

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case Nos. 09-1839
) 09-2065PL
JEFFREY KEVIN WATTS and)
EMERALD COAST FUNERAL HOME,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held on July 9, 2009, before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, in Fort Walton Beach, Florida.

APPEARANCES

For Petitioner: Thomas A. "Tad" David, Esquire
Florida Department
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Division of Legal Services
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For Respondents: Derek E. Leon, Esquire
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STATEMENT OF THE ISSUES

The issues in this proceeding are whether Emerald Coast Funeral Home (Emerald Coast) and Jeffrey Kevin Watts (Watts)

failed to treat remains with dignity and respect in violation of Section 497.386(4), Florida Statutes, and whether Emerald Coast was required by Section 497.380(12)(a), Florida Statutes, to submit a change of ownership application.

PRELIMINARY STATEMENT

On February 20, 2009, the Department of Financial Services (Department) filed Administrative Complaints against Emerald Coast and Jeffrey Kevin Watts in connection with their licenses to operate a Funeral Establishment and an Apprentice Training Agency and as a Funeral Director and Embalmer, respectively. Specifically, the Administrative Complaints alleged that both parties' licenses should be disciplined for failing to treat an excised portion of a decedent's tongue with dignity and respect in violation of Subsection 497.380(12)(a), Florida Statutes (2007). Additionally, the Administrative Complaint alleged that Emerald Coast's licenses should be disciplined for failing to submit a change in ownership form to the Department.

Both parties timely requested a formal administrative proceeding. Subsequently, the cases were forwarded to the Division of Administrative Hearings and were later consolidated.

At the hearing, Petitioner presented the testimony of four witnesses and offered Exhibits P-1 through P-7 into evidence. Respondent presented the testimony of four witnesses and offered Exhibits R-1 through R-13 into evidence.

After the hearing, the Department filed a Proposed Recommended Order on August 20, 2009. Likewise, Respondents filed a Proposed Recommended Order on August 20, 2009.

FINDINGS OF FACT

1. Emerald Coast has been licensed to operate a Funeral Establishment in the state of Florida and as an Apprentice-Intern Training Agency since May 4, 1998, holding license numbers FO41292-2600-01 and FO41292-2200-01.

2. In 1997, Carriage Services of Florida, Inc., acquired Emerald Coast Funeral Home from Forest Lawn/Evergreen Management Corporation. Emerald Coast is a fictitious name registered with the Florida Department of State, Division of Corporations, to Carriage Funeral Holdings, Inc.

3. Also in 1997, Carriage Funeral Holdings, Inc., became the indirect owner of Emerald Coast through issuance of all the shares of common stock of Carriage Services of Florida.

4. In 1998, shortly after the merger, Emerald Coast filed a change of ownership application with the Board of Funeral Directors & Embalmers. Unfortunately, the application contains a scrivener's error that erroneously reflects "Carriage Funeral Services of Florida" as the owner of Emerald Coast instead of Carriage Services of Florida, Inc. However, the attachments to Emerald Coast's application properly identify Carriage Services of Florida, Inc., as the direct owner of Emerald Coast, and

Respondent's records reflected Carriage Services of Florida as the owner. Additionally, at the time Emerald Coast's application was filed, one of the attachments reflected that Carriage Services, Inc., was the sole shareholder of Carriage Services of Florida, Inc. However, as indicated, since 1997, Carriage Funeral Holdings, Inc., has owned all the common stock of Carriage Services of Florida, Inc., and is the ultimate owner of Emerald Coast.

5. In 2000, Carriage Services of Florida, Inc. merged into Carriage Cemetery Services, Inc., a Texas corporation authorized to do business in the State of Florida. Under the Articles of Merger, Carriage Services of Florida and Carriage Cemetery as the constituent corporations merged into the surviving corporation Carriage Cemetery Services. Carriage Services ceased to exist and, by the terms of the merger, Carriage Services shares of stock were cancelled. The official records of the Department of State do not contain any corporate annual reports for Carriage Services after 1999. The official records of the Department of State do contain required corporate annual reports for Carriage Cemetery up through 2009. There was no evidence regarding the relationship between Carriage Holdings and Carriage Cemetery. However, all three corporations appear to be owned by the same individuals, but are legally separate entities.

