

BEFORE THE  
STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS  
STATE OF MISSOURI

STATE BOARD OF EMBALMERS AND	)	
FUNERAL DIRECTORS,	)	
	)	
Petitioner,	)	
	)	Case no.: 08-2031 EM
v.	)	
	)	
DUANE E. HARVEY	)	
	)	
Respondent.	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DISCIPLINARY ORDER**

On or about December 9, 2009, the Administrative Hearing Commission entered its Decision in the case of *State Board of Embalmers and Funeral Directors v. Duane E. Harvey*, Case No. 08-2031 EM. In that Decision, the Administrative Hearing Commission found cause for the State Board of Embalmers and Funeral Directors (“Board”) to discipline Duane E. Harvey (“Harvey” or “Respondent”) under § 333.121.2(5), (13), and (15), RSMo.<sup>1</sup>

The Board has received and reviewed the record of the proceedings before the Administrative Hearing Commission and the Decision of the Administrative Hearing Commission. The record of the Administrative Hearing Commission is incorporated herein by reference in its entirety.

Pursuant to notice, §§ 621.110 and 333.121.3, the Board held a hearing on March 31, 2010, at approximately 11:30 a.m., at the Best Western, 1200 Gannon Drive, Festus, Missouri, for the purpose of determining the appropriate disciplinary action against Respondent. The

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri as amended.

Board was represented by Assistant Attorney General Sharon Euler. Respondent received proper notice and opportunity to appear and appeared in person without legal counsel. After being present and considering all of the evidence presented during the hearing, the Board issues the following Findings of Facts, Conclusions of Law and Order.

Based upon the foregoing the Board hereby states:

**I.**

**FINDINGS OF FACT**

1. The Board is an agency of the state of Missouri created and established pursuant to § 333.151, and is responsible for executing and enforcing the provisions of Chapter 333 and §§ 436.400 – 436.525, RSMo (as amended), relating to the practice of funeral directing, funeral establishments, embalming and preneed funeral contracts.

2. The Board hereby adopts and incorporates by reference the Findings of Fact as set forth in the Decision of the Administrative Hearing Commission in *State Board of Embalmers and Funeral Directors v. Duane E. Harvey*, Case No. 08-2031 EM, in its entirety.

3. The Board set this matter for disciplinary hearing and served notice of the disciplinary hearing upon Respondent in a proper and timely fashion.

**II.**

**CONCLUSIONS OF LAW**

4. This Board has jurisdiction over this proceeding pursuant to § 621.110 and § 333.121.3.

5. The Board expressly adopts and incorporates by reference the Conclusions of Law as set forth in the Decision issued by the Administrative Hearing Commission in *State*

*Board of Embalmers and Funeral Directors v. Duane E. Harvey*, Case No. 08-2031 EM, in its entirety. The Board hereby enters its Conclusions of Law consistent therewith.

6. As a result of the foregoing, and in accordance with the Administrative Hearing Commission's Decision on December 9, 2009, Harvey's funeral director license is subject to disciplinary action by the Board pursuant to § 333.121.2(5), (13), and (15).

7. The Board has determined that this Order is necessary to ensure the protection of the public.

### III.

#### ORDER

Having fully considered all the evidence before the Board, and giving full weight to the Decision of the Administrative Hearing Commission, it is the **ORDER** of the Board that Duane E. Harvey's funeral director license shall be placed on **PROBATION** for a period of **TWO (2) YEARS**, beginning upon the effective date of this Order. During the period of probation, Respondent Duane E. Harvey shall be entitled to operate as a funeral director as defined in Chapter 333, RSMo, subject to the following terms and conditions:

- A. During the probationary period, Respondent shall comply with all applicable provisions of Chapter 333 and §§ 436.400 – 436.525, RSMo, as amended, all applicable Board regulations and all applicable federal and state laws. "State" includes the state of Missouri, all other states and territories of the United States, and the ordinances of their political subdivisions.
- B. Respondent shall meet in person with the Board or its representative at any such time and place as required by the Board or its designee upon notification from the Board or its designee. Said meetings will be at the Board's discretion and may occur periodically during the probationary period.
- C. Respondent shall submit written reports to the Board by no later than January 1 and July 1, during each year of the Disciplinary period, stating truthfully whether there has been compliance with all terms and conditions of this Order. A copy of the required report may be obtained from the Board.

