

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE 20TH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE)
ex. rel. JULIE MIX MCPEAK, solely)
in her official capacity as Commissioner of)
Commerce & Insurance)

Plaintiff,)

vs.)

No. CH-14-0102-II)

GALILEE MEMORIAL GARDENS,)
JM&M SERVICES, INC.,)
LAMBERT MEMORIAL CO., aka)
LAMBERT MEMORIALS, INC.)
LAMBERT & SONS, INC.,)
JEMAR LAMBERT, MARJE LAMBERT)
and MARY H. LAMBERT, and ALL)
PERSONS ACTING IN CONCERT WITH)
THEM,)

Defendants.)

**MOTION TO LIFT STAY
FOR THE LIMITED PURPOSE OF DEPOSING ROBERT E. MOORE**

Akilah Louise Wofford and the other families who are the named plaintiffs in *Wofford et al. v. M.J. Edwards & Sons Funeral Home, Inc.*, Shelby County Chancery Court Case No. CH-14-0197 (hereinafter “The Families”), hereby ask this Court to grant this motion to lift the stay for the limited purpose of deposing Robert E. Moore, Deputy Receiver for Receivership Management, Inc.

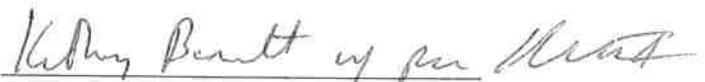
The Families have been appointed by the Shelby County Chancery Court as class representatives, to bring claims arising from the mishandling of remains at Galilee, on behalf of themselves and all others similarly situated. Ex. 1. The trial court’s Order designating The Families as class representative was affirmed by the Tennessee Court of Appeals, *Wofford v. M.J. Edwards*, 2017 WL1191298 (Tenn. Ct. App. 2017), and the Supreme Court has denied the

applications for permission to appeal by multiple funeral homes who are defendants in that action. Ex. 2.

The Families are readying their case for trial. They seek to depose Mr. Moore. Counsel for the Receiver has indicated that he does not oppose allowing this deposition, but that he wishes to avoid the distraction and waste of multiple depositions. Thus, in order to ensure that the deposition of Mr. Moore proceeds efficiently and appropriately, The Families seek an Order from this Court lifting the stay and allowing them to depose Mr. Moore in a single discovery deposition.

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NOTICE OF HEARING

THIS MOTION SHALL BE HEARD ON SEPTEMBER 29, 2018 AT 9:00AM.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid, to the following on September 15, 2017:

Jef Feibelman BURCH, PORTER & JOHNSON, PLLC 130 North Court Avenue Memphis, TN 38103	Robert E. Moore Receivership Management, Inc. 1101 Kermit Drive, Suite 735 Nashville, TN 37217
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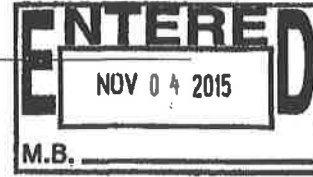

Kathryn E. Barnett

EXHIBIT 1

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, SHELBY COUNTY



AKILAH LOUISE WOFFORD, et. al.,
Individually and on behalf of all similarly
Situated persons,

Plaintiffs,

No. CH-14-0197-2

vs.

M.J. EDWARDS & SONS FUNERAL HOME, INC., et. al.,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

THIS CASE CAME to be heard before the Court on October 26, 2015 on Plaintiffs' Motion for Class Certification.

A. PROCEDURAL HISTORY

On March 3, 2014, Plaintiffs filed Motion for Class Certification seeking from the Court certification pursuant to Tenn.R.Civ.P.23 of a class of people affected by the improper and uncertain disposition of decedent remains at Galilee Memorial Gardens. On May 19, 2014, Plaintiffs filed substitute motion for conditional class certification, and on September 14, 2015, Plaintiffs filed supplemental memorandum in support of class certification. On October 6, 2015, Harrison's Funeral Home, Inc. filed memorandum opposing class certification. Christian Funeral Directors, Mays Funeral Home, N.H. Owens & Sons Funeral Home, Inc., SLS, Inc., J.E. Herndon Funeral Home, Wolfe Brothers, and R.S. Lewis & Sons Funeral Home and Lofties Funeral Home each filed memorandum opposing class certification on October 7, 2015. On

