

Before the  
Administrative Hearing Commission  
State of Missouri



STATE BOARD OF EMBALMERS AND )  
FUNERAL DIRECTORS, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
BUESCHER MEMORIAL HOME & )  
BARBARA BUESCHER, )  
 )  
Respondents. )

No. 08-1328 EM

**ORDER**

We grant part of the second motion for summary decision filed by the State Board of Embalmers and Funeral Directors (“the Board”) as follows:

Count I

1. Barbara Buescher’s and Buescher Memorial Home's (“Respondents”) failure to forward Virginia L. Vossen’s final payment of \$1,816.03 to Vossen’s preneed contract trust fund is cause to discipline Buescher’s funeral director license and Buescher Memorial Home’s funeral establishment license (“the Home’s license”)

for incompetence and gross negligence under § 333.121.2(5)<sup>1</sup> and a violation of professional trust or confidence under § 333.121.2(13).

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<sup>1</sup>Statutory references are to RSMo 2000, unless otherwise noted.

2. Respondents' retention of an amount greater than 20 percent of the total of Vossen's preneed contract<sup>2</sup> violates § 436.027 and is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and for a violation of professional trust or confidence under § 333.121.2(13).
3. The violation of § 436.027 is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).
4. The violation of § 436.027 is cause to discipline the Home's preneed provider and seller registrations ("the Home's registrations") under § 436.063.

## Count II

1. Respondents' conduct regarding the preneed and at-need contracts<sup>3</sup> for Kenneth G. Bolten's funeral is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence and a violation of professional trust or confidence under § 333.121.2(5) and (13).
2. Respondents' conduct regarding the at-need contract for Bolten's funeral violates § 436.011.2, which is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).
3. Respondents' violation of § 436.011.2 is cause to discipline the Home's registrations under § 436.063 and the Home's license under § 333.061.5.<sup>4</sup>

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<sup>2</sup>Section 436.005(5) defines a "preneed contract" as one made to arrange a funeral for a death that has not yet occurred.

<sup>3</sup>Although the term "at-need" is used in the Board's Regulations 20 CSR 2120-2.060(14), (19) and (20) and 2.080(2), it is not defined. We infer from the Board's use of the term in these proceedings that, in contrast to the term "preneed," "at-need" refers to making funeral arrangements for one who has already died.

<sup>4</sup>RSMo Supp. 2008.

### Count III

1. Respondents' conduct regarding Helen L. Dooley's preneed contract violated §§ 436.035.1 and 436.053.1. Respondents' failure to place Dooley's payment in an account with joint control by Dooley is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5)<sup>5</sup> and for a violation of professional trust or confidence under § 333.121.2 (13).<sup>6</sup>
2. Respondents' failure to cancel Dooley's contract and refund her deposits is cause to discipline Buescher's funeral director license and the Home's license and for a violation of professional trust or confidence under § 333.121.2 (13).<sup>7</sup>
3. Respondents' failure to refund Dooley's payment of \$8,563.68 and to cancel Dooley's contract when asked in writing violated §§ 436.035.1 and 436.053.1(4) and is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).<sup>8</sup>
4. The Home's violations of §§ 436.035 and 436.053 are cause to discipline its registrations under § 436.063.

### Count IV

1. Respondents' failure to itemize on certain preneed contracts and their mathematical errors that resulted in erroneous payments is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence

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<sup>5</sup>RSMo Supp. 2008. The conduct in Count III occurred after the August 28, 2007, effective date of the 2007 amendment to § 333.121. Laws 2007, S.B. 272 § A (94<sup>th</sup> Gen. Assembly., 1<sup>st</sup> Reg. Sess'n). However, the amendment did not affect any of the provisions in § 333.121.2 upon which the Board relies in its second motion for summary decision.

<sup>6</sup>RSMo Supp. 2008.

<sup>7</sup>RSMo Supp. 2008.

under § 333.121.2(5) and a violation of professional trust or confidence under § 333.121.2(13).

2. Respondents' failure to itemize on certain preneed contracts violated § 436.007.1(3) and is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).
3. The conduct described in the "ten summaries of conduct"<sup>9</sup> is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and for violation of professional trust or confidence under § 333.121.2(13).
4. The discrepancies in the services listed and paid regarding the preneed contracts of Louise I. Gaertner and Margaret Caroline Pauline Wolken and the resulting charges identified in Finding of Fact 68 violated § 436.011.2. This is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 436.063, § 333.061.5<sup>10</sup> and § 333.121.2(15).

#### Count V

1. Respondents violated §§ 436.015.2(3) and 436.021.2(1), (2), and (5) when they failed to provide an investigator for the Board with copies of requested documents and failed to meet with the Board's inspector when requested. These violations are cause to discipline the Home's registrations under § 436.063.
2. Respondents violated §§ 333.101 and 436.021.2(5) when they failed to meet with the Board inspectors as requested and did not answer their door when the inspector

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<sup>8</sup>RSMo Supp. 2008.

<sup>9</sup>Conclusions of law, Count IV.

<sup>10</sup>RSMo Supp. 2008.

was present. The violation of § 333.101 is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(6).<sup>11</sup>

3. Each of the violations of Chapter 436 established under Count V are cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).<sup>12</sup>

We deny parts of the Board's second motion for summary decision as follows:

Count I

1. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13) because the alleged conduct relating to Vossen's preneed contract does not relate to the functions and duties of the practice of embalming.
2. We find no cause to discipline under § 436.061.2 because it does not address the disciplinary proceedings brought before us.

Count II

1. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13) because the alleged conduct regarding the preneed and at-need contracts for Bolten's funeral does not relate to the functions or duties of the practice of embalming.
2. There is no cause to discipline Buescher's funeral director license or the Home's license for misconduct, fraud, misrepresentation, or dishonesty under § 333.121.2(5) regarding the preneed and at-need contracts for Bolten's funeral because the Board failed to prove fraudulent or willful intent.

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<sup>11</sup>RSMo Supp. 2008. Respondents' conduct in Count V occurred before and after the amendment to § 333.121 in 2007.

<sup>12</sup>RSMo Supp. 2008.

3. We find no cause to discipline Respondents under § 333.121.2(4), (14), and (20) because the Board failed to prove any fraudulent or willful intent relating to Bolton's preneed and at-need contracts.
4. We find no cause for discipline under § 436.061.2 because it does not address the disciplinary proceedings brought before us.
5. We find no cause for discipline under § 436.015.4 because it only provides civil remedies for those having a cause of action against a licensee for the licensee's liabilities under a preneed contract.

### Count III

1. We find no cause for discipline regarding Respondents' alleged false promise regarding the Dooley preneed contract because the Board made no such allegation in its first amended complaint.
2. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13)<sup>13</sup> because the alleged conduct regarding the Dooley contract does not relate to the functions or duties of the practice of embalming.
3. There are no violations of Chapter 436 and no cause to discipline Respondents under § 333.121.2(15)<sup>14</sup> for any failure to set out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided and to identify the preneed trust to which contract payments were to be deposited because the parties opted for the alternative procedure that § 436.053 allows.
4. We find no cause for discipline under § 436.061.2.

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<sup>13</sup>RSMo Supp. 2008.

<sup>14</sup>RSMo Supp. 2008.

#### Count IV

1. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13) because the conduct does not relate to the functions or duties of the practice of embalming.
2. There is no cause to discipline Respondents under § 333.121.2(4) for failing to itemize in preneed contracts or for the conduct described in the “ten summaries of conduct”<sup>15</sup> because there is no evidence of fraudulent or willful intent.
3. Except for one instance of Respondents withholding a service for which Louise I. Gaertner and Margaret Caroline Pauline Wolken were charged, the Board failed to show violations of § 436.011.2 regarding their preneed contracts and the embalming costs in Floyd Black’s preneed contract.
4. We find no cause for discipline under § 436.015.4.