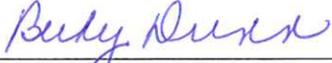
- D. In addition to the required compliance reports, Respondent shall immediately submit documents showing compliance with the requirements of this Order to the Board when requested by the Board or its designee.
- E. Respondent shall keep the Board apprised at all times of his current address and telephone number and the address and telephone number of the funeral establishment at which he is employed. Respondent shall immediately inform the Board in writing within two (2) days of any change in this information.
- F. During the probationary period, Respondent shall timely renew his license(s), timely pay all fees required for licensure and comply with all other requirements necessary to maintain his license(s) current and active.
- G. During the probationary period, Respondent shall accept and comply with unannounced visits from the Board's representatives to monitor compliance with the terms and conditions of this Order.
- H. If Respondent fails to comply with the terms of this order during the probationary period, in any respect, the Board may choose to conduct a hearing before it either during the probationary period, or as soon thereafter as a hearing can be held, to determine whether a violation occurred and, if so, may impose disciplinary action under § 324.042, RSMo. The Board has continuing jurisdiction to hold a hearing to determine if a violation of this Order has occurred.
- I. In the event the Board determines that Respondent has violated any term or condition of this Order, the Board may, in its discretion, vacate this Order and may impose additional discipline as deemed appropriate by the Board, including revocation of the license.
- J. This Order does not bind the Board or restrict the remedies available to the Board for any violation of Chapter 333 or Chapter 436, RSMo, as amended, not specifically mentioned in this document.
- K. Upon the expiration of the probationary period, Respondent's funeral director license shall be fully restored if all other requirements of law have been satisfied provided, however, that in the event the Board determines that Respondent has violated any term or condition of this Order, the Board may, in its discretion, vacate and set aside the probation imposed herein and may impose any other lawful discipline the Board shall deem appropriate, including, revocation of said certification. No order shall be entered by the Board pursuant to this paragraph without any required notice and opportunity for a hearing before the Board in accordance with Chapter 536, RSMo, as amended.
- L. If the Board determines that Respondent has violated a term or condition of this Order, which violation would also be actionable in a proceeding before the Administrative Hearing Commission or the circuit court, the Board may elect to pursue any lawful remedies or procedures afforded it and is not bound by this Order in its determination of appropriate legal actions concerning that violation.

- M. Any failure by Respondent to comply with any condition of discipline set forth herein constitutes a violation of this Order.
- N. If, at any time during the probationary period, Respondent changes his business address from the state of Missouri, or ceases to be currently licensed under the provisions of Chapter 333, RSMo, or fails to keep the Board advised of his current places of business, the time of such absence, unlicensed or inactive status, or unknown whereabouts shall not be deemed or taken to satisfy any part of the probationary period.
- O. Unless otherwise specified by the Board, all reports, documentation, evaluations, notices, or other materials required to be submitted to the Board shall be forwarded to: State Board of Embalmers and Funeral Directors, P.O. Box 423, Jefferson City, Missouri 65102.

The terms of this Order are contractual, legally enforceable, and binding and not mere recitals. Except as otherwise contained herein, neither this Order nor any of its provisions may be changed, waived, discharged, or terminated, except by an instrument in writing signed by the party against whom the enforcement of the change, waiver, discharge, or termination is sought.

The Board will maintain this Order as an open record of the Board as provided in Chapters 333, 610 and 324, RSMo.

SO ORDERED EFFECTIVE THIS 4<sup>th</sup> day of May, 2010.

  
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Becky Dunn, Executive Director  
Missouri State Board of  
Embalmers and Funeral Directors

Before the  
Administrative Hearing Commission  
State of Missouri



STATE BOARD OF EMBALMERS AND  
FUNERAL DIRECTORS,

Petitioner,

vs.

DUANE E. HARVEY,

Respondent.

No. 08-2031 EM

**DECISION**

There is cause to discipline Duane E. Harvey for issuing nine death certificates with forged signatures in the medical certifications, for refusing to pay life insurance proceeds to the company entitled to them, and for obtaining and refusing to pay life insurance proceeds that he had no right to obtain or keep.

**Procedure**

On December 4, 2008, the State Board of Embalmers and Funeral Directors ("Board") filed a complaint to establish cause to discipline Harvey as a funeral director. On January 7, 2009, we consolidated for hearing and decision the Board's complaint against Harvey filed in Case No. 08-0594 EM with the complaint in this case.