October 8, 2015, Defendants Lewis, Herndon and Lofties filed a motion in limine to exclude expert testimony at class certification hearing. Plaintiffs filed on October 19, 2015 a reply in support of their class certification memorandum, and on October 21, 2015, Plaintiffs filed a response to Defendants' motion in limine to exclude expert testimony. Also on October 21, 2015, Jefferson Mortuary filed a notice of joinder in Defendants' Responses to motion for class certification. On October 23, 2015, Plaintiffs filed a notice of withdrawal of class allegations from Third Amended Complaint as to certain funeral home Defendants. Finally, the Court heard oral argument on Plaintiffs' Motion for Class Certification and Defendant's Responses on October 26, 2015 and took the matter under advisement at the conclusion of the hearing.

B. PROPOSED CLASS DEFINITION

The named Plaintiffs moved this Court for certification pursuant to Tenn.R.Civ.P. 23 of a class of families affected by the events at Galilee, defined as:

All those who are or were next of kin¹ of any decedent delivered to Galilee for burial from January 1, 2011 through January 31, 2014; and

all persons or entities who were parties to any contract with any defendant regarding funeral arrangements for a decedent who was delivered to Galilee for burial from January 1, 2011 through January 31, 2014.

The class is defined to exclude any class member who timely elects to be excluded from the class, and any class member who has obtained other legal representation and has commenced a separate lawsuit as of the date of certification. However, any potential class member who is participating in a separate lawsuit may elect to join the class. The class excludes the defendants, including any parent, subsidiary, affiliate or controlled person of these entities and their officers,

¹ Next of kin for purposes of this class is defined pursuant to *Akers v. Buckner-Rush Enterprises, Inc.*, 270 S.W.3d 67 (Tenn. Ct.App. 2007).

directors, agents, employees and members of their immediate families; and the judicial officers to whom this case is assigned, their staff, and the members of their immediate families.

C. STANDARD OF REVIEW

According to Rule 23.01, “one or more members of a class may sue or be sued as representative parties on behalf of all only if

- 1) The class is so numerous that joinder of all members is impracticable,
- 2) There are questions of law or fact common to the class,
- 3) The claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- 4) The representative parties will fairly and adequately protect the interest of the class.”

Tenn. R. Civ. P. 23.01.1.

While the party seeking class certification has the burden to show that the prerequisites of Rule 23.01 have been satisfied, the decision whether or not to certify a class is within the trial court’s sound discretion. *See Hamilton v. Gibson County Util. Dist.*, 845 S.W.2d 218, 225 (Tenn. Ct. App. 1992); *See Warren v. Scott*, 845 S.W.2d 280, 282 (Tenn. Ct. App. 1992). Only upon a finding of an abuse of that discretion should the trial judge’s decision be modified on appeal. *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 637 (Tenn. 1996).

If all four prerequisites of Rule 23.01 are met, then the proponent of class certification must demonstrate that the class is maintainable. *First Am. Nat. Bank of Nashville v. Hunter*, 581 S.W.2d 655, 659 (Tenn. Ct. App. 1979). Rule 23.02 provides three potential bases for class action maintenance, only one of which must be met. Plaintiffs are asserting that the proposed class is maintainable under Rule 23.02(2) or 23.02(3):

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, hereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the question of law or fact common to the members of the class predominates over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action. Tenn. R. Civ. P. 23.02.

As the Tennessee Supreme Court has explained, class actions advance “efficiency and economy of litigation which is a principal purpose of the procedure.” *Meighan*, 924 S.W.2d at 637 (citing *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 159 (1982)). Class actions protect the Defendant from inconsistent obligations, protect the interests of absentee class members, provide a convenient and economical means of disposing of similar lawsuits, and facilitate the spreading of litigation costs among numerous litigants with similar claims. *Meighan*, at 637 (citing *United States Parole Commission v. Geraghty*, 445 U.S. 388, 402–03 (1980)). Thus, while the class action device has its notable advantages to the parties to a lawsuit, it also advances the interests of judicial economy and of providing access to the courts. *Id.*

The procedural analysis of whether to certify a class action under Rule 23 does not include any consideration of the merits of the case. *Eisen v. Carlisle and Jacqueline*, 417 U.S.