6. As separate entities, the merger of Carriage Services with Carriage Cemetery technically caused a change of ownership of Emerald Coast to occur at the time of the merger, since Carriage Services ceased to exist. At that point, the new owner should have notified the Department of the change in ownership. Emerald Coast did not file such a notification. There was no evidence that Emerald Coast intentionally elected not to notify the Department regarding its change in ownership or that it was trying to hide such change. As indicated, the people at Emerald Coast's corporate headquarters remained the same, even though the technical corporate entity changed. However, the failure to notify the Department about the change in ownership is a violation of Florida law, albeit a very minor violation, easily corrected by filing the correct paperwork with the Department. Except for failing to notify the Department, no other violation of Florida law was shown by the evidence, since the funeral establishment is the licensed entity under Florida law and Emerald Coast, as the licensed funeral establishment, had a valid license to operate as such. Given these facts, Emerald Coast is guilty of violating Section 497.380(12)(a), Florida Statutes. All other statutory violations alleged in Count II of the Administrative Complaint should be dismissed.

7. Jeffrey Kevin Watts has been a licensed Funeral Director and Embalmer for approximately 20 years holding license

number FO47717. In 2008, he was the funeral director for Emerald Coast.

8. In February of 2008, the family of decedent B.C. hired Emerald Coast to provide funeral services. Those services included embalming B.C.'s body for viewing and cremation.

9. To enable Emerald Coast to prepare B.C.'s body for viewing, B.C.'s husband executed a written Embalming Authorization. The written Authorization authorized Emerald Coast to care for and prepare for disposition of B.C. in accordance with its customary practices.

10. Additionally, B.C.'s family provided Emerald Coast with a photograph of B.C. in life. The purpose of the photograph was to enable Emerald Coast to prepare B.C.'s body for viewing by her friends and family. In fact, the goal of the embalming process was to restore B.C. to as natural state as possible towards which the picture served as the standard. Importantly, B.C.'s tongue did not protrude between her teeth and out of her mouth while she was alive. Thus, the goal was to prepare B.C.'s body so that her mouth would close normally and she would resemble the photograph provided by her husband.

11. In order to prepare a body for viewing, the body of the deceased must be embalmed. Embalming is a restorative art and always involves removing fluid and tissue from the body and replacing the same with embalming fluid. The evidence

demonstrated that it is standard practice for some tissue to be removed and discarded down the drain and some tissue to be removed and discarded in a biomedical waste container at the funeral home. The condition of the body at the time of death determines how much tissue must be removed from a decedent's remains in order to restore the exterior features of that person to its natural appearance.

12. On February 15, 2008, Mr. Watts embalmed the body of B.C. in preparation for its viewing on February 17, 2008. During the embalming process, B.C.'s tongue became swollen. Such swelling is not a frequent occurrence of the embalming process; but it is always a possibility due to the nature of the embalming fluid used to embalm a decedent's body. In this case, the swelling caused B.C.'s tongue to protrude from her mouth and disfigure her appearance.

13. The decedent's tongue protruded approximately a quarter of an inch beyond her upper and lower front teeth and prevented the mouth from being closed. The disfigurement would not have allowed B.C. to be viewed with a normal appearance since her tongue would have protruded from her mouth.

14. To reduce the swollen tongue, Mr. Watts first tried to put the tongue back into B.C.'s mouth using firm digital pressure. The pressure was unsuccessful.

15. He also tried to roll decedent's tongue back into her mouth and reduce the swelling using a series of forceps and clamps. Mr. Watts also attempted to reduce the swelling in decedent's tongue using a hot towel. These procedures were also unsuccessful and did not improve B.C.'s appearance.

16. Mr. Watts then attempted to suture the inside of B.C.'s upper and lower lip area. However, the sutures did not keep B.C.'s tongue from protruding out of her mouth and did not restore a natural appearance to B.C.'s remains.

17. Next, Mr. Watts tried to put cardboard into B.C.'s mouth to create a barrier that would hold the tongue back. The cardboard was unsuccessful.

18. He also used a syringe to try to remove the fluid from B.C.'s tongue. Again, the attempt was unsuccessful and B.C.'s tongue continued to protrude past her teeth.

19. After all these methods failed to restore B.C. to a natural appearance, Mr. Watts consulted his supervisor, Chuck Jordan, regarding the swelling in the decedent's tongue.

20. Like Mr. Watts, Mr. Jordan tried to reduce the swelling in the B.C.'s tongue and to force it back into position. Importantly, all of the methods used by Mr. Watts and Mr. Jordan are standard practices in the embalming industry. In fact, the process and practices followed by both men are

recognized as appropriate practices to restore a body's natural appearance.

21. As a last resort, Mr. Jordan and Mr. Watts agreed that excision of the protruding portion of the tongue was the only procedure that would restore B.C.'s natural appearance.