On February 11, 2009, we granted leave for the Board to file an amended complaint as of February 10, 2009. We had served Harvey personally with the complaint in Case No. 08-0594 EM on May 28, 2008. On June 10, 2009, the Board filed Harvey's signed acceptance of service of the amended complaint in the consolidated Case No. 08-2031 EM, as we acknowledged in our order of June 11, 2009. Harvey did not respond to the complaints or the amended complaint.

On June 16, 2009, we held a hearing. Assistant Attorney General Edwin R. Frownfelter represented the Board. Harvey appeared without counsel. On June 19, 2009, the Board filed, with our leave, a corrected version of its Exhibit 7, which we admit as a substitute for the Exhibit 7 offered at the hearing.

The Board filed its written argument on August 27, 2009. Although we gave Harvey until September 28, 2009, to reply, he did not.

#### **Findings of Fact**

1. The Board licensed Harvey as a funeral director on August 22, 1993. His license has remained current and active through the present. Unless renewed, his license expires on May 31, 2010.

2. Harvey is the manager and licensed funeral director in charge of Duane E. Harvey Funeral Directors and the 9100 Group, LLC, which operates a funeral establishment with a business address at 9100 Blue Ridge Avenue, Kansas City, Missouri, 64138 ("Harvey Funeral Directors").

#### **Count I – Death Certificates**

3. As the funeral director in charge of Harvey Funeral Directors, Harvey is responsible for all aspects of the funeral establishment, including the responsibility to assure the accuracy and authenticity of death certificates that his staff prepares.

4. A death certificate is registered for any death that occurs in the state. The funeral director responsible for a decedent's funeral arrangements obtains the decedent's personal and demographic information required by 19 CSR 10-10.050(1). The funeral director enters the information on a form for the death certificate. The funeral director signs this portion of the death certificate as the "funeral service licensee or person acting as such."

5. The funeral director sends the death certificate to a physician, medical examiner or coroner, who completes the medical certification portion with the cause and manner of death and signs as the "certifier." The certifier returns the death certificate to the funeral director.

6. The funeral director files the death certificate with the local registrar.<sup>1</sup> The local registrar files the death certificate with the State Registrar at the Bureau of Vital Records, Department of Health and Senior Services.

7. Thomas Young, M.D., was the Chief Medical Examiner of Jackson County. In 2005, the staff at his office asked Harvey Funeral Directors for a copy of a death certificate for which Young's office had forgotten to keep an office copy. Upon receiving the copy from Harvey Funeral Directors, Young's staff noticed that the signature in the medical certification that purported to be Young's was not his signature. Further inquiry revealed that the copy was of a death certificate that had been filed with the local registrar but was not a copy of the death certificate whose medical certification Young had signed.

8. On the same day, Young's staff discovered another death certificate whose medical certification Young had signed but that now displayed Young's forged signature. The death certificate had not yet been filed with the local registrar.

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<sup>1</sup>Before being filed with the local registrar, the death certificate must contain a statement as to whether the deceased was embalmed. If the deceased was embalmed, a licensed embalmer must sign a statement that he or she did the embalming. 20 CSR 2120-2.030(4).

9. On June 29, 2005, Young's staff informed Irva J. Cross, State Registrar, of the forged signatures. Cross investigated. She found that since mid-2003, there had been other death certificates signed by Harvey, as the licensed funeral director, that had forged signatures on the medical certification.

10. On August 4, 2005, after unsuccessful attempts to speak with Harvey by telephone, Cross spoke with a member of Harvey Funeral Directors' staff, Anthony Milligan. Milligan asked if she was calling about the "two certificates," giving Cross the names of the decedents. Milligan explained that the secretary had just "re-did" the death certificates after some mistakes had been made on them.

11. On August 17, 2005, Cross met with Harvey about the issue of forged signatures. Harvey informed Cross that when the forged signatures were discovered, he had sanctioned the person responsible by withholding pay. When Cross informed Harvey that her investigation had revealed other forged signatures on death certificate medical certifications filed since mid-2003, Harvey offered the same explanation that Milligan had, that the secretary "re-did" some certificates on which mistakes had been made. Harvey also said that he could not monitor all staff activities.

12. Cross informed Harvey that she was referring the matter to the Board. She notified the Board of the results of her investigation on September 26, 2005.

13. During 2003 through 2005, Harvey employed Willie Meeks. Meeks' responsibilities included completing the personal and demographic portion of the death certificate, sending it to the physician or medical examiner to complete and sign the medical certification, having the death certificate returned to him, and then filing the signed death certificate with the local registrar.