156, 177-178 (1974). As the Supreme Court has explained, "In determining the propriety of a class action, the question is not whether the Plaintiff or Plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 177-178.

Finally, it is the trial court's prerogative to make the initial determination of and any subsequent modifications to class certification. The trial court retains significant authority to *redefine, modify, or clarify the class*. *Meighan*, 924 S.W.2d at 637, *see also* Tenn.R.Civ.P. 23 Advisory Commission Comment (the determination of whether class action is appropriate, "is subject to alteration at any time prior to judgment on the merits.") In light of this broad judicial discretion, inherent flexibility, and ongoing ability to define further or even decertify the class as litigation progresses, the court should err in favor of, and not against, certification of the class action. *See, e.g. Edington v. R.G. Dickinson and Co.*, 139 F.R.D. 183, 188 (D. Kansas 1991) ("In making the decision, the courts have erred in favor of certification since the decision is not set in stone, but is subject to later modification.")

D. THE COURT'S FINDINGS

The Court finds that this case meets the requirements for class certification under Rule 23.01 and Rule 23.02.

I. NUMEROSITY

Under Tenn.R.Civ.P.23.01, class certification is appropriate where the class is so numerous that joinder of all members is impractical. When class size reaches substantial proportions, the impracticability of joinder requirement is usually satisfied by the number alone.

In re Am. Med. Sys. Inc., 75 F.3d 1069, 1079 (6th Cir.1996), *see also Isabel v. Velsicol Chem. Corp.*, 2006 WL 1745053, at *3-4 (W.D.Tenn. 2006) (Hon. Bernice Donald). Thus, when the number of class members exceeds forty, the numerosity requirement is generally deemed satisfied. *Ham. v. Swift Transp. Co., Inc.*, 275 F.R.D. 475 (W.D.Tenn. 2011) (citations omitted). Other factors to consider include the need to avoid a multiplicity of actions and the interests of judicial economy. *Id.* Plaintiffs have the burden of establishing the number of the members of the class and also that joinder is not practicable. *Albriton v. Hartsville Gas Co.*, 655 S.W. 2d 153, 155 (Tenn. Ct. app. 1983) (citing *Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970)).

Galilee's records indicate that, from January 1, 2011 through November 2, 2013, some 1,288 decedents were buried at Galilee. In total, this case's class includes the next of kin of hundreds of decedents who were to be buried at Galilee between January 1, 2011 through January 31, 2014, as well as the individuals who contracted for the funeral services for those decedents. Defendants deny that joinder is impractical, arguing that a very large percentage of potential Plaintiffs have already been named and successfully joined in both this case and the related matters of the Chancery Court Part III *Stevens* case and the Circuit Court *Anderson* case. Defendants further argue that Plaintiffs have failed to meet their burden of providing specific, identifiable evidence or proof to show that joinder is impracticable.

The Court finds that Plaintiffs have effectively met their burden of providing specific, identifiable evidence or proof to show that joinder is impracticable. It is undisputed that there are at least 1,288 deceased individuals in the purported class, some of whom are part of this lawsuit and some of whom are not. Therefore, the Court finds the Plaintiffs' argument that the class is too numerous for practicable joinder to be well-taken.

II. COMMONALITY

Tenn.R.Civ.P. 23.01(2) requires that, for certification of a class, there must be questions of law or fact that are common to the class; the commonality test is qualitative rather than quantitative. *Robinson v. EMI Music Distribution Inc.*, 1996 WL 49551, at *1 (Circuit Court of Tennessee, 2015). Where a common course of wrongful conduct is alleged, commonality is most easily demonstrated. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir.1988), see also *Newberg on Class Actions*, § 3.10 (“When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more elements of that cause of action will be common to all of the persons affected . . .”). A common nucleus of facts is usually enough to satisfy the commonality requirement of Rule 23.01(2). *Robinson*, 1996 WL 49551, at *2. Finally, separate issues of law and fact regarding damages do not negate class action certification. *Meighan*, 924 S.W.2d at 637.