#### Count V

1. We reject the Board's reliance upon § 436.061.2 because it does not address disciplinary proceedings brought before us. Section 436.061.2 sets forth the remedies available to the attorney general when he files a judicial proceeding to enforce Chapter 436.
2. We find no cause for discipline under § 436.015.4.

The Board shall notify us by August 11, 2009, whether it wants to proceed to hearing on those portions of the first amended complaint for which we did not grant its second motion for summary decision.

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<sup>15</sup>Conclusions of law, Count IV.

## **Procedure**

On July 18, 2008, the Board filed a complaint to establish cause to discipline Respondents. On December 24, 2008, the Board filed a motion for summary determination. On January 26, 2009, we denied the motion because there had been no service obtained on Respondents. On February 11, 2009, the Board filed a first amended complaint. On February 24, 2009, the original complaint, our notice of complaint/notice of hearing, the Board's motion for summary determination, our order of January 26, 2009, the first amended complaint, and our notice setting the hearing for July 14, 2009, were personally served upon Respondents. Respondents have not responded to the original or the first amended complaint. The Board filed its second motion for summary decision on June 1, 2009.<sup>16</sup> We gave Respondents until June 15, 2009, to respond, but they did not respond.

## **Findings of Fact**

1. Buescher holds an embalmer license and a funeral director license, which are current and active and were so during the events set out below.
2. Buescher operates Buescher Memorial Home, located at 429 East Capitol Avenue, Jefferson City, Missouri.

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<sup>16</sup>The type of relief sought with a motion for summary determination is now sought by a motion for summary decision. 1 CSR 15-3.446(5), effective January 1, 2009.

3. The Home holds a funeral establishment license, a preneed seller registration, and a preneed provider registration, which are current and active and were so during the events set out below.

Count I – Virginia L. Vossen Contract

4. On or about October 23, 1990, Respondents entered into a preneed contract for funeral services with Virginia L. Vossen.

5. The total amount of the preneed contract for funeral services was \$4,949.

6. On or about October 23, 1990, Vossen paid Respondents the initial deposit of \$500 that was due on the preneed contract.

7. Vossen continued to make regular payments on the preneed contract to Respondents.

8. Vossen's daughter, Barbara Germann, contacted the Home to inquire whether an outstanding amount existed on Vossen's preneed contract.

9. Buescher contacted Germann and notified her that Vossen's preneed contract had an outstanding balance of \$1,816.03.

10. On or about August 29, 2003, Respondents received a check from Germann for the outstanding balance of \$1,816.03.

11. On or about September 29, 2003, the check amount of \$1,816.03 was paid to Buescher by Central Bank.

12. Buescher did not pay the \$1,816.03 into the trust fund for Vossen's preneed contract, which was being handled by American Prearranged Services, Inc. ("APS").

13. On or about November 12, 2005, Vossen died.

14. On or about November 14, 2005, Germann and her family made numerous attempts to contact Buescher. Buescher acknowledged receiving their check, but refused to meet with them to discuss the outstanding amount due on Vossen's contract.

15. On or about November 14, 2005, John McCulloch, the president of APS, contacted Buescher on behalf of the Germann family. Buescher told McCulloch that she would pay the remaining balance to APS if McCulloch would personally pick up the check, but she refused to meet with the Germann family.

16. On or about November 14, 2005, McCulloch again contacted Buescher and explained to Buescher that the family wanted the funds directly from her. Buescher told McCulloch to inform the family that she would have the check, payable to APS, ready for pickup by McCulloch only.

17. On or about November 14, 2005, McCulloch picked up the check from Buescher, payable to APS, for \$1,816.03.

18. As of June 1, 2009, APS no longer conducts business with either Respondent.

#### Count II – Kenneth O. Bolten Contract

19. On or about September 5, 1995, Kenneth O. Bolten entered into a preneed contract with Respondents for \$5,275 to cover all funeral expenses upon his death.

20. Included in the preneed contract were the cost of a casket (\$2,285), the cost of an outer burial container (\$995), and the cost of funeral services (\$1,995).

21. Pursuant to the preneed contract, Bolten paid \$3,100, with the remaining \$2,175 to be paid out of an irrevocable trust that Bolten held with Exchange National Bank.

22. On or about October 5, 2005, Bolten died.

23. At the time of his death, Bolten held \$3,100 in an irrevocable trust with Exchange National Bank and two insurance policies in the amount of \$1,000 through Business Men's Assurance Company of America, both of which had been earmarked to cover the remainder of Bolten's funeral expenses through the preneed contract.

24. After Bolten's death, Jeffrey Thomas, the personal representative of Bolten's estate, contacted the Home to finalize Bolten's funeral arrangements.

25. When Thomas made contact with Respondents, Buescher represented to Thomas that certain items were not included in Bolten's preneed contract and would cost extra.

26. Thomas requested a copy of Bolten's preneed funeral plan, but Buescher never provided Thomas with a copy.

27. On or about October 5, 2005, Thomas, on behalf of Bolten, entered into an at-need contract with Respondents in the amount of \$857.47 to cover additional costs for Bolten's funeral, including, but not limited to:

- a. the cost of printing a newspaper obituary (\$86.00),
- b. the cost of flowers (\$212.45),
- c. the cost of an American War Veteran's grave marker ("V.A. grave marker") (\$125.00),
- d. the cost of certified copies of the death certificate (\$43.00),
- e. the cost of a "memorial package" (\$125.00), and
- f. taxes (\$391.72).

28. The actual cost of printing the newspaper obituary was \$66.

29. Respondents overcharged Bolten's estate \$20 for the cost of printing the newspaper obituary.

30. The actual cost of flowers was \$177.

31. Respondents overcharged Bolten's estate \$35.45 for the cost of flowers.

32. On or about October 7, 2005, Bolten was interred at Hawthorn Memorial Gardens in Jefferson City, Missouri.

33. On or about October 7, 2005, Respondents completed and held the form requesting a V.A. grave marker and its delivery to Hawthorn Memorial Gardens.

34. Following Bolten's interment, Hawthorn Memorial Gardens attempted to contact Buescher numerous times regarding the V.A. grave marker, but Buescher did not respond to these requests.

35. Hawthorn Memorial Gardens was eventually forced to make the final arrangements for obtaining the V.A. grave marker, which it finally received on or about March 17, 2006.

36. Numerous times Thomas requested an itemized statement of the total of \$857.47 in charges paid for the at-need contract from Buescher, but Buescher never sent Thomas the statement.

37. On or about November 21, 2005, December 8, 2005, and February 14, 2005, R. Max Humphreys, attorney for Thomas, made unsuccessful attempts to contact Buescher to request a copy of Bolten's prepaid funeral contract and an accounting of the additional \$857.47 that Thomas paid for Bolten's funeral arrangements. Buescher did not provide Humphreys the contract or accounting documents.

38. The newspaper obituary, death certificates, memorial package, and flowers, all included in the total additional cost of \$857.47 charged to Thomas, were optional items that Bolten never requested that Respondents provide.

Count III – Helen L. Dooley Contract

39. On October 28, 2002, Respondents and Carl D. Dooley, as representative for Helen L. Dooley, entered into a preneed contract for funeral services (“Dooley contract”).

40. The Dooley contract provides:

FUNERAL PRE-ARRANGED CONTRACT  
IRREVOCABLE TRUST ACCOUNT

The undersigned provider and the purchaser or beneficiary of the trust (or agent for the purchaser/beneficiary) enter into this contract for the purpose of having available funds to be used at the time of death of the beneficiary.

The agreement provides that all funds held in the account shall be applied at the beneficiary’s death toward the purchase of the funeral or burial services or facilities, or funeral merchandise,

selected by the beneficiary or the responsible party after the beneficiary’s death as the beneficiary has designed to be used.

This agreement provides that all payment [sic] made for the above mentioned purpose are to be deposited in an account by the provider and the beneficiary with a financial institution chartered and regulated by the federal or state government authorized to do business in Missouri.