14. On occasion, Harvey signed some of the death certificates in blank before Meeks completed the personal and demographic information.

15. Sometimes Meeks made mistakes in the preparation of death certificates. Harvey had instructed Meeks not to file any death certificates with corrections made on them. So when Meeks caught any errors after the medical certification was signed, he prepared a new certificate free of errors and sent it to the medical examiner or physician to complete and sign the medical certification again. This resulted in delays that Harvey found unacceptable.

16. Harvey had developed a practice of disciplining Meeks when his errors resulted in delays, including docking Meeks' pay or reducing his hours. So when Meeks found errors after the certifier had signed, Meeks typed a new certificate and forged the certifier's signature on the medical certification.

17. Meeks forged the certifier's signature on the medical certification of the death certificate for each of the following decedents:

<u>Forged Signature</u>	<u>Decedent</u>	<u>Date of Death</u>
a. Thomas Young	Rueben E. Clinton	May 25, 2005
b. Thomas Young	Ajay P. Udehan	August 11, 2004
c. Thomas Young	Daniel D. Johnson	October 10, 2004
d. Thomas Young	Jerry R. Watkins	June 10, 2005
e. Thomas Young	DeMarco M. Thompson	November 3, 2004
f. Thomas Young	Josephine E. Walker	November 12, 2004
g. Nicholas Comminellis	Belinda Pennington	December 20, 2002
h. James M. Stoddard	Nellie Marshall	November 11, 2004
<u>Forged Signature</u>	<u>Decedent</u>	<u>Date of Death</u>
i. Julie M. Alvarez	Benita Johnigan	August 22, 2004

18. Harvey signed each of these death certificates. Harvey did not know that the signatures on the medical certifications were forged.

19. All nine of the death certificates were filed with the local registrar.

Count II – Life Insurance Proceeds

20. Jackman Financial Corporation (“Jackman”) is a corporation located in Chicago, Illinois.

21. Among its services, Jackman offers insurance assignment financing to funeral homes. Funeral assignment financing is intended to assist funeral homes in financing the funerals of decedents who have life insurance, but whose estates or families are unable to pay the costs of funerals.

22. Jackman funded funerals performed by Harvey Funeral Directors through insurance assignment agreements on 28 occasions.

23. When requested to arrange a funeral for a decedent with life insurance, Harvey obtained from the beneficiary a guarantee and an assignment of the insurance proceeds to Jackman. Harvey then sent the assignment to Jackman. Jackman verified the information on the assignment form with the insurer. Jackman paid an advance to Harvey in the amount of the assignment, less a 4.5 percent fee, and submitted the assignment as a claim to the insurer. The insurer sent the entire amount of the proceeds to Jackman as the assignee. Jackman kept the entire amount of the proceeds.

24. The arrangement contemplated that Harvey was paid almost immediately after Jackman received the assignment and that the insurer delivered the proceeds to Jackman rather than to the beneficiary or Harvey.

Decedent Walter R. Barbour

25. On May 23, 2005, Harvey submitted to Jackman an assignment of insurance

benefits in the amount of \$10,577.95 for decedent Walter R. Barbour, who was insured by CUNA Mutual Insurance Company ("CUNA"). Betty Hogan, Barbour's common law wife, guaranteed and signed the assignment.

26. On May 27, 2005, based on this assignment, Jackman advanced to Harvey the sum of \$10,241.21, calculated as \$10,557.95 minus a fee of \$316.74, for payment of the Barbour funeral expenses.

27. On June 15, 2005, CUNA mistakenly sent the check for the proceeds in the amount of \$10,557.95 to Betty Hogan.

28. When Hogan received the check, she contacted Harvey and asked him for confirmation of the amount of the check and to whom it should be made payable. Harvey specifically instructed Hogan to write a check to "Duane E. Harvey Funeral Directors" for \$10,557.95.

29. Hogan delivered a check for \$10,557.95 to Harvey on June 27, 2005. Harvey deposited this sum into the account of his funeral home.

30. Jackman asked Harvey for the proceeds. On or about September 26, 2005, Harvey sent Jackman a check for \$10,557.95, drawn upon the account of Duane E. Harvey Funeral Directors at Bank of America. However, this check was returned as drawn on insufficient funds.

31. Jackman spoke with Harvey several times and requested that Harvey pay the \$10,557.95 to Jackman.

32. Harvey failed to pay the funds to Jackman. As a result, Jackman filed a lawsuit against Harvey and Betty Hogan in the Circuit Court of Jackson County.

33. On March 14, 2008, Harvey settled the lawsuit by paying the sum of \$10,557.95 to counsel for Jackman on the eve of trial. Jackman's counsel sent the amount to Jackman, minus \$3,177 for attorney fees and court costs.

Decedent Charlotte Robinson-Richie

34. On July 8, 2005, Harvey submitted to Jackman an assignment of life insurance benefits in the amount of \$8,000 for decedent Charlotte Robinson-Richie, who was insured by Reassure America Insurance Company ("Reassure"). Dora A. Taylor, the deceased's daughter, signed and guaranteed the assignment.

35. On July 11, 2005, based on this assignment, Jackman advanced the sum of \$7,760, calculated as \$8,000 minus a fee of \$240, to Harvey for payment of the Robinson-Richie funeral expenses.

36. On August 8, 2005, Reassure mistakenly paid the sum of \$8,000 to Harvey. Harvey received the check and deposited it into the account of Harvey Funeral Directors.

37. Despite requests to do so, Harvey never repaid the overpayment of \$8,000 either to Jackman or to Reassure.

Decedent Calvin Lee Goulden

38. On September 2, 2005, Harvey submitted to Jackman an assignment of life insurance benefits in the amount of \$5,622.16 for decedent Calvin Lee Goulden, who was insured by Caremark Insurance Company ("Caremark"). Dana Goulden, the deceased's widow, guaranteed and signed the assignment.

39. The Caremark claim was handled by Unum Life Insurance Company ("Unum").

40. On September 14, 2005, based on this assignment, Jackman advanced the sum of \$5,369.16, calculated as \$5,622.16, minus a fee of \$253 to Harvey, for payment of the Goulden funeral expenses.

41. On October 13, 2005, Caremark/Unum mistakenly paid the sum of \$5,622.16 to Dana Goulden, who delivered the funds to Harvey on October 23, 2005. Harvey deposited the funds into the account of his funeral home.

42. Despite requests to do so, Harvey did not disburse the overpayment of \$5,622.16 either to Jackman or to Caremark and benefited by failing to deliver those funds.

43. In the Reassure and Caremark matters, Harvey received \$13,622.16 in insurance payments that had been assigned to Jackman, and benefited by failing to deliver those funds either to Jackman or to the insurance companies who mistakenly distributed them to him.

44. Reassure and Caremark both suffered financial losses as they were never reimbursed by Harvey for the amounts they had mistakenly disbursed to Harvey or to the beneficiaries.

45. Although the principal amounts that Jackman advanced were ultimately repaid to Jackman in all three cases, Jackman suffered financial losses in all three cases due to lost opportunity to use the erroneously distributed funds, interest costs of 10 percent paid on the advanced amounts, and attorney fees and costs of litigation.

### Conclusions of Law

We have jurisdiction of the complaint.<sup>2</sup> The Board has the burden to prove facts for which the law allows discipline.<sup>3</sup>

#### I. Count I – Death Certificates

Section 333.011 provides:

(3) “**Funeral director**”, any individual licensed to engage in the practice of funeral directing;

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(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

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<sup>2</sup>Section 621.045, RSMo Supp. 2008. Statutory references are to RSMo 2000, unless otherwise noted.

<sup>3</sup>*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

bodies or engaging in the general control, supervision or management of the operations of a funeral establishment[.]

The practice of funeral directing includes complying with the laws on the preparation of death certificates. Section 193.145.4<sup>4</sup> provides:

The funeral director or person acting as such in charge of final disposition of the dead body shall file the certificate of death. The funeral director shall obtain:

- (1) The personal data from the next of kin or the best qualified person or source available; and
- (2) The medical certification from the person responsible for such certification.

The person responsible for the medical certification is the appropriate physician, medical examiner or coroner, as provided in subsections 5 through 8 of § 193.145.

The Board contends that Harvey failed to supervise the activities of his staff in the preparation and submission of death certificates and that such failure resulted in the filing of death certificates containing forged signatures on the medical certifications.

The Board contends that these facts are cause for discipline under § 333.121.2(5), which authorizes discipline for:

[i]ncompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter[.]

Section 193.145.4(2) expressly makes its requirements a part of the functions or duties of a licensed funeral director.

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<sup>4</sup