Defendants argue that the commonality bar is not met by Plaintiffs because each claim of the proposed class representatives will require extensive, individualized proof. However, in this case, regardless of whether it was Plaintiff family member or some other authorized person on Plaintiff's behalf who contacted and met with the Defendant funeral home, all Plaintiffs came away with the same basic understanding that the Defendant would provide appropriate funeral services. Furthermore, all members of the proposed class have been victims of a common course of conduct: they suffered the death of a loved one, they entrusted their loved one's remains with a funeral home Defendant for the purpose of providing a respectful and lawful final disposition by burial at Galilee, and they relied upon contracts they entered with the funeral homes based upon:

the uniform contractual duties owed by the funeral home Defendants;

the uniform fiduciary duties owed by the Defendants to these families;

the uniform standard of care applicable to the funeral homes and to the Galilee Defendants;

the uniform elements of the common law tort of mishandling of remains; and

the uniform conduct on the part of the funeral home Defendants of abandoning the remains at Galilee.

Plaintiffs' breach of contract claims present numerous common questions, questions that lie at the heart of each of the claims. Regardless of any differences between the agreements made between the various Plaintiffs and various Defendants (whether these agreements were written, oral, or "handshake" in nature), the respective Plaintiffs came away from meeting the respective Defendant funeral homes with the understanding that there would be a proper disposition of the decedent remains. While the exact duty of the Defendant funeral homes and whether such duty was breached is disputed, there is no dispute that the contracts between the funeral home Defendants and each and every class representative and class member included a federally-required line item for "Basic Services of a Funeral Director." Therefore, central to the breach of contract claims of each and every class representative and the class member is the common question of whether "Basic Services of a Funeral Director and Staff" includes the supervision and ensuring of the proper, lawful final disposition of the remains. It is clear that, at the beginning of the process, pursuant to the Tenn. Code Ann. § 62-5-101(6) (A), the funeral home takes possession of the remains, and then, at some point in time, the duty to provide a proper burial shifts to the cemetery. Tennessee law further mandates that, "no employee or member of any firm or corporation shall engage in the care, preparation, disposal or burial of dead bodies ... unless the employee or member is a licensed funeral director." Tenn. Code. Ann § 62-5-313(a).

In fact, the Board of Funeral Directors has issued civil penalties for funeral homes that “conducted committal and interment service of the decedent without employing the services of a funeral director licensed to conduct services in Tennessee,” and “conduct[ing] committal and interment services in Tennessee without a Tennessee funeral director present and in charge of the services.” Ex. 3, Civil Penalties.

The common question of what obligations, if any, federal and state regulations impose on funeral directors regarding the burial of remains must be answered for each and every class member and class representative.

Therefore, the Court finds that the requirement of commonality is met in that each Plaintiff had same common expectation for what was going to happen with the deceased, and that expectation was that the body would be, with certainty, properly managed. Certainty is the very thing these Plaintiff families contracted for with these Defendants. As set forth in the expert witness disclosure for Shun Newbern:

It is recognized in the profession that learning that there is any uncertainty about the treatment of or final resting place of a loved one’s remains reasonably and expectedly disrupts the grief process and causes serious emotional distress. The foundation of a funeral professional’s services is providing families with certainty that they have entrusted their loved one’s remains to professionals who will care for, protect and ultimately provide for the disposition of the remains in a lawful, dignified, appropriate manner. In the case of a traditional casketed burial, this includes ensuring the remains are laid to rest in a meaningful place permanently, for the family and for future generations. Learning that the location of the remains is uncertain or unknown, losing the certainty that a loved one’s remains were treated at all times with the utmost dignity and/or learning that those who came into contact with the remains demonstrated disrespect and disregard for the remains is devastating, leading to expected and reasonable emotions of violation and betrayal, as well as guilt, worry, disappointment, inadequacy and failure.

Ex. 4, at 8. Likewise, licensed funeral director Charles Crawford’s disclosure explains:

The loss of certainty about the honor, dignity and respect a loved one’s remains were provided and the loss of certainty about the final resting place of a loved one’s remains are serious emotional harms. Certainty and respect are exactly

what the bereaved seek when entrusting the remains of their loved one to a funeral professional and are exactly what the bereaved need in the grieving process.