For the purpose of allowing or qualifying the beneficiary, if the beneficiary is eligible, becomes eligible, or desires to become eligible to qualify or to receive old age assistance, welfare, Social Security, state or federal aid, or other public assistance under state or federal law, the beneficiary hereby elects to make this trust to which these funds are placed irrevocable and irrevocably waive the right to cancel this agreement. If the death of the beneficiary occurs outside the general area served by the provider, then the provider shall make arrangements to provide services according to the location of the death of the beneficiary.

After the services for the beneficiary have been provided and rendered, the provider shall withdraw the funds so stated and apply them to the services as selected by the beneficiary.

The amount of \$ 8563.68 to fund the selected services as by this contract shall be deposited in the Central Bank (Authorized Bank) located at Jefferson City, Missouri.

IRREVOCABLE OPTION: For the purpose of qualifying myself for or maintaining my eligibility for public assistance under state or federal law, I hereby elect to make the trust to which these funds are placed irrevocable and waive my right to cancel this Agreement.<sup>[17]</sup>

41. The Dooley contract did not set out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided.

42. On or about October 28, 2002, Dooley paid the amount due on the preneed contract to Respondents.

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<sup>17</sup>Ex. H-1.

43. On or about November 7, 2002, a check in the amount of \$8,563.68 was paid to Central Bank by Buescher, and a certificate of deposit (“CD”) was purchased in the name of “Buescher Memorial Home for Helen L. Dooley.”

44. This CD was neither placed in an account jointly with the purchaser’s name (Carl D. Dooley) nor placed in an account under joint control with Dooley.

45. On or about August 1, 2007, a representative of Dooley contacted Buescher and requested that her funds be transferred from the Home to another local funeral home.

46. Leesa Wimberley, Dooley’s daughter, made numerous attempts to contact Buescher and met with her on or about August 31, 2007.

47. On August 31, 2007, Buescher photocopied the documents that Wimberley provided.

48. Dooley had a stroke in September 2007, but was still alive on June 1, 2009.

49. Pete Fleischmann is an investigator for the Division of Professional Services. On or about October 19, 2007, Fleischmann met with Buescher on behalf of the Board. In that meeting, Buescher recalled the family of Dooley and that they wanted to transfer funds used to purchase an irrevocable preneed funeral agreement. She also stated that she had told the family that this could not be done until another provider was selected to transfer the funds to.

50. Fleischmann asked Buescher if he could obtain a copy of the preneed file maintained by Respondents. Buescher said that if Fleischmann could send her a copy of the documents he had received from the family, she would review them and send him what he did not have. Fleischman reiterated that he needed a copy of the preneed file listing Helen Dooley as the beneficiary.

51. Buescher stated that the family just wanted the money out of the fund and then said that she would just send them the money and be “done with it.” Fleischmann stated that he still needed a copy of the file for his report, and she again stated that she would just send the family the money.

52. Buescher did not provide the requested documentation at the time of Fleischmann’s request. Buescher finally agreed to fax a copy of her file to Fleischmann, but stated that it would be the following week.

53. On October 23, 2007, Fleischmann had not received the documents from Buescher. Fleischmann got no answer when he attempted to call her at approximately 8:45 a.m.

54. On October 25, 2007, Fleischmann again attempted to call Buescher at the Home. The first two attempts resulted in busy signals and in the third attempt there was no answer, answering service or voice mail.

55. On October 26, 2007, Fleischmann successfully contacted Buescher by telephone. She indicated surprise that he had not received the documents and said that she had faxed them to him. Buescher stated that she would again fax the documents to Fleischmann.

56. To date, Buescher has not provided the requested documentation to Fleischmann.

57. On November 20, 2008, Wimberley sent a written letter, certified mail, return receipt requested, on her mother’s behalf, requesting a full refund of the \$8,563.58 payment made to Respondents. The letter states:

According to Chapter 436.035 of the Revised Statutes of Missouri, the purchaser of a contract may cancel that contract without reason anytime [sic] before use of the contract and receive full refund of all payments made on that contract within 15 days of the request for a refund.

As a representative of my mother, Helen L. Dooley, having Durable Power of Attorney for her affairs (a copy of which is

enclosed), and on her behalf I am requesting today that a full refund be made of the \$8,563.68 payment made to Buescher Memorial Home on October 28, 2002.<sup>[18]</sup>

58. Wimberley's letter was delivered to Respondents on November 25, 2008.

59. To date, Buescher has not provided Wimberley with the funds or transferred them to another funeral establishment.

Count IV – Preneed and At-Need Contracts  
Containing Similar or Identical Violations of Law

60. In 2006, the Board conducted two investigations of Respondents. Pursuant to these investigations, Buescher was required to produce various at-need and preneed contracts for the Board's inspection.

61. The preneed contracts of Herbert Raithel, Winona Wagner, and Edna L. Phillips failed to itemize what was purchased.

62. The preneed and at-need contracts of Mildred Raithel, Herbert Raithel, James I. Miller, and Mary Hilgert contained mathematical errors resulting in underpayments.

63. The preneed and at-need contracts of Stephanie C. Novy, Erma H. Stuart, Louise I. Gaertner, Maxine J. Pullam, and Ralph L. Coshow contained mathematical errors resulting in overpayments.

64. The preneed and at-need contracts of Mildred Raithel, Herbert Raithel, Alva F. Engelbrecht, Eileen A. Fisher, Carl R. Evans, Irene Kiso, Winona Wagner, Georgia A. Stark, Erma H. Stuart, Clarence F. Phillips, Drucella O. Durham, Maxine J. Pullam, James I. Miller, Edna L. Phillips, Mary Hilgert, Carol E. Borron, and Earl Hodges overcharged the purchasers of said contracts in that sales tax was assessed on services in addition to merchandise sold.

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<sup>18</sup>Ex. H-2.

65. The preneed and at-need contracts of Irene Kiso overcharged the purchaser in that sales tax was assessed on previously computed sales tax.

66. The preneed and at-need contracts of Georgia A. Stark and Maxine J. Pullam overcharged the purchasers in that the same sales tax was added to the total contract amount more than once.

67. The preneed and at-need contracts of Helen White and Carol E. Borron contained discrepancies in that the at-need contract services and merchandise amounts listed were less than the preneed payments, but the preneed amounts were charged.

68. The preneed and at-need contracts of Louise I. Gaertner and Margaret Caroline Pauline Wolken contained discrepancies in that services listed and paid for on the preneed contract were not included on the at-need contract, and/or additional fees were charged on the at-need contract.

69. With regard to the preneed contract of Mary St. George, a higher price was charged than what had been previously agreed to in the original preneed contract.

70. With regard to the preneed contract of Louise I. Gaertner, although Gaertner had contracted for transportation costs as part of her preneed contract, Respondents charged a transportation fee of \$187.50 after she died.

71. With regard to the preneed contract of Floyd Black, although Black had contracted for embalming costs as part of his preneed contract, Respondents charged his next of kin, Mary McGowan, for embalming after he died.

72. With regard to the preneed contract of Amy Creed, the total contract was in the amount of \$3,500, and the total amount still owed by Respondents to the trustee, APS, is \$3,500.

73. With regard to the preneed contract of Annandean Steinmetz, the total contract was in the amount of \$3,500, and the total amount still owed by Respondents to the trustee, APS, is \$3,500.

74. With regard to the preneed contract of Oda Scott, the total contract was in the amount of \$5,000, and the total amount still owed by Respondents to the trustee, APS, is \$5,000.

75. With regard to the preneed contract of Tillie Brown, the total contract was in the amount of \$4,100, and the total amount still owed by Respondents to the trustee, APS, is \$4,100.

76. With regard to the preneed contract of Anton Wolken, the total contract was in the amount of \$4,030, and the total amount still owed by Respondents to the trustee, APS, is \$4,030.

77. With regard to the preneed contract of June Nienhueser, the total contract was in the amount of \$4,103, and the total amount still owed by Respondents to the trustee, APS, is \$2,000.

