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IN THE DISTRICT COURT OF BUTLER COUNTY, KANSAS

STATE OF KANSAS, ex rel.,
ROBERT T. STEPHAN, Attorney General,
Plaintiff,

vs.

COMMEMORATIVE SERVICES
CORPORATION, NORMAN ANDERSON,
an individual, et al.,
Defendant.

Case No. 80 C-665

MEMORANDUM DECISION AND ORDER

After the remaining issues in this case were tried to the Court, the matter was taken under advisement pending submission of proposed findings by counsel. The Court has had the opportunity to review the evidence, submissions, proposed findings and arguments of counsel.

Basically, this case involves a petition by the Attorney General of the State of Kansas seeking relief under the Kansas Consumer Protection Act (KCPA), K.S.A. 50-623 *et seq.* and certain statutory provisions governing funeral and cemetery merchandise arrangements, K.S.A. 16-301 *et seq.* The Attorney General alleges that defendants Commemorative Services Corporation and Norman Anderson violated certain provisions of the above statutes and requests that the Court impose penalties and sanctions in regard thereto.

The Attorney General desires enforcement of these statutes by a order requiring said defendants to fund consumer trusts for all contracts made by the defendants with private citizens for pre-need burial markers in which defendants received moneys for such markers but

put nothing in trust as required by law.

This case has had a long and tortured history involving two different District Judges, a multitude of other parties now dismissed from the case, and several counsel.

Perhaps, it would be best to briefly summarize the history of this case, at least in terms of prior court rulings which have affected the key issues which are still before the Court.

Judge Benson, the previous trial judge in the case, ruled:

- a) KSA 16-301 *et seq.* applies to all pre-need sale of burial markers by defendants to consumers prior to July 1, 1973. Thus, the establishment of trust fund for markers sold on such a basis is required by law.
- b) KSA 50-623 applies to all pre-need sales of burial markers by defendants in which delivery of merchandise was not made prior to sale of certain cemetery corporations by defendant Commemorative Services.

In granting plaintiff's motion for partial summary judgment, Judge Benson further ruled that defendants Norman Anderson and Commemorative Services Corporation were both liable under KSA 16-301 *et seq.* and the KCPA for their failure to properly fund merchandise trusts for such burial markers sold on a pre-need basis.

This Court, after Judge Benson retired, in response to various motions and issues raised by the parties, ruled:

- a) The Court has authority under KSA 16-306 to compel compliance with the act by requiring a violating party to deposit funds into a trust account as mandated by the act.
- b) One possible form of injunctive relief available to the Attorney General would be for the Court to require defendants to now deposit a

sum of money into trust equal to the total amount of funds originally paid by purchasers of burial markers but never deposited in trust by the defendants.

- c) Every contract and resulting non-deposit of funds is a separate and distinct violation of KSA 16-301.
- d) If defendants wish to argue that delivery of some markers have already been made and such monies for those markers should not be paid into trust under an equitable theory of unjust enrichment, defendants may do so, and the Court would certainly consider such arguments.
- e) Every contract for burial markers where the receipted funds were not deposited constitutes a separate and distinct violation of the KCPA.
- f) The KCPA permits the Attorney General to seek declaratory judgments and restraining orders; to recover actual damages and reasonable investigative fees and expenses.
- g) The KCPA further allows the Attorney General to seek civil penalties of up to \$2000.00 for each violation of the KCPA.
- h) The statute of limitations do not run against the State under either KSA 16-301 *et seq.* or the KCPA.
- i) No pre-need payments by consumers for burial markers were ever deposited in trust during the time periods in question.

Findings & Conclusions

1. The damages to be imposed against defendants for violation of K.S.A. 16-301 which will fully compensate the consumers of Kansas is the wholesale cost of providing a marker and will ensure that all Kansas consumers receive the marker they bargained for when the need arises.

2. Based upon the evidence, the Court finds that the defendants

are liable for the sale of markers prior to 1973 at the various cemeteries in the below listed quantities and wholesale amounts:

<i>Cemeteries</i>	<i>Number of Contracts</i>	<i>Wholesale Cost</i>
Ft. Hays Memorial Gardens	23	\$ 4,398
Greencrest Memorial Gardens	436	27,443
Crestwood Cemetery	50	6,410
Greenlawn Cemetery	74	12,372
Hillcrest Cemetery	170	43,392
Sunset Cemetery	94	27,198
Roselawn Cemetery	28	4,703
Restlawn Cemetery	145	23,454
Walnut Valley Cemetery	227	23,962
TOTAL pre-1973 contracts:	1,247	\$173,332

(See Stipulation of the Parties, St. Exh. #7 and Defendants' Proposed Findings, para. 2, pg. 2.)

3. There were no violations of K.S.A. 16-301 after 1973. At that time the legislature specifically changed the statute to make it clear that burial markers were not included in the trust provisions of this statute.

4. The Court finds that no actual damages should be assessed against the defendants for markers already provided since this would amount to a windfall. Such consumers have already been provided the marker that was contracted for, even though the amounts originally paid had not been placed in trust. The Court has considered and rejected the Attorney General's argument that such amounts should be assessed against the defendants anyway and paid over to the individual cemeteries to be used for general maintenance, repair and improvement. Administering and monitoring such a procedure would appear too unwieldy. If the individual cemeteries feel they have some recourse against defendants,

they should seek appropriate legal remedies.

5. The Court finds that no additional actual damages should be awarded under the KCPA. Any such award would essentially be duplicative to the penalty imposed under K.S.A. 16-301 above.

6. As previously noted, the Court has found that every infraction constitutes a violation of the KCPA. In regard to question of civil penalties under the KCPA, the Attorney General argues for a maximum fine of \$2,000.00 for every instance of a violation, i.e. \$2000 times 1,247 violations = a total fine of \$2,494,000.00. The defendants argue for no penalties, citing various factors in their proposed findings.

7. It would appear to the Court that a fine of nearly \$2.5 million is clearly oppressive in this case, where the Court is making no finding that the defendants actions are malicious or deliberately fraudulent. Therefore, the Court will assess a fine of \$25.00 for every violation of the act, for a total fine of \$31,175.00.

8. The Attorney General's Office will be allowed \$10,000.00 for expenses and investigation expenses as claimed in the pre-trial order.

Orders of the Court

For the foregoing reasons, the Court finds and concludes as follows:

A. Defendants are ordered to immediately place the sum of \$173,332.00 in trust, said sums to be used to purchase burial markers for the 1,247 contracts mentioned above.

B. Defendants are hereby fined the sum \$31,175.00 for their violations of the Kansas Consumer Protection Act.

C. Plaintiff is granted a personal judgment against defendants in the sum of \$10,000.00 for expenses and investigation fees.

D. Counsel for the parties are invited to suggest to the Court, within seven days after receipt of this opinion, their recommendations as to how the trust account provisions of this opinion may best be implemented.

E. Moneys collected in the enforcement of this judgment shall be first applied toward restitution, then toward investigative fees and expenses, and lastly toward the civil penalty imposed.

This Memorandum Decision and Order shall serve as the Order of the Court, no further Journal Entry being required. The Court will issue a Supplemental Opinion regarding implementation of the trust account portion of this order after considering the recommendations of counsel.

IT IS BY THE COURT SO ORDERED this 18th day of March, 1990.


HON. JOHN E. SANDERS
Judge of the District Court