22. Mr. Jordan authorized Mr. Watts to excise the protruding portion of B.C.'s tongue. Again, excision of the tongue, or a portion thereof, in cases such as the one here is an accepted and customary embalming practice specifically recognized by the industry and is addressed in the textbook used by all 49 of the colleges of mortuary science in the United States - Embalming: History, Theory and Practice by Robert G. Mayer - as a proper method of last resort in restoring a body to its natural appearance.

23. Thereafter, Mr. Watts excised the protruding portion of B.C.'s tongue by tracing over the upper and lower teeth with a scalpel. This procedure resulted in the excision of a piece of waste tissue that measured approximately a quarter of an inch wide by an inch and a quarter long. He did not remove a body part from B.C.'s body since B.C.'s tongue remained with her body. After removal, Mr. Watts placed the excised tissue in the biomedical waste container in the preparation room. Such a receptacle is the appropriate container in which to dispose of waste tissue. Indeed, the better expert evidence demonstrated

that disposal of such waste tissue as biomedical waste is appropriate and is standard practice in the industry. There was no clear and convincing evidence that demonstrated disposal of waste tissue, like the tissue in this case, was disrespectful or an undignified handling of a person's remains especially since standard mortuary practice recognizes such disposal as appropriate. Moreover, there was no clear or convincing evidence that the excised portion of B.C.'s tongue constituted human remains since they were no longer part of the decedent's body.

24. In February of 2008, Kirk Kahler was a licensed embalmer's apprentice working for Emerald Coast under the supervision of Mr. Watts. As the supervising embalmer, Mr. Watts was responsible to teach and instruct Mr. Kahler.

25. On February, 17, 2008, Mr. Watts discussed the excision of the protruding portions of B.C.'s tongue with Mr. Kahler. Mr. Watts discussed the issues with B.C.'s tongue because the methods and processes he used to resolve the protruding tongue do not occur frequently; but, do occur during the embalming process. It was an opportunity for Mr. Kahler to learn about an infrequent occurrence in the embalming industry.

26. While Mr. Watts was checking the point of excision to ensure there would be no fluid leaks from the area, Mr. Kahler

asked Mr. Watts where the excised tissue was and how much had been removed.

27. Mr. Watts informed Mr. Kahler the tissue was in the biomedical waste receptacle and removed it to show Mr. Kahler the amount of tissue removed. In order to show the tongue to Mr. Kahler, Mr. Watts held the tongue up. Mr. Kahler testified that Mr. Watts held the tongue up "like a trophy fish." Mr. Watts denied such an action or that he demonstrated a "trophy fish" attitude. Such a personal opinion by Mr. Kahler about another person's attitude or thoughts is neither clear nor convincing evidence that Mr. Watts treated B.C.'s tongue in an undignified manner.

28. After showing Mr. Kahler the excised tissue, Mr. Watts placed the tissue back into the biomedical waste container.

29. Later that day, without Emerald Coast's consent, Mr. Kahler removed the excised tissue from the biomedical waste container, placed it in an envelope, and kept it in his mailbox at Emerald Coast. Mr. Kahler, whose rationale is somewhat suspect in this case, testified that he took the tissue because he was outraged by Mr. Watts' handling of the tissue, thought the family should have been advised about the excision of the tissue, and thought the waste tissue should have been cremated with B.C.'s body. His desire was to preserve the tissue as evidence.

30. The family of B.C. held her viewing and service on February, 17, 2008. On February 21, 2008, Mr. Kahler transported B.C.'s body to the crematorium where she was cremated. Even though Mr. Kahler professed concern for the family and felt that the excised tissue should have been placed with the body, Mr. Kahler neither advised the family about the excised tissue, nor placed the excised tissue with the body even though he had the opportunity to do so.

31. Later, after his resignation from Emerald Coast in the middle of March, 2008, Mr. Kahler took the envelope home with him and kept it on his kitchen counter for approximately 45 days.

32. On March 21, 2008, Mr. Kahler emailed the corporate headquarters of Emerald Coast regarding "the removal of a large portion of tongue," from a decedent's body. The email also voices other concerns about the management of Emerald Coast.

33. Mr. Kahler again emailed corporate headquarters to advise that he had the "referenced tongue." He communicated the same message about his possession of "the tongue" to corporate headquarters again on March 30, 2008.

34. At some point, Emerald Coast's corporate headquarters contacted its attorney regarding Mr. Kahler's removal and possession of excised tissue from Emerald Coast. On April 29, 2008, the attorney wrote Mr. Kahler a letter demanding that he

return the tissue to Emerald Coast by a specific date and time. The attorney advised that if Mr. Kahler did not return the tissue, Carriage would file a civil suit against Mr. Kahler. The letter does not constitute an admission by Respondents that the excised portion of B.C.'s tongue meets the definition of remains contained in Chapter 497, Florida Statutes.

