

during the hearing held on April 30, 2009, and the argument presented by the parties in post-hearing briefs, the Court hereby enters the following ruling:

PROCEDURAL AND FACTUAL BACKGROUND

Defendants are the owners of five private perpetual care cemeteries in Chatham County. Defendants adopted a rule, effective November 1, 2008, which provides that all burial vaults interred in any of the five private cemeteries must be constructed of 12 gauge welded steel or double walled seamless rotational polymer. The rule specifically prohibits the use of concrete vaults or grave boxes (the Concrete Vault Rule).

Defendants agreed to delay implementation of the rule until December 1, 2008.

Notwithstanding Defendants' voluntary decision to delay implementation of the rule, Plaintiffs filed suit to enjoin Defendants from implementing the rule.

Plaintiffs contend that the Concrete Vault Rule is unreasonable and violates a number of provisions to the Georgia Cemetery Act, constitutes an illegal restraint of trade in violation of Georgia and Federal law, and is in derogation of thousands of preneed contracts. Plaintiffs allege that Defendants have promulgated the Concrete Vault Rule in bad faith in order to increase their revenues and thereby forcing thousands of families to switch to a more expensive or different vault than that which they purchased from Defendants or Plaintiffs.

APPLICABLE LAW AND CONCLUSIONS

Plaintiffs have argued their petition on the following grounds: (1) the Concrete Vault ban should be enjoined because its implementation would constitute a tortious interference with Plaintiffs' existing and prospective business relations;

(2) implementation of the ban would constitute tortious interference with Plaintiffs' contractual relations; (3) implementation would cause a breach of contract between Plaintiff DePue, as an express third party beneficiary, and thousands of Co-Plaintiffs' and Defendants' preneed contractual clients; and (4) the Concrete Vault Rule violates the Georgia Cemetery Act.

The Court will start the discussion with whether the Concrete Vault Rule implemented by Defendants is violative of the Georgia Cemetery Act.

I. Should the Defendants be enjoined from implementing the concrete vault ban because the rule allegedly violates the Georgia Cemetery Act?

The Georgia Cemetery Act is found in O.C.G.A. § 10-14-1 *et seq.* Defendants claim that they have the right under O.C.G.A. § 10-14-16(b) to restrict the type of vault materials that are used in their cemeteries. O.C.G.A. § 10-14-16(b) states that "[t]he owner of every cemetery shall have the . . . right to establish reasonable rules and regulations regarding the type of material, design, composition, finish, and specifications of any and all merchandise to be used or installed in the cemetery." The question then becomes "What is *reasonable*?"

A. Testimony of Larry Nikola

Prior to "reasonableness" being discussed, it is important to address the testimony of Larry Nikola, owner of defendant cemeteries. Mr. Nikola testified that he has been in the cemetery business for thirty five years, and bought defendant cemeteries in order to make a profit. Part of Mr. Nikola's plan for making a profit was to ban concrete vaults in order to sell steel and polymer vaults - of which he is the only

local dealer.² Mr. Nikola's stated reasons behind banning the concrete vaults were (1) to increase revenue for the cemeteries, and (2) reduce damage to the cemetery grounds.

i. Increasing revenue for the cemeteries

Mr. Nikola testified that perpetual care cemeteries require at least \$200,000 per acre. When he bought defendant cemeteries, the amount accessible per acre was much less. Therefore he needed to increase his revenues and lower his expenses in order to make a profit. He testified that the most significant cost in cemetery care is the maintenance cost. He indicated that part of the maintenance cost includes repairing roads and lawns that the concrete vault trucks have damaged while delivering the vaults. He stated that he has attempted to reduce the weight of almost all mechanical equipment used on his properties.

Plaintiff DePue testified to another manner in which Mr. Nikola intended to reduce his costs. Plaintiff DePue stated that when Mr. Nikola moved to town, Mr. Nikola requested a meeting with Plaintiff DePue. At that meeting, Mr. Nikola told Plaintiff DePue that he was going to "put him out of business." Mr. Nikola did not deny this statement. The way that Mr. Nikola was going to put Plaintiff DePue out of business was to prevent the installation of concrete vaults in his properties.

Uncontroverted testimony at the April 30 hearing indicated that 99% of the vault sales in this area are made of concrete. The concrete vaults sales are predominately made by DePue-Wilbert Vault Company and Reita Vault Company (both located in this area)

² Mr. Nikola added to his testimony that anyone could get a steel or polymer dealership, including Mr. DePue.

through the local funeral homes. The assertion of the local funeral home operators that testified on April 30 reveal that at least 50% of their burials occur in Defendants' cemeteries.

To offer a different revenue-producing option to the 99% of the people selecting concrete vaults, Mr. Nikola became the only local dealer of the alternative vaults: steel and polymer. He indicated that as the only dealer of these types of vaults, his revenues would increase. Mr. Nikola testified that if those who previously bought a burial plot in his cemeteries demanded a concrete vault, there was nothing stopping them from selling their burial plot and relocating to a different cemetery which would allow their choice of a concrete vault.

ii. Reducing damages to the cemeteries

In addition to increasing the revenues that Mr. Nikola would receive by only allowing steel or polymer vaults in his cemeteries, Mr. Nikola testified that the vaults he sold would result in less damage to his cemetery properties. Mr. Nikola's testimony was that he firmly believes that steel and polymer are a better quality of vault for this area, and for his cemeteries. Steel and polymer vaults are lighter, and therefore do less damage to the cemetery property as they are being transported to their location. However, testimony from expert David Brugger revealed that with proper planking for the grounds, a truck carrying a concrete vault would do less damage to the property than a man just walking on the ground.³ Additionally, no evidence was presented to the

³ Mr. Brugger's testimony was that a 250 lb. man's footprint carries approximately 20 lbs. per square inch, while a truck driving over planking would carry about 6.5 lbs. per square inch due to the dissipation of weight that the planking would provide.