III. TYPICALITY

Under Tenn.R.Civ.P. Rule 23.01(3), a class can only be certified if the claims of the class representatives are typical of the claims of the class members. A class representative's claim is typical if it arises from the same event, practice or course of conduct that that gives rise to the claims of the other class members and if his claims are based on the same legal theory.

Freeman, 229 S.W.3d at 703 (citing *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 96th Cir. 1996). The claims and defenses do not have to be identical, so long as a common element of fact of law exists between the claims. *Ham*, 275 F.R.D. 475, at 484-485. A class representative's claims are typical when there is a common element of fact or law, even the claims do not involve the same facts or law. *Freeman*, 229 S.W.3d at 703.

The essence of the typicality requirement is ensuring that the class representative's interests are aligned with those of the representative group, such that the named Plaintiff will also advance the interests of the class members. *Roberts v. McNeill*, 2011 WL 662648, at * 6 (Tenn. Ct. App. 2011). Thus, when the class representatives will have to prove essentially the same elements as the remainder of the class, typicality should be found, notwithstanding factual differences between various members of the class. *Robinson*, 1996 WL 495551, at * 3 (Tenn. Circuit Court, 1996) (citing *Brown v. Cameron-Brown Co.* [1982-2 TRADE CASES ¶ 64,874], 92 F.R.D. 32, 38 (E.D.Va.1981).

While Defendants respectively argue factual difference between their relationships with purported class representatives, it is clear that regardless of the particular facts of each burial, each burial was to be done at Galilee, making each experience by the family members typical of

each other. Further, none of the individual differences between the burials are material to the legal theories underlying these cases, nor are they relevant to the Defendants' practices and course of conduct that gives rise to the class members' claims. There were uniform contractual, fiduciary, statutory and professional duties owed by each of the Defendants. For the funeral home Defendants, there was a uniform course of conduct in delivering remains to Galilee. The families' individual details are irrelevant to the underlying, pivotal common questions surrounding the nature and scope of the Defendants' contractual, fiduciary, professional and statutory duties, whether those duties were breached, the common defenses, and the equitable relief sought by the Plaintiffs. Thus, the Court finds that the class representative's claims are typical of the claims of the class members.

IV. ADEQUACY OF REPRESENTATION

Finally, Tenn.R.Civ.P. 23.01(4) requires that the representative Plaintiffs will fairly and adequately protect the interests of the class. To meet this criterion, the class representatives must have common interests with the unnamed class members and it must appear that the class representatives will vigorously prosecute the case and protect the interests of the class through qualified counsel. *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.) *cert. denied*, 429 U.S. 870 (1976), *see also Robinson*, 1996 WL 495551, at *3.

The adequacy requirement is met in this case, as the named Plaintiffs' interests are united with those of the class they seek to represent, and the counsel they have retained to bring this litigation are competent and experienced in the field of complex civil litigation, including class actions and the prosecution of desecration and mishandling of remains claims.

The named Plaintiffs' interests are co-extensive with those of the class. They, like the

class members, suffered direct injury to their legal rights when their loved ones' remains were delivered to a cemetery that Plaintiffs allege mishandled, stacked, crushed and lost remains. They share the class members' interest in obtaining the requested compensatory and punitive damages, and the requested equitable relief from the Defendants. In no way are any of the named Plaintiffs' interests antagonistic to those of the class. They will fairly and adequately represent the class' interests as this litigation proceeds.

Further, it is undisputed that undersigned counsel are members in good standing of the Tennessee bar and have a background in prosecuting complex and class action lawsuits. The Court finds that undersigned counsel are more than capable of providing adequate representation for the purported class.

V. TENN. R.CIV.P. 23.02(2)

Certification of a class action under Rule 23.02(2) is appropriate where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole." This Rule applies in cases in which injunctive or declaratory relief is the predominate relief sought. *Meighan*, 924 S.W.2d at 636.

The Complaint contains claims for both damages and equitable relief. This Court need not determine whether legal or equitable claims predominate, or certify all claims under a single subsection of Rule 23. The Court may treat each claim individually and certify under Rule 23.02(2) only those claims in which equitable relief predominate under the provisions of Rule 23.03(4). See *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999).