35. On April 30, 2008, Mr. Kahler responded that he would return the tongue to the family since he felt it "technically" belonged to them. He also stated that he would "contact his friends at the local newspaper." That same day, Mr. Kahler asked that Petitioner contact him about the "illegal removal of body parts." At that time, Mr. Kahler had the excised tissue in his possession for 70 days.

36. An investigator for the Department met with Mr. Kahler and advised him to return the tissue to Emerald Coast so that it could be disposed of properly. Shortly after that meeting, Mr. Kahler returned the tissue to Emerald Coast. However, the evidence was neither clear nor convincing that either Emerald Coast or Mr. Watts treated B.C.'s remains in an undignified or disrespectful manner. The procedures they used to restore B.C. to a natural appearance were standard procedures. The disposal of the waste tissue from that restorative process was likewise standard. Similarly, there was no clear or convincing evidence that demonstrated Mr. Watts treated B.C.'s remains in an

undignified or disrespectful manner. Mr. Kahler's opinion is simply insufficient to demonstrate that either Respondent violated Florida law regarding the treatment of human remains. Based on these facts, the Count I of the Administrative Complaint filed against Emerald Coast should be dismissed. Similarly, the Administrative Complaint against Mr. Watts should be dismissed.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2008).

38. Chapter 497, Florida Statutes, is the authority by which funeral homes and practitioners of mortuary science are regulated. It is also the authority which governs discipline of the licenses of funeral homes and mortuary science practitioners.

39. Section 497.386, Florida Statutes (2009), provides that:

(4) The licensing authority shall establish by rule the minimal standards of acceptable and prevailing practices for the handling and storing of dead human bodies, provided that all human remains transported or stored must be completely covered and at all times treated with dignity and respect.

40. Section 497.005, Florida Statutes, defines "human remains" as follows:

(36) "Human remains" or "remains," or "dead human body" or "dead human bodies," means the body of a deceased person for which a death certificate is required under chapter 382 and includes the body in any stage of decomposition." (Emphasis supplied.)

41. Notably, Chapter 497, Florida Statutes, does not elaborate on what constitutes the requisite dignity and respect due a decedent's remains. Similarly, there are no rules which define those terms.

42. Without such rules, the only standards which arguably govern licensed funeral homes, funeral directors and embalmers are those generally accepted practices established in the embalming and mortuary industry for the handling of dead human bodies. Such generally accepted practices comply with the mandate in Section 497.386(4), Florida Statutes.

43. With these criteria in mind, license revocations and discipline procedures are penal in nature. Therefore, the Department must prove the allegations in the Administrative Complaints against Emerald Coast and Kevin Watts by clear and convincing evidence. See Dept. of Financial Servs. v. Cremation Center at Horizon Funeral Homes, 2007 WL 2142852 * 3 (DOAH 2007).

44. To meet this elevated standard, the evidence must be of such weight that it produces in the mind of the trier of fact a firm conviction, without hesitancy, as to the truth of the allegations sought to be established. See Dept. of Financial Servs. v. Cremation Center at Horizon Funeral Homes, 2007 WL 2142852 * 3 (DOAH 2007) quoting Slomowitz v. Walker, 429 So. 2d. 797 (Fla. DCA 1983).

45. The Department argues that Respondents failed to treat the B.C.'s remains with dignity and respect by 1) excising the protruding portion of her tongue without getting specific authorization from the decedent's family, 2) placing the excised tissue in the biomedical waste receptacle instead of keeping it with B.C.'s body, and 3) displaying it to an embalmer's apprentice.

46. In this case, Respondents had consent from B.C.'s family to prepare B.C.'s body for her viewing. However, on the issue of whether Respondents treated B.C.'s remains with dignity and respect, such authorization is irrelevant. The issue is Respondents' treatment of B.C.'s remains, not the Respondents' treatment of or consideration for B.C.'s family.

47. On that point, embalming necessarily involves the removal of small amounts of tissue from a deceased person's body. Such removal might be necessitated due to the embalming process or disfigurement caused by trauma, disease or the

embalming process itself. It is undisputed that excision is an accepted method of last resort to deal with swelling of the tongue that disfigures a deceased person's natural appearance. It is specifically acknowledged as a generally accepted practice by the seminal textbook on embalming, Embalming: History, Theory, and Practice by Robert G. Mayer. Indeed, all of the licensed embalmers who testified at the hearing acknowledged excision as a recognized and accepted embalming practice. The Department's argument that the small portion of B.C.'s tongue excised by Mr. Watts should not have been excised without the specific permission of the family is simply absurd given the nature and standard practice of embalming. Moreover, no statute or rule requires permission from the family in order to excise a small portion of a deceased person's body to restore that person to their natural appearance. Respondents, therefore, did not fail to treat B.C.'s remains with dignity and respect in excising a small portion of tissue in order to restore her to her natural appearance.