78. With regard to the preneed contract of Emerson Nienhueser, the total contract was in the amount of \$4,103, and the total amount still owed by Respondents to the trustee, APS, is \$2,000.

79. With regard to the preneed contract of Roy Brown, the total contract was in the amount of \$4,100, and the total amount still owed by Respondents to the trustee, APS, is \$4,100.

80. With regard to the preneed contract of Margaret Pauline, the total contract was in the amount of \$4,030, and the total amount still owed by Respondents to the trustee, APS, is \$4,030.

81. With regard to the preneed contract of Warren West, the total contract was in the amount of \$3,500, and the total amount still owed by Respondents to the trustee, APS, is \$3,500.

82. With regard to the preneed contract of Bessie Licklider, the total contract was in the amount of \$5,223, and the total amount still owed by Respondents to the trustee, APS, is \$5,223.

83. With regard to the preneed contract of Joe Putnam, the total contract was in the amount of \$4,000, and the total amount still owed by Respondents to the trustee, APS, is \$2,000.

84. With regard to the preneed contract of Margaret Province, the total contract was in the amount of \$600, and the total amount still owed by Respondents to the trustee, APS, is \$300.
85. With regard to the preneed contract of Anna Bushman, the total contract was in the amount of \$5,000, and the total amount still owed by Respondents to the trustee, APS, is \$5,000.
86. With regard to the preneed contract of Leona Johnston, the total contract was in the amount of \$2,000, and the total amount still owed by Respondents to the trustee, APS, is \$2,000.
87. With regard to the preneed contract of Eleanor Weavers, the total contract was in the amount of \$5,000, and the total amount still owed by Respondents to the trustee, APS, is \$5,000.
88. With regard to the preneed contract of Augusta Black, the total contract was in the amount of \$545, and the total amount still owed by Respondents to the trustee, APS, is \$45.41.
89. With regard to the preneed contract of Floyd Black, the total contract was in the amount of \$1,145, and the total amount still owed by Respondents to the trustee, APS, is \$580.32.
90. With regard to the preneed contract of Emil Sosa, the total contract was in the amount of \$4,859.61, and the total amount still owed by Respondents to the trustee, APS, is \$4,859.61.
91. With regard to the preneed contract of Alva Smith, the total contract was in the amount of \$3,000, and the total amount still owed by Respondents to the trustee, APS, is \$3,000.
92. With regard to the preneed contract of Barbara Wolfe, the total contract was in the amount of \$600, and the total amount still owed by Respondents to the trustee, APS, is \$600.
93. With regard to the preneed contract of Bessie Gilmore, the total contract was in the amount of \$2,992, and the total amount still owed by Respondents to the trustee, APS, is \$2,992.

94. With regard to the preneed contract of Sadie Stone, the total contract was in the amount of \$3,500, and the total amount still owed by Respondents to the trustee, APS, is \$3,500.

95. With regard to the preneed contract of Roberta Couchman, the total contract was in the amount of \$3,600, and the total amount still owed by Respondents to the trustee, APS, is \$3,600.

96. With regard to the preneed contracts that were the subject of Findings of Fact 72 to 95, the total amount of outstanding balances that the Respondents owe to the trustee, APS, is \$74,460.34.

#### Count V – Respondents’ Non-Compliance with Board Investigations

97. Pursuant to the Board’s investigations, and beginning on or around August 16, 2006, Board Investigator Fleischmann made numerous attempts to contact Buescher to schedule an interview.

98. After leaving several messages and receiving two requests from Buescher to reschedule already-scheduled interviews, Fleischmann was finally able to arrange an interview with Buescher on or about September 5, 2006.

99. At the September 5, 2006, interview, Fleischmann asked Buescher to describe the Home’s procedure to sell a preneed contract and the procedure to deposit trust funds under a preneed contract and requested a written list of these procedures.

100. Buescher did not provide an answer to Fleischman regarding these procedures and did not provide a written list describing the procedures.

101. In the September 5, 2006, interview, Fleischmann requested copies of the Home’s preneed contracts for the preceding five years, a list of the Home’s preneed contracts written in

the last five years that had not become at-need, and a copy of the insurance policies for Kenneth G. Bolten (hereinafter collectively referred to as “requested documentation”).

102. Buescher was unable to provide the requested documentation at the time of Fleischmann's request.

103. By September 27, 2006, Buescher still had not provided the requested documentation to Fleischmann. Fleischmann mailed Buescher a certified letter requesting that the information be forwarded to him within 10 days of receipt of the letter. Buescher received Fleischmann's letter on or about September 28, 2006.

104. As of October 13, 2006, Buescher still had not provided the requested documentation to Fleischmann.

105. On or about January 6, 2007, Buescher received a letter from the Board dated January 5, 2007. The letter notified Respondents of the Board's investigation into the practices of the Home and offered Buescher the opportunity to respond to the allegations by attending the Board's meeting on March 28, 2007.

106. Buescher did not respond to the Board's January 5, 2007 letter and did not attend the March 28, 2007, meeting.

107. On April 15, 2008, the Board sent a certified letter to Buescher that she received on or about April 16, 2008. The letter notified Respondents of the Board's additional investigation into the practices of the Home and offered Buescher the opportunity to respond to the allegations by attending the Board's meeting on April 22, 2008.

108. Buescher did not respond to the Board's April 15, 2008, letter and did not attend the April 22, 2008, meeting.

109. On October 7, 2008, Inspector Lori Hayes contacted Buescher to schedule an inspection of the Home. Buescher stated that she would be able to do the inspection on October 8, 2008, at 2 p.m.

110. Later in the day on October 7, 2008, Buescher contacted the Board's office and asked that Hayes contact her before inspecting on October 8.

111. On October 8, 2008, Hayes contacted Buescher and Buescher stated that she would not be able to meet Hayes at 2 p.m. Hayes asked if she could come to her establishment in the morning. Buescher stated that she had a family coming in at 10 a.m. and that she would not be able to meet her.

112. No family was scheduled to meet with Buescher at 10 a.m. on October 8, 2008. The only automobiles around the funeral establishment at that time were Buescher's two vans.

113. On October 14, 2008, Hayes and Becky Dunn, Executive Director, went to the Home at approximately 2:30 p.m. and rang the doorbell a couple of times. Buescher failed to open the door.

### **Conclusions of Law**

We have jurisdiction to hear this case.<sup>19</sup> The Board has the burden to prove facts for which the law allows discipline by a preponderance of credible evidence.<sup>20</sup>

#### **I. Second Motion for Summary Decision**

We may grant the Board's second motion for summary decision if the Board establishes facts that entitle it to a favorable decision and Respondents fail to genuinely dispute such facts.<sup>21</sup> The Board has submitted admissible evidence in the form of affidavits, business records, and the second request for admissions to which Respondents never responded.<sup>22</sup>

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<sup>19</sup>Section 621.045, RSMo Supp. 2008; § 436.063.

<sup>20</sup>*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989); *State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

<sup>21</sup>1 CSR 15-3.446(5)(A).

<sup>22</sup>1 CSR 15-3.446(5)(B).

Respondents' failure to answer the second request for admissions establishes the matters asserted in the request, and no further proof is required.<sup>23</sup> That rule applies to all parties, including those acting without an attorney.<sup>24</sup>

Such deemed admissions can also establish "application of the facts to the law, or the truth of the ultimate issue, opinion or conclusion, so long as the opinion called for is not an abstract proposition of law."<sup>25</sup> Nevertheless, the General Assembly and the courts have instructed that we must:<sup>26</sup>

make an independent assessment of the facts to determine whether cause for disciplining a licensee exists. . . . But this impartiality would be compromised if the determination of cause was not a separately and independently arrived at determination by the Hearing Commission.

We therefore independently apply the law to the facts that Respondents are deemed to have admitted.