While Defendants allege that equitable relief, and not damages, must be the primary demand for a class action to be suitable, the Court agrees with the Plaintiff that the equitable relief sought in this case is particularly suited to class treatment, because it must be undertaken on behalf of all families whose loved ones' remains were delivered for burial at Galilee to be effective. The historical purpose of Rule 23.02(2) certification is to bind all those presently or subsequently interested in the subject matter to the final decree. Additionally, the need for equitable remedy has arisen from the Defendants' actions with regard to the class as a whole. Accordingly, certification of the Plaintiffs' claims for equitable relief is appropriate under Rule 23.02(2).

VI. TENN.R.CIV.P. 23.02(3)

Under Tenn.R.Civ.P. 23.02(3), class certification is appropriate when common questions of fact or law predominate over any individual questions and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The Court finds that this case meets both criteria.

- **Common Issues Predominate**

“Considering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.” *Erica P. John Fund, Inc. v. Halliburton Co.* (Halliburton I), 563 U.S. 804, 131 S.Ct. 2179, 2184 (2011). To satisfy the predominance requirement, a Plaintiff must establish that issues that are subject to generalized proof and thus applicable to the class as a whole predominate over those issues that are subject to only individualized proof. *Beattie v. Century Tel., Inc.*, 511 F.3d 554, 564 (6th Cir. 2007). Significantly, Rule 23 requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. *Rockos v. Procter &*

Gamble Co., 2015 WL 4978712, at *18 (6th Cir. 2015) (citing *Amgen*, 133 S.Ct. at 1191). A failure of proof on any of the common elements of one of the class claims would not result in individual questions predominating the litigation, but instead would end the claim. *Id.*

It is well established that the existence of separate issues of law and fact, particularly regarding damages, do not negate class certification. *Meighan*, at 637, *see also Ham*, 275 F.R.D. at 487-488. Even if separate factual issues of individual damages remain, common legal and factual issues, including the nature of the claim and of the relief, can predominate. *Id.* Moreover, class certification should not be denied merely because some class members may be subject to individual defenses. *Beattie*, 511 F.3d at 564, *see also City of Goodlettsville v. Priceline.com, Inc.*, 267 F.R.D. 523, 533 (M.D.Tenn. 2010).

Defendants argue that mass torts are inappropriate for class certification. While Plaintiffs agree that some tort cases have been found inappropriate for class treatment, Plaintiffs maintain that cases involving the widespread desecration and mishandling of remains are uniquely appropriate for class certification. Unlike some types of tort cases, widespread mishandling of remains cases involve core, predominant common questions, including the existence and scope of contractual, professional and regulatory duties owed to grieving families. These cases also present common defenses - such as blaming the State and arguing about the level of proof required of what befell each decedents' remains. In addition, mishandling of remains cases do not present a myriad of complicated, individual medical and toxicological causation defenses. Instead, while the amount of damages is an individual issue, it has long been recognized that desecration and mishandling of remains reasonably and expectedly causes significant suffering and emotional distress. *Hill v. Travelers Ins. Co.*, 294 S.W. 1097, 1098 (Tenn. 1927).

For these reasons, and contrary to the Defendants' assertions, the circumstances of this case are particularly appropriate for class certification.

To summarize, some of the common questions that predominate this litigation include:

whether the Defendants had a contractual or professional duty to ensure and supervise the burial of the remains,

whether the Defendants breached any such duties,

whether the Defendants breached any fiduciary duties in their conduct,

whether the Defendants had a statutory duty to ensure and supervise the burial of the remains,

whether the Defendants breached and such duty,

whether the Defendants' conduct constituted mishandling of remains,

whether the class members may recover despite the fact that the Defendants' actions have left them without knowledge of the specific mishandling that befell their loved ones' remains,

whether the funeral home Defendants are directly or vicariously liable for the actions of the Galilee Defendants,

whether the injuries to the class representatives and class members was a reasonably foreseeable harm,

whether and to what extent the State of Tennessee should share fault,

whether the Defendants would be unjustly enriched by retaining the benefits conferred upon them under the circumstances, and

whether and to what equitable relief the class is entitled.