48. However, once the tissue was removed from B.C.'s body, it became waste tissue and no longer met the definition of remains contained in Section 497.005(36), Florida Statutes. As such, the tissue constituted biomedical waste and was required to be disposed of properly in a biomedical waste container. Again, the Department has no statutes or rules governing the

disposal of biomedical waste. Nevertheless, the Department contends that by discarding this waste tissue rather than keeping it with B.C.'s body, Respondents failed to treat B.C.'s remains with dignity and respect. However, the evidence adduced at the hearing demonstrated that requiring such waste tissue to be kept with the body would conflict with standard embalming procedures and its own recognition that it is appropriate to excise and dispose of some tissue during the embalming process without specifically consulting the family. On this point, the evidence was neither clear nor convincing that Respondents violated Florida law.

49. Likewise, there was no credible or competent evidence that Mr. Watts displayed the excised tissue to his apprentice in a disrespectful or undignified manner. Mr. Watts had an obligation as Mr. Kahler's supervising embalmer to teach and instruct Mr. Kahler, which included explaining the excision procedure to him. Mr. Kahler's opinion regarding Mr. Watts' mindset at the time he showed him the excised tissue is insufficient to clearly and convincingly demonstrate that Respondents failed to treat B.C.'s remains with dignity and respect by displaying the excised tissue to an embalmer's apprentice.

50. Finally, the Department did not offer any evidence to establish that Respondent's treatment of B.C.'s remains somehow

constituted fraud, deceit, negligence, incompetency or misconduct as charged in Section 497.15(b)(1), Florida Statutes, or amounted to a failure to perform a statutory or legal obligation as charged in Section 497.152(4)(h), Florida Statutes, or violated any other provision of this chapter or a lawful order of the board as charged in Section 497.152(1)(a), Florida Statutes. Given this lack of evidence, the allegations of the Administrative Complaints involving the treatment of B.C.'s remains should be dismissed

51. Count II of the Administrative Complaint against Emerald Coast alleges that it violated a variety of statutory requirements when it failed to submit a change of ownership form to the Department.

52. Section 497.380(12)(a)(2008) provides that:

A change in ownership of a funeral establishment shall be promptly reported pursuant to procedures established by rule and shall require the relicensure of the funeral establishment, including reinspection and payment of applicable fees.

53. This statutory provision does not describe what constitutes a "change of ownership." The Department's unwritten "policy" is that there is a change of corporate ownership under this section when the FEIN changes. However, there was no evidence presented at the hearing that demonstrated federal tax law regarding FEINs should be interpreted in such a manner.

However, irrespective of the interpretation of federal tax law, the evidence clearly established that Carriage Services of Florida, Inc., was the original owner of Emerald Coast and was merged out of existence in 2000. At that point, a change of ownership occurred and Emerald Coast should have notified the Department about the change of ownership. Emerald Coast did not submit a change of ownership application in violation of Section 497.380(12)(a), Florida Statutes, and Section 497.152(1)(a), Florida Statutes (violating a provision of Chapter 497).

54. Except for failing to notify the Department, no other violation of Florida law was shown by the evidence, since the funeral establishment is the licensed entity under Florida law and Emerald Coast, as the licensed funeral establishment, had a valid license to operate as such. The other violations charged by the Department fail since those charges relate to the entity holding the funeral establishment license. Therefore, the alleged violations related to Sections 497.141(10), Florida Statutes, (assignment or transfer of the license); Section 497.152(5)(a), Florida Statutes, (practicing beyond scope permitted of licensure); Section 497.152(5)(c), Florida Statutes (representing as its own the license of another); and Florida Administrative Rule 69K-21.001(14)(operating prior to licensure) should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore,

RECOMMENDED that a final order be entered dismissing the Administrative Complaint filed against Jeffrey Kevin Watts and dismissing Count I of the Administrative Complaint filed against Emerald Coast.

It is further RECOMMENDED that a final order be entered finding Emerald Coast guilty of violating Sections 497.380(12)(a) and 497.152(1)(a), Florida Statutes, and issuing a letter of reprimand for such violation.

DONE AND ENTERED this 5th day of October, 2009, in Tallahassee, Leon County, Florida.



DIANE CLEAVINGER
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Filed with the Clerk of the
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this 5th day of October, 2009.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.