of Concordia, Cloud County, Kansas. Payment shall be made by Defendant prior to Defendant's signing of this Consent Judgment.

17. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Consent Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of violations thereof.

18. If any portion, provision or part of this Consent Judgment is held to be invalid, unenforceable, or void for any reason whatsoever, that portion shall be severed from the remainder and shall not affect the validity or enforceability of the remaining provisions, portions or parts.

19. Compliance with this Consent Judgment does not relieve Defendant of any obligation imposed by applicable federal, state or local law, nor shall the Attorney General be precluded from taking appropriate legal action to enforce civil or criminal statutes under her jurisdiction.

20. The parties understand this Consent Judgment shall not be construed as an approval of or sanction by the Attorney General of the business practices of Defendant nor shall Defendant represent the decree as such an approval. The parties further understand that any failure by the State of Kansas or by the Attorney General to take any action in response to any information submitted pursuant to the Consent Judgment shall not be construed as an approval of or sanction of any representations, acts or practices indicated by such information, nor shall it preclude action thereon at a later date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the stipulation and agreement of the parties contained herein are adopted and approved as the findings of fact and conclusions of law of the Court and any monies owed hereunder by Defendant immediately become a judgment upon filing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered against Defendant in favor of Plaintiff in the amount of \$5,000.00 (consisting entirely of restitution to Ms. Madeline Wright.).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Kansas Consumer Protection Act, and the provisions of K.S.A. 50-632(b), the Court hereby approves the terms of the Consent Judgment and adopts the same as the Order of the Court.

IT IS SO ORDERED.

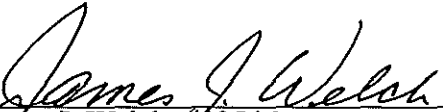


The Honorable Eric S. Rosen
Judge of the District Court

PREPARED AND APPROVED BY:

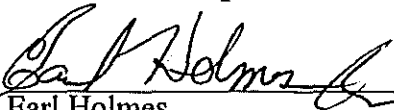


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Attorney General



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Attorney for Plaintiff

APPROVED BY:



Earl Holmes,
d/b/a Holmes Brothers Construction
RR 5, Box 50C
Carthage, Missouri 64836

Defendant

Holmes Brothers Construction



Private Roads Driveways Parking Lots



Earl Sr. • Earl Jr. • Charles • John Mobile: 417-850-6550

PROPOSAL SUBMITTED TO:

WORK TO BE PERFORMED AT:

Name _____
 Street _____
 City _____
 State _____ Zip _____
 Telephone Number _____

Name Madeleine Wright
 Street R1 Box 173
 City Concordia, Kansas
 State _____ Zip 66901
 Telephone Number 785-243-3715

- Description of work
- Dig out area & base with 4-6" base rock 142 sq. ft.
- Grade area
- Compact base with roller
- Apply weed killer & salt
- Install asphalt locks
- Tack coat driveway
- Apply pretromale
- Lay _____ * hot mix asphalt
- Compact asphalt
- Finish edges (Tamp & clean)
- Patch area _____
- Seal driveway with comm. sealer -- area _____
- Seal in 60 to 120 days for \$ _____
- Other (_____)

Handwritten calculations:
 $300 \times 10 = 3000$
 $22 \times 42 = 924$
 $3000 + 924 = 3924$
 144
 880
 924
TOTAL Sq Ft. 3,924

Earl Holmes

CHECK PAYABLE TO: EARL Holmes

Total Price \$ 5,572
 Deposit \$ _____
 Balance \$ _____

*paid in full!
 Subd out making checks # 1415*

FEDERAL REPORTS, R. I.
PLAINTIFF'S EXHIBIT
 A

ACCEPTANCE OF PROPOSAL & CONTRACT

I have read the description of work and fully understand its complete contents. The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Contractor not responsible for pre-mix materials, low spots, tire impressions and vegetation growth.

To be paid in full upon completion of job. If for any reason customer decides not have said job done after signing this agreement, thirty percent of the above price will be charged for services rendered.

Signature Madeleine Wright Date _____
 CUSTOMER'S AUTHORIZATION
 Signature Earl Holmes Date 012698
 CONTRACTOR