The answers to these common questions do not vary based on the sorts of differences that are inherent in the uniqueness of every death, and of every grieving family. The Plaintiffs' claims are not differentiated by such factors as the individual class member's relationship to the decedent, the particulars of the ceremony for the decedent's remains, whether the payment to Galilee was delivered by the family directly or through the funeral home, the number of times a

family went to visit Galilee after the burial, or the amount of time that has passed since the decedent's death. None of these variables has any bearing upon the funeral home's duty to ensure that the decedent's remains were treated with the highest degree of dignity and respect, or the question of whether the funeral homes' duties included ensuring and supervising the final disposition of the remains. Certainly, every family that seeks a funeral home's services will be unique; the funeral home's contractual, fiduciary, statutory and professional duty to those families regarding the disposition of the remains, however, does not vary.

Class certification is appropriate because of the predominance of common issues, each of which will be determined based upon common proof, expert testimony and legal authority.

- **A Class Action Is Superior**

The Court finds that a class action is the superior method for adjudicating this controversy. Importantly, a class action need not be perfect; it must merely be the superior method. Tennessee courts recognize that class actions are superior where, as here, the Defendants' liability can be determined on a class-wide basis because the claims rest on a single course of conduct which is the same for all class members. *Freeman*, 229 S.W.3d at 706. Proceeding with this matter as a class action would be superior here because "the common issues will only have to be heard and decided once, thereby promoting judicial efficiency." *See City of Goodlettsville*, 275 F.R.D. at 534, *see also Meighan*, 924 S.W.2d at 637-638 (finding a class action superior because otherwise the matter, "could result in hundreds of lawsuits in dozens of courts occupying dozens of judges. Inconsistent decisions regarding the trespass and punitive damages claims would be likely. Separate appellate decisions with differing results are no less likely.")

While a major individual issue among each family is the amount of emotional damages arising from their claims, the Court finds that these damages should be dealt with individually, if

necessary, after a trial on the common issues of liability.

Other “pertinent” factors for consideration in determining if a class action is the superior method for adjudicating the controversy include (a) the class members’ interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Tenn.R.Civ.P. 23.02(3). These factors weigh in favor of certification of a class in this case.

Regarding the first two factors, it is plain that the vast majority of those individuals impacted by this course of conduct prefer to have the common issues in their cases resolved through a class action trial. In addition to the named Plaintiffs in this action, the families of the more than 550 decedents filed suit in the *Stevens* case, explaining that they seek to participate as class members in *Wofford, Stevens et al. v. JM&M Services, Inc. et al.*, Case No. CH-4-1772, at ¶1-2. Hundreds of additional class members have not yet filed suit and thus have indicated no interest in controlling this litigation. The small minority of class members who are pursuing claims in Circuit Court (less than 15% of the families who have filed suit arising from this matter), are not included in the class definition – although they would be free to join the class. Even if none of those individuals joins this case, proceeding with this class action is still superior because this case would still provide the opportunity to avoid hundreds and hundreds of individual trials on the common issues.

Regarding the third factor, concentrating this litigation in this forum is desirable because the majority of witnesses, evidence and parties are in and around Shelby County, Tennessee, because Galilee cemetery is located here, as are the remains that are the subject of this action and

because each Defendant transacted business here. Furthermore, the Chancery Court has the ability to consider the parties claims for equitable relief as well as damages.

Finally, allowing the case to proceed as a class action will not be unmanageable. The Court need only consider and apply the laws of one State in this matter and the contracts and underlying professional and fiduciary obligations of the Defendants are uniform. Further, despite the relatively large number of parties, all counsel have worked cooperatively, efficiently and effectively to conduct the discovery and motions practice necessary. Any complications of *trying these common issues together in one trial would be far outweighed by the prospect of* having to conduct more than 550 individual trials, over and over again, on the same fundamental issues.