## II. Disciplinary Statutes

Section 333.061<sup>27</sup> provides for the suspension or revocation of funeral establishment licenses as follows:

5. The board . . . may suspend or revoke any license issued pursuant to this section if it finds, after hearing, that the funeral establishment does not meet any of the requirements set forth in this section as conditions for the issuance of a license, or for the violation by the owner of the funeral establishment of any of the provisions of section 333.121. . . .

Section 333.121 authorizes discipline for funeral directors, embalmers, and funeral establishments. Section 333.121.2 authorizes discipline for:

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<sup>23</sup>Supreme Court Rule 59.01, as applied to our proceedings by § 536.073 and 1 CSR 15-3.420(1); *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985).

<sup>24</sup>*Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App., W.D. 1983).

<sup>25</sup>*Briggs v. King*, 714 S.W.2d 694, 697 (Mo. App., W.D. 1986).

<sup>26</sup>*Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

(4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;

(6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;

\* \* \*

(13) Violation of any professional trust or confidence;

(14) Use of any advertisement or solicitation which is false, misleading or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed;

(15) Violation of any of the provisions of chapter 193, RSMo, chapter 194, RSMo, or chapter 436, RSMo;

\* \* \*

(20) Willfully and through undue influence selling a funeral[.<sup>28</sup>]

Section 436.011.2 provides:

Any person who knowingly permits a seller to sell a preneed contract designating him as the provider or as one of two or more providers who will furnish the funeral merchandise and services described in the preneed contract shall provide the funeral merchandise and services described in the preneed contract for the beneficiary. Failure of any such person to do so shall be a violation of the provisions of sections 436.005 to 436.071 and shall be cause for suspension or revocation of that person's license under the provisions of section 333.061, RSMo.

Section 436.063 allows discipline of preneed seller and provider registrations as follows:

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<sup>27</sup>RSMo Supp. 2008.

<sup>28</sup>The subdivisions of § 333.121.2 that the Board relies upon are identical in RSMo 2000 and RSMo Supp. 2008.

Whenever the state board determines that a registered seller or provider has violated or is about to violate any provision of sections 436.005 to 436.071 following a meeting at which the

registrant is given a reasonable opportunity to respond to charges of violations or prospective violations, it may request the attorney general to apply for the revocation or suspension of the seller's or provider's registration or the imposition of probation upon terms and conditions deemed appropriate by the state board in accordance with the procedure set forth in sections 621.100 to 621.205, RSMo. Use of the procedures set out in this section shall not preclude the application of the provisions of subsection 2 of section 436.061.

### Count I – Virginia L. Vossen Preneed Contract

Respondents failed to forward Vossen's final payment of \$1,816.03 to Vossen's preneed contract trust fund with APS. After Vossen died, § 436.051 governed:

Upon the death or legal incapacity of a purchaser, all rights and remedies granted to the purchaser pursuant to the provisions of sections 436.005 to 436.071 shall be enforceable by and accrue to the benefit of the purchaser's legal representative or his successor designated in such contract, and all payments otherwise payable to the purchaser shall be paid to that person.

Respondents forwarded the payment over two years later, only when pressured to do so by APS and Vossen's daughter.

#### 1. Professional Functions or Duties

The Board contends that this conduct is cause for discipline under § 333.121.2(5) as incompetence, misconduct or gross negligence in the performance of the functions or duties of the professions of a funeral director, embalmer, and funeral establishment.

Incompetence is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.<sup>29</sup> Misconduct is the

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<sup>29</sup> *Tendai v. Missouri Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005).

commission of wrongful behavior, intending the result that actually comes to pass or being indifferent to the natural consequences.<sup>30</sup> Gross negligence is a deviation from the standard of

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<sup>30</sup>*Grace v. Missouri Gaming Commission*, 51 S.W.3d 891, 900 (Mo. App., W.D. 2001).

care so egregious as to demonstrate a conscious indifference to a professional duty.<sup>31</sup> We may infer the requisite mental state from the conduct of the licensee "in light of all surrounding circumstances."<sup>32</sup> A licensee cannot be found guilty of both misconduct and gross negligence because the requisite intent of each is exclusive of the other.

We deduce the functions or duties of embalmers and funeral directors from the definitions of their practices set forth in § 333.011:

(6) **“Practice of embalming”**, the work of preserving, disinfecting and preparing by arterial embalming, or otherwise, of dead human bodies for funeral services, transportation, burial or cremation, or the holding of oneself out as being engaged in such work;

(7) **“Practice of funeral directing”**, engaging by an individual in the business of preparing, otherwise than by embalming, for the burial, disposal or transportation out of this state of, and the directing and supervising of the burial or disposal of, dead human bodies or engaging in the general control, supervision or management of the operations of a funeral establishment.

The functions or duties of embalming relate to the physical preparation of the dead human body for funeral services, transportation, and burial. The mishandling of Buescher's obligations under Vossen's preneed contract has nothing to do with the functions or duties of an embalmer. Therefore, we find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(5).

On the other hand, § 333.042.1 requires that an applicant for a funeral director license be tested on the “legal and practical knowledge of . . . preneed funeral contracts[.]” Therefore, § 333.121.2(5) applies to Buescher's funeral director license as well as the Home's license.

The Board contends that the failure to forward Vossen's final payment of \$1,816.03 to Vossen's preneed contract trust fund constitutes incompetence, misconduct, or gross negligence.

By not responding to the second request for admissions, Respondents admitted their failure, but there is no evidence of willfulness. Therefore, we conclude that Respondents are guilty of incompetence and gross negligence, but not misconduct. There is cause for discipline under § 333.121.2(5). We find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(5).

## 2. Professional Trust or Confidence

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.<sup>33</sup> Respondents' conduct violated the professional trust between Respondents and Vossen. There is cause to discipline Buescher's funeral director license and the Home's license under § 333.121.2(13). We find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(13).

## 3. Violations of Chapter 436

Section 436.027 provides:

The seller may retain as his own money, for the purpose of covering his selling expenses, servicing costs, and general overhead, the initial funds so collected or paid until he has received for his use and benefit an amount not to exceed twenty percent of the total amount agreed to be paid by the purchaser of such prepaid funeral benefits as such total amount is reflected in the contract.

The Board contends that Respondents violated § 436.027 when Buescher retained an amount in excess of 20 percent of the total agreed amount of \$4,949. Respondents admit by their failure to respond to the second request for admissions that their conduct violated § 436.027, but there is no evidence of willfulness. The Board argues that this violation is cause for discipline under

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<sup>31</sup>*Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs*, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988).

<sup>32</sup>*Id.*

<sup>33</sup>*Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

§ 333.121.2(5) and (13). We conclude that Respondents are guilty of incompetence and gross negligence, but not misconduct. There is cause for discipline under § 333.121.2(5).

Respondents' conduct violated the professional trust between Respondents and Vossen. There is cause for discipline under § 333.121.2(13). We find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(5) and (13).

The Board also contends that the violation of § 436.027 is cause for discipline under § 333.121.2(15). The introductory paragraph in § 333.121.2 authorizes discipline for "any holder of any . . . license required by this chapter." "Any" is an all-inclusive term meaning "EVERY: --used to indicate one selected without restriction[.]"<sup>34</sup> Unlike subdivision (5), subdivision (15) does not contain language limiting its applicability to conduct in the course of the functions or duties peculiar to a particular license. Accordingly, § 333.121.2(15) authorizes the discipline of the holder of an embalmer license as well as a funeral director license for violations of Chapter 436. Therefore, the violation of § 436.027 also is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).

The Home's violation of § 436.027 also is cause to discipline its registrations under § 436.063.

The Board alleges that this violation also subjects the Home to discipline under § 436.061.2, which provides:

Any violation of the provisions of sections 436.005 to 436.071 shall constitute a violation of the provisions of section 407.020, RSMo. In any proceeding brought by the attorney general for a violation of the provisions of sections 436.005 to 436.071, the court may, in addition to imposing the penalties provided for in sections 436.005 to 436.071, order the revocation or suspension of the registration of a defendant seller.