Court illustrating that any of the Plaintiffs had caused damage to Defendants' properties.

B. Reasonableness of Defendants' actions

Plaintiffs argue that "the 'reasonableness' of a proposed rule must be viewed in the context of an important public policy which recognizes that 'every competent adult has the right to control the decisions relating to his or her own funeral arrangements' and the legislator's intent not to regulate these industries in a 'manner which will unreasonably affect the competitive market,'"⁴ O.C.G.A. § 10-14-2(b). Part of the decision in planning funeral arrangements involves selecting which type of vault, if any, will be used. As indicated previously, 99% of the vault sales in this area are made of concrete. These are the same vaults previously selected by people making their own funeral decisions that Defendants' cemeteries are seeking to ban. Plaintiffs' position is that this ban will unreasonably affect not only the market, but the vault purchaser's preference.

"Reasonable" is defined as "fair, proper, or moderate under the circumstances," Black's Law Dictionary 1293 (8th ed. 2004). In determining what is "reasonable" in this case, the Court finds compelling the expert testimony from David Brugger which reveals that due to the water table and the chemical composition of the soil in Defendants' cemeteries, a concrete vault is a much better choice. Concrete becomes more durable with time due to its curing tendencies, while steel will rust. Concrete weighs more and will therefore stay buried in a high water table location such as Chatham County, while

⁴ Plaintiffs' Post Hearing Brief in Support of Permanent Injunction and in Opposition to Defendants' Motion for Partial Summary Judgment, pg. 19, filed May 8, 2009.

a polymer vault will “pop up” out of the ground - as was illustrated by such an occurrence at one of Defendants’ cemeteries.⁵ Furthermore, the “life” of a concrete vault is much longer than that of a steel vault, which is approximately sixty years per testimony of Mr. Brugger. In a perpetual care cemetery, it is obvious that the person planning their funeral arrangement would be concerned about the “life” of their vault, and whether that vault would involuntarily “pop” out of the ground due to excessive rain. Local residents have traditionally and overwhelmingly selected concrete vaults and now Defendants are attempting to restrict that choice by preventing concrete vaults from being allowed in their cemeteries.

Based on the above, the Court finds as follows:

In essence, Mr. Nikola is a business predator and has acted in bad faith. He bought cemeteries in an effort to make a profit to the detriment of those he claims to serve. Mr. Nikola decided to get rid of 99% of the vaults in Savannah so that he could sell his inferior vaults at an increased price against the will of the majority of the vault-buying population. Furthermore, Mr. Nikola’s actions were in direct response to complaints filed against him by Plaintiff DePue - thereby prompting Mr. Nikola’s comment that he would put Plaintiff DePue out of business. And finally, the Court has found no documented evidence that any alleged damage to Defendants’ cemeteries was caused by any of the Plaintiffs. The Court does not find that any of Mr. Nikola’s actions were “reasonable” as contemplated by the Georgia legislature when they enacted O.C.G.A. § 10-14-16.

⁵ Testified to by Mary Messix, Regional Administrator for Defendants’ cemeteries, at the April 30 hearing, and in her depositional testimony.

Furthermore, the Court finds that Defendants are in violation of O.C.G.A. § 10-14-17(c)(5) which indicates it is unlawful to “[t]ie the purchase of any grave space or burial right to the purchase of merchandise from or through the seller or any other designated person or corporation.” Clear evidence of this violation is Mr. Nikola’s own testimony, as stated above, that if those who previously bought a burial plot in his cemeteries demanded a concrete vault, there was nothing stopping them from selling their burial plot and relocating to a different cemetery which would allow their choice of a concrete vault. Mr. Nikola essentially affirmed that the only way to be buried in one of his cemeteries is to purchase a vault which is sold exclusively in this area by him.

For the foregoing reasons, the Court finds that Defendants’ Concrete Vault Ban Rule is unreasonable and prohibited by O.C.G.A. § 10-14-1 *et seq*, and therefore **GRANTS** Plaintiffs’ Petition for Permanent Injunction.

II. Tortious interference with business relations

Based on the holding in Section I, the Court does not need to address this issue.

III. Tortious interference with contractual relations

Based on the holding in Section I, the Court does not need to address this issue.

IV. Breach of contract

Based on the holding in Section I, the Court does not need to address this issue.

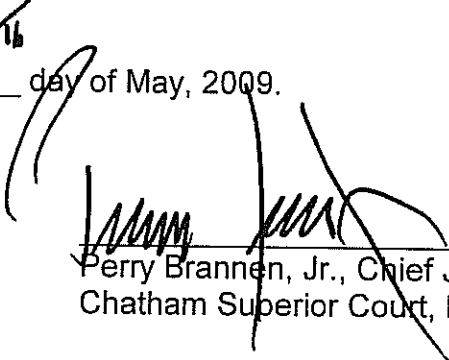
CONCLUSION

For the foregoing reasons, the Court finds that Defendants’ Concrete Vault Ban Rule is unreasonable and prohibited by O.C.G.A. § 10-14-1 *et seq*, and therefore **GRANTS** Plaintiffs’ Petition for Permanent Injunction. Defendants are permanently

enjoined from implementing a concrete vault ban, in any form, in any their five private
cemeteries in Savannah, Chatham County, Georgia.

This ruling makes Defendants' Motion for Partial Summary **MOOT**.

SO ORDERED, this 19th day of May, 2009.



Perry Brannen, Jr., Chief Judge,
Chatham Superior Court, EJC, Georgia

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