The superiority of a class trial of the common issues in this case is especially evident when considering the alternative. The families of more the 550 decedents each have claims to pursue. Without a class approach to the common questions, they will each need to present and re-present the same evidence over and over and over -- either in a massive consolidated trial, or in hundreds and hundreds of individual trials. Each case would present the same contractual terms, the same evidence and argument about the statutory, fiduciary and professional obligations of the Defendants. Each case would present the same evidence of the conduct of the Defendants. Each case would present the same evidence about the scope of the discoveries at Galilee, the desecration of remains there and the utter lack of any reasonable records for determining where any remains rest, or to what treatment any were subjected. Rule 23 provides the tool needed to avoid this unnecessary, lengthy drain on the Court's and the parties' resources. With a class trial on the common issues, the common issues at the heart of this case can be tried and decided once,

with a single judge and jury – instead of more than 550 times. For this reason, a class action is the superior method for adjudicating this controversy.

E. CONCLUSION


Based on the submissions of the parties, the arguments and statements of counsel in open court, the Court's findings, and the entire record in this action, the Court finds that Plaintiffs' Motion for Class Certification is well taken and the Court grants the same in its entirety. The Court finds that Plaintiffs have shouldered the burden of proof under Rule 23 in order for a class to be certified.

The Court does not accept the notice of withdrawal of class action allegations against Kenneth Gerald Mays (Mays Funeral Home), Larry Wolfe (Wolfe Brothers Funeral Home), J.A. Lofties Funeral Home and James F. Lofties, Golden Gate Funeral Home and Sheila Davis Parris, Vernal H. Bins, Jr. individually and d/b/a VH Bins & Sons Mid-South Funeral Home, and Hardeman County Funeral Home.

As for Defendant M.J. Edwards-Hillside Chapel, Inc., the Court on December 16, 2014 denied M.J. Edwards' Application and Motion to Compel Arbitration. Subsequently, Defendant M.J. Edwards filed a notice of appeal (No. W2015-00092-COA-R3-CV), and proceedings in Shelby County Chancery Court, Part II against Defendant M.J. Edwards were stayed. If the Court's denial of M.J. Edwards' Application and Motion to Compel Arbitration is overruled, then M.J. Edwards will not be included in the Court's certified class. If the Court's denial of M.J. Edwards' Application and Motion to Compel Arbitration is upheld, then M.J. Edwards will be included in the Court's certified class.

Based on the foregoing, it is hereby **ORDERED**: Plaintiffs' Motion for Class Certification is granted.

IT IS SO ORDERED.

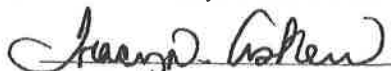


Chancellor Jim Kyle

Date: NOV 04 2015

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing order to all attorneys of record at the address below on November 4, 2015.


Tracy D. Askew, Deputy Clerk

November 4, 2015
Date

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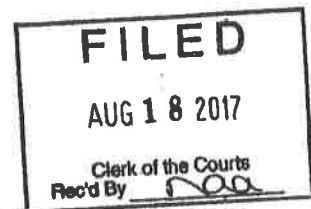
EXHIBIT 2

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

**AKILAH LOUISE WOFFORD, ET AL. v. M.J. EDWARDS & SONS
FUNERAL HOME INC., ET AL.**

**Chancery Court for Shelby County
No. CH140197**

No. W2015-02377-SC-R11-CV



ORDER

Upon consideration of the applications for permission to appeal of N.J. Ford and Sons Funeral Home, Inc., M.J. Edwards & Sons Funeral Home, Inc., M.J. Edwards - Whitehaven Chapel, Inc., M.J. Edwards Hillside Chapel, Inc., N.H. Owens & Son Funeral Home, Inc., Christian Funeral Directors, Inc., Millington Funeral Home, Inc., James E. Herndon, III, J.A. Lofties Funeral Home, James Lofties, R.S. Lewis Funeral Home, LLC, Preston Jefferson, SLS, LLC d/b/a Superior Funeral Home Hollywood Chapel, and Harrison's Funeral Home, Inc., and the record before us, the applications are denied.

Upon further consideration of the motion of applicants, M.J. Edwards & Sons Funeral Home, Inc., et al. for consideration of post-judgment fact, the motion is denied.

PER CURIAM

ROGER A. PAGE, J., not participating

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SEP 19 2017

TN ATTORNEY GENERAL
FINANCIAL DIVISION