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<sup>34</sup>MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 56 (11<sup>th</sup> ed. 2004).

We find that the Board's reliance upon § 436.061.2 is misplaced because it does not address disciplinary proceedings brought before us. Instead, § 436.061.2 sets forth the remedies available to the attorney general when he files a judicial proceeding to enforce Chapter 436.

### Count II – Kenneth O. Bolten Contracts

The Board contends that the following conduct, undisputed by Respondents, is cause for discipline under § 331.121.2(4), (5), (13), (14), and (20):

- a. Respondents required Thomas to enter into an at-need contract on behalf of Bolten and thereby charged Thomas an additional \$857.47 for Bolten's funeral services, when the \$857.47 was charged for optional items and services that Bolten never requested.
- b. Respondents overcharged Thomas for the cost of printing the newspaper obituary and the cost of the flowers as part of the \$85.47 at-need contract for funeral services.
- c. Respondents failed to provide the V.A. grave marker paid for as part of the \$857.47 at-need contract for Bolten's funeral services, and instead Hawthorn Memorial Gardens finalized the arrangements for and provided the V.A. grave marker.

When Respondents entered into the preneed contract, they formed a relationship of professional trust or confidence with Bolten, his personal representative, and his heirs. Respondents also formed a relationship of professional trust or confidence with Thomas when it entered into the at-need contract.

As with Count I, we find no cause to discipline Buescher's embalmer license under

§ 333.121.2(5) and (13) because the conduct does not fall within the practice of embalming. However, we do find cause to discipline Buescher's funeral director license and the Home's license for being guilty of incompetence and gross negligence, but not misconduct, under subdivision (5) and for violating a professional trust or confidence under subdivision (13).

The Board's evidence is insufficient to prove cause for discipline under subdivisions (4), (14), and (20) because they all require a showing of fraudulent intent or willfulness. Fraudulent intent involves purposeful conduct in which a party misrepresents or falsifies facts to obtain a benefit or advantage.<sup>35</sup> Willful means acting deliberately.<sup>36</sup> The Board's evidence, though undisputed, is insufficient for any finding of fraudulent intent or willfulness.

The Board contends that the following conduct is cause to discipline Respondents for incompetence, misconduct, gross negligence, fraud, misrepresentation, and dishonesty under § 331.121.2(5) and violation of professional trust or confidence under § 333.121.2(13): Respondents failed to provide a statement of accounting of the additional \$857.47 charges, as well as a copy of Bolten's preneed contract, when both were requested on numerous occasions by both Thomas and Thomas' attorney.

Again, we find no cause to discipline Buescher's embalmer license under subdivisions (5) and (13). As for Buescher's funeral director license and the Home's license, we find cause to discipline for incompetency and gross negligence pursuant to § 333.121.2(5) and for violating professional trust or confidence pursuant to subdivision (13). There is insufficient evidence to prove the requisite intent to establish misconduct, fraud, misrepresentation, and dishonesty.

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<sup>35</sup>*Hernandez v. State Bd. of Regis'n for Healing Arts*, 936 S.W.2d 894, 899 ns.2 and 3 (Mo. App., W.D. 1997).

<sup>36</sup>*Grace v. Missouri Gaming Commission*, 51 S.W.3d 891, 900 (Mo. App., W.D. 2001).

The Board contends that the following conduct violates § 436.011.2: Respondents entered into a preneed contract with Bolten and subsequently required Thomas to pay an additional \$857.47 as part of an at-need contract for Bolten that included optional items and services never requested by Bolten.

Respondents' conduct violated § 436.011.2. Such violation is cause to discipline the Home's registrations under § 436.063 and the Home's license under § 333.061.5.<sup>37</sup> We find no cause for discipline under § 436.061.2 for reasons already stated.

The violation of § 436.011.2 also subjects Buescher's embalmer and funeral director licenses and the Home's license to discipline under § 333.121.2(15).

The Board contends that the violation of § 436.011.2 is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 436.015.4, which provides:

If any licensed embalmer, funeral director or licensed funeral establishment shall knowingly allow such licensee's name to be designated as the provider under, or used in conjunction with the sale of, any preneed contract, such licensee shall be liable for the provider's obligations under such contract.

This provision only provides a civil remedy for those having a cause of action against a licensee for the licensee's civil liabilities under the contract. It does not authorize discipline before this Commission or the Board. Therefore, we find no cause for discipline under § 436.015.4.

### Count III – Helen L. Dooley Contract

In the first amended complaint, the Board alleges that the following conduct relating to the Dooley preneed contract is cause for discipline under §333.121.2(5), (13), and (15):

Buescher and the Home's failure

1. to refund Dooley's payment of \$8,563.68 when asked,
2. to place the \$8,563.68 in an account with joint control by Dooley and Buescher,

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<sup>37</sup>RSMo Supp. 2008.

3. to cancel Dooley's preneed contract and refund her money, and
4. to provide the paperwork regarding the Dooley preneed contract to the Board's investigator.

The Board argues that Buescher violated statutes pertaining to preneed contracts. Section 436.035 provides:

1. At any time before the final disposition of the dead body, or before funeral services, facilities, or merchandise described in a preneed contract are provided by the provider designated in the preneed contract, the purchaser may cancel the contract without cause by delivering written notice thereof to the seller and the provider. Within fifteen days after its receipt of such notice, the seller shall pay to the purchaser a net amount equal to all payments made into trust under the contract. Upon delivery of the purchaser's receipt for such payment to the trustee, the trustee shall distribute to the seller from the trust an amount equal to all deposits made into the trust for the contract.

The parties did not enter into a contract for the money to be put into a preneed trust, but chose the alternative provided for in § 436.053:

1. Notwithstanding the provisions of sections 436.021 to 436.048, the provider and the purchaser may agree that all funds paid the provider by the purchaser shall be deposited with financial institutions chartered and regulated by the federal or state government authorized to do business in Missouri in an account in the joint names and under the joint control of the provider and purchaser. If the purchaser has irrevocably waived and renounced his right to cancel the agreement between the provider and the purchaser pursuant to subdivision (5) of this subsection, such agreement may provide that all funds held in the account at the beneficiary's death shall be applied toward the purchase of funeral or burial services or facilities, or funeral merchandise, selected by the purchaser or the responsible party after the beneficiary's death, in lieu of the detailed identification of such items required by subdivision (3) of subsection 1 of section 436.007. The agreement between the provider and purchaser shall provide that:

\* \* \*

(2) The financial institution shall hold, invest, and reinvest the deposited funds in savings accounts, certificates of deposit or other

accounts offered to depositors by the financial institutions, as the agreement shall provide;

\* \* \*

(4) At any time before the final disposition, or before funeral services, facilities, and merchandise described in a preneed contract are furnished, the purchaser may cancel the contract without cause by delivering written notice thereof to the provider and the financial institution, and within fifteen days after its receipt of the notice, the financial institution shall distribute the deposited funds to the purchaser;

(5) Notwithstanding the provisions of subdivision (4) of this subsection, if a purchaser is eligible, becomes eligible, or desires to become eligible to receive public assistance under chapter 208, RSMo, or any other applicable state or federal law, the purchaser may irrevocably waive and renounce his right to cancel such agreement. The waiver and renunciation must be in writing and must be delivered to the provider and the financial institution;

\* \* \*

2. There shall be a separate joint account as described in subsection 1 of this section for each preneed contract sold or arranged under this section.

Respondents failed to place Dooley's payment in an account with joint control by Dooley and Buescher and failed to refund Dooley's payment of \$8,563.68 when asked and failed to cancel Dooley's contract and refund her money when asked in writing. This conduct violated §§ 436.035.1 and 436.053.1

The Board contends that these failures to comply with the Dooley preneed contract and §§ 436.035.1 and 436.053.1 are cause to discipline Buescher's funeral director license, Buescher's embalmer license, and the Home's license for incompetence, misconduct or gross negligence under § 333.121.2(5)<sup>38</sup> and for violating professional trust or confidence under

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<sup>38</sup>RSMo Supp. 2008.

§ 333.121.2(13).<sup>39</sup>

Buescher's conduct displayed incompetence as a funeral director.

The Board failed to provide sufficient evidence of Buescher's intentions for us to find that she intentionally refused to comply with § 436.053.1 regarding the bank account. Instead, we find that she was grossly negligent. Nevertheless, in regard to Respondents' duty to cancel Dooley's contract upon written request and refund the \$8,563.68, the facts show that Buescher was aware of her duty and that her refusal to comply was purposeful. Accordingly, Respondents' conduct constituted misconduct.

Therefore, we find cause to discipline Buescher's funeral director license and the Home's license for incompetence, misconduct, and gross negligence under § 333.121.2(5).<sup>40</sup>

Because the Dooley contract created a relationship of professional trust or confidence in the skills of Buescher as a funeral director and in the Home as a funeral establishment, the conduct in violation of that contract and associated statutes violated that professional relationship. We find cause to discipline Buescher's funeral director license and the Home's license under § 333.121.2(13).<sup>41</sup>

We find no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13)<sup>42</sup> for reasons stated in Counts I and II.

The Dooley contract did not contain terms that set out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided and did not identify the preneed trust in which contract payments were to be deposited. The Board contends that this

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<sup>39</sup>RSMo Supp. 2008.

<sup>40</sup>RSMo Supp. 2008.

<sup>41</sup>RSMo Supp. 2008.

<sup>42</sup>RSMo Supp. 2008.

is cause for discipline under § 333.121.2(15)<sup>43</sup> because the failure of Respondents to include those terms violated the following provisions of § 436.007:

1. Each preneed contract made after August 13, 1982, shall be voidable and unenforceable unless:

\* \* \*

(3) It identifies the contract beneficiary and sets out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided;

(4) It identifies the preneed trust into which contract payments shall be deposited, including the name and address of the trustee thereof[.]

The Board's contention ignores the fact that the Dooley contract was drafted pursuant to the alternative provisions of § 436.053, which exempts such a contract from the requirements of § 436.007.1(3) and (4). Section 436.053.1 provides:

the provider and the purchaser may agree that all funds paid the provider by the purchaser shall be deposited with financial institutions chartered and regulated by the federal or state government authorized to do business in Missouri in an account in the joint names and under the joint control of the provider and purchaser. . . . [S]uch agreement may provide that all funds held in the account at the beneficiary's death shall be applied toward the purchase of funeral or burial services or facilities, or funeral merchandise, selected by the purchaser or the responsible party after the beneficiary's death, in lieu of the detailed identification of such items required by subdivision (3) of subsection 1 of section 436.007. The agreement between the provider and purchaser shall provide that:

(1) The total consideration to be paid by the purchaser under the contract shall be made in one or more payments into the joint account at the time the agreement is executed or, thereafter within five days of receipt, respectively[.]

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<sup>43</sup>RSMo Supp. 2008.

Therefore, we conclude that the terms of the Dooley contract do not violate chapter 436 and, accordingly, are not cause for discipline under § 333.121.2(15).<sup>44</sup>

The Board contends that Respondents' failure to refund Dooley's payment of \$8,563.68 and cancel Dooley's contract when asked in writing is cause for discipline under

§ 333.121.2(15).<sup>45</sup> This conduct violated §§ 436.035.1 and 436.053.1(4). Therefore, § 333.121.2(15)<sup>46</sup> authorizes discipline of Buescher's embalmer and funeral director licenses and the Home's license.

The Home's violations of §§ 436.035 and 436.053 are cause to discipline its registrations under § 436.063. We find no cause for discipline under § 436.061.2 for reasons already stated.

In the Board's second motion for summary decision, it adds the grounds that "Buescher and Buescher Memorial Home induced Dooley to buy preneed services with the false promise that the money would go into an irrevocable trust."<sup>47</sup> Both due process and our regulations require that the grounds for discipline be set forth in the complaint.<sup>48</sup> We cannot find cause to discipline based on facts not pled in the complaint.<sup>49</sup>

Although the Board charges Respondents' lack of cooperation with the Board's investigator regarding the Dooley contract as grounds for discipline under both Counts III and V, the Board did not cite in Count III the statutes that create the obligation for Respondents to cooperate. Therefore, we dispose of those contentions in Court V, wherein the appropriate statutes are cited.

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<sup>44</sup>RSMo Supp. 2008.

<sup>45</sup>RSMo Supp. 2008.

<sup>46</sup>RSMo Supp. 2008.

<sup>47</sup>Second motion for summary decision, pp. 69-71.

<sup>48</sup>*Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs*, 744 S.W.2d 524, 538-39 (Mo. App., E.D. 1988); 1 CSR 15-3.350(2)(A)3.

Count IV – Preneed and At-Need Contracts  
Containing Similar or Identical Violations of Law

Respondents entered into incomplete preneed contracts with Herbert Raithel, Winona Wagner, and Edna L. Phillips by failing to itemize what had been purchased. The Board contends that this is sufficient for us to conclude that Respondents “obtained a fee, charge, and compensation by fraud, deception, and misrepresentation; displayed incompetency, misconduct, gross negligence, fraud, misrepresentation, and dishonesty in the performance of the functions or duties of any profession licensed or regulated by Chapter 333, RSMo; violated the professional confidence and trust with Raithel, Wagner, and Phillips; and violated § 436.007.1(3), RSMo, providing cause to discipline Buescher’s funeral director license, Buescher’s embalmer license, and Buescher Memorial Home’s funeral establishment license, pursuant to § 331.121.2(4), (5), (13), and (15)[.]”<sup>50</sup>

Section 436.007 provides:

1. Each preneed contract made after August 13, 1982, shall be voidable and unenforceable unless:

\* \* \*

(3) It identifies the contract beneficiary and sets out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided;

(4) It identifies the preneed trust into which contract payments shall be deposited, including the name and address of the trustee thereof;

(5) The terms of such trust and related agreements among two or more of the contract seller, the contract provider, and the trustee of such trust are in compliance with the provisions of sections 436.005 to 436.071[.]

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<sup>49</sup>*Missouri Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993).

<sup>50</sup>Second motion for summary decision, at ¶ 181.

The only evidence presented by the Board is that there was a failure to itemize. There is no evidence to prove the requisite fraudulent or willful intent in order to establish cause for discipline under § 333.121.2(4) or for misconduct under subdivision (5). Nevertheless, we find that because of the many and repeated failures to properly complete the contracts, there is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and violation of professional trust or confidence under

§ 333.121.2(13). We find no cause to discipline Buescher's embalmer license for reasons already stated.

Further, this conduct violated § 436.007.1(3), which is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).<sup>51</sup>

Respondents' mathematical errors resulted in underpayments on the preneed and/or at-need contracts between the Home and Mildred Raithel, Herbert Raithel, James I. Miller, and Mary Hilgert. Respondents' mathematical errors resulted in overpayments on the preneed and/or at-need contracts between the Home and Stephanie C. Novy, Erma H. Stuart, Louise I. Gaertner, Maxine J. Pullam, and Ralph C. Coshow. The Board contends that Respondents displayed "incompetency, misconduct, gross negligence, fraud, misrepresentation, and dishonesty in the performance of the functions or duties of any profession licensed or regulated by Chapter 333, RSMo, and violated the professional confidence and trust with M. Raithel, H. Raithel, Miller, and Hilgert, providing cause to discipline Buescher's funeral director license, Buescher's embalmer license, and Buescher Memorial Home's funeral establishment license, pursuant to § 331.121.2(5) and (13)[.]"<sup>52</sup>

The only evidence is of mathematical errors. There is no evidence to establish the requisite fraudulent or willful intent needed to establish misconduct, fraud, misrepresentation, and dishonesty. Nevertheless, because of the many and repeated failures to properly complete the contracts, we find cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and violation of professional trust or confidence under § 333.121.2(13). We find no cause to discipline Buescher's embalmer license for reasons already stated.

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<sup>51</sup>RSMo Supp. 2008.

For the “ten summaries of conduct” set forth below, the Board contends that Respondents “obtained a fee, charge, and compensation by fraud, deception, and misrepresentation; displayed incompetency, misconduct, gross negligence, fraud, misrepresentation, and dishonesty in the performance of the functions or duties of any profession licensed or regulated by Chapter 333, RSMo; and violated the professional confidence and trust . . . , providing cause to discipline Buescher’ s funeral director license, Buescher’s embalmer license, and Buescher Memorial Home’s funeral establishment license, pursuant to § 331.121.2(4), (5), and (13)[.]”<sup>53</sup> The following ten summaries are of Respondents’ conduct, as further detailed in our findings of fact:

1. assessed sales tax on services in addition to merchandise sold on the preneed and/or at-need contracts between the Home and Mildred Raithel, Herbert Raithel, Alva F. Engelbrecht, Eileen A. Fisher, Carl R. Evans, Irene Kiso, Winona Wagner, Georgia A. Stark, Erma H. Stuart, Clarence F. Phillips, Drucella O. Durham, Maxine J. Pullam, James I. Miller, Edna L. Phillips, Mary Hilgert, Carol E. Borron, and Earl Hodges;
2. assessed sales tax on previously computed sales tax on the at-need and/or preneed contracts between the Home and Irene Kiso;
3. overcharged Georgia A. Stark and Maxine J. Pullam as purchasers of preneed and at-need contracts in that the same sales tax was added to the total contract amount more than once;
4. made discrepancies on the at-need and/or preneed contracts between the Home and Helen White and Carol B. Borron, where at-need contract services and merchandise amounts listed were less than preneed payments, but preneed amounts were charged;
5. made discrepancies on the at-need and/or preneed contracts between the Home and Louise I. Gaertner and Margaret Caroline Pauline Wolken, where services listed and paid for on preneed contracts were not included on the at-need contract, or additional fees were charged;
6. charged a higher price than what was previously guaranteed on the preneed contract between the Home and Mary St. George;

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<sup>52</sup>Second motion for summary decision at ¶¶ 182-83.

<sup>53</sup>Second motion for summary decision at ¶¶ 184-92.

7. contracted for transportation costs as part of Gaertner's preneed contract and then, upon her death, charged a transportation fee of \$187.50;
8. contracted for embalming costs as part of Black's preneed contract and then, upon his death, charged an embalming fee;
9. induced the following clients to purchase preneed services with false promises that the money would go to a trust account with APS and that they would retain no more than specified amounts and Respondents failed to pay remaining balances owed to APS on the following preneed contracts: Amy Creed, Annandean Steinmetz, Oda Scott, Tillie Brown, Anton Wolken, June Nienhueser, Emerson Nienhueser, Roy Brown, Margaret Pauline, Warren West, Bessie Licidider, Joe Putnam, Margaret Province, Anna Bushman, Leona Johnston, Eleanor Weavers, Augusta Black, Floyd Black, Emil Sosa, Alva Smith, Barbara Wolfe, Bessie Gilmore, Sadie Stone, and Roberta Couchman;
10. made discrepancies on the at-need and/or preneed contracts between the Home and Louise I. Gaertner and Margaret Caroline Pauline Wolken, where services listed and paid for on preneed contracts were not included on the at-need contract, or additional fees were charged[.]

There is no evidence to prove the requisite fraudulent or willful intent to establish cause to discipline under § 333.121.2(4) or for misconduct, fraud, misrepresentation, and dishonesty under subdivision (5). Nevertheless, we find that because of the many and repeated failures regarding the contracts, there is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and violation of professional trust or confidence under § 333.121.2(13). We find no cause to discipline Buescher's embalmer license for reasons already stated.

For the following conduct, the Board contends that Respondents “violated § 436.011.2, RSMo, providing cause to discipline Buescher Memorial Home’s preneed seller and provider registrations, pursuant to § 436.063, RSMo, and Buescher Memorial Home’s funeral establishment license, pursuant to § 333.061.5, RSMo.”<sup>54</sup> We found that Respondents:

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<sup>54</sup>Second motion for summary decision ¶¶ 193-95.

1. made discrepancies on the at-need and/or preneed contract with Louise I. Gaertner and Margaret Caroline Pauline Wolken, where services listed and paid for on preneed contracts were not included on the at-need contract, or additional fees were charged;
2. contracted for transportation costs as part of Gaertner's preneed contract and then, upon her death, charged a transportation fee of \$187.50; and
3. contracted for embalming costs as part of Black's preneed contract and then, upon his death, charged an embalming fee.

Section 436.011.2 prohibits the withholding of items or services that the provider has contracted to provide. It does not prohibit mathematical errors or charging more than once for a service provided. We found only one instance of Louise I. Gaertner and Margaret Caroline Pauline Wolken being charged for a service not provided. Section 436.063 and § 333.061.5<sup>55</sup> authorize discipline for this conduct. Because the conduct violates a provision of Chapter 436, § 333.121.2(15) also authorizes discipline. However, the rest of the conduct, for which we have found cause to discipline for other reasons, does not fall within the proscriptions of § 436.011.2.

Finally, the Board contends that the violation of § 436.011.2 is cause for discipline under § 436.015.4. As we have explained above, § 436.015.4 does not apply to administrative proceedings.

#### Count V – Respondents' Non-Compliance with Board Investigations

Section 436.015 provides:

2. Each provider under one or more preneed contracts shall:

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<sup>55</sup>RSMo Supp. 2008.

(3) Cooperate with the state board, the office of the attorney general of Missouri, and the division in any investigation, examination or audit brought under the provisions of sections 436.005 to 436.071[.]

Section 436.021 provides:

2. Each seller under one or more preneed contracts shall:

(1) Maintain adequate records of all such contracts and related agreements with providers and the trustee of preneed trusts regarding such contracts, including copies of all such agreements;

(2) Notify the state board in writing of the name and address of each provider who has authorized the seller to sell one or more preneed contracts under which the provider is designated or obligated as the contract' "provider";

\* \* \*

(5) Cooperate with the state board, the office of the attorney general, and the division in any investigation, examination or audit brought under the provisions of sections 436.005 to 436.071.

Respondents violated §§ 436.015.2(3) and 436.021.2(1), (2), and (5) when they failed to provide Investigator Fleischmann with copies of the Home's preneed contracts for the preceding five years, a list of the Home's preneed contracts written in the last five years that had not yet become at-need, a copy of the insurance policies for Kenneth G. Bolten, copies of the preneed documents for Helen L. Dooley, and the failure to meet with the Board's inspector when requested. These violations are cause to discipline the Home's registrations under § 436.063. We find no cause for discipline under § 436.061.2 because it does not apply to administrative proceedings.

Section 333.101 provides:

The board or any member thereof or any agent duly authorized by it may enter the office, premises, establishment or place of business of any funeral service licensee in this state or any office, premises, establishment or place where the practice of funeral

directing or embalming is carried on, or where such practice is advertised as being carried on for the purpose of inspecting said office, premises or establishment and for the purpose of inspecting the license and registration of any licensee[.]

Respondents violated this provision and § 436.021.2(5) when they failed to meet with the Board's inspectors when requested and did not answer the the Home's door when the inspector was present.

The violation of Chapter 333 are cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(6).<sup>56</sup> Each of the violations of Chapter 436 established under Count V is cause for discipline under § 333.121.2(15).<sup>57</sup> We do not find that § 436.015.4 authorizes discipline because it relates only to civil remedies for those having a cause of action against a licensee for the licensee's liabilities under the contract.

SO ORDERED on July 28, 2009.

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JOHN J. KOPP  
Commissioner

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<sup>56</sup>RSMo Supp. 2008.

<sup>57</sup>RSMo Supp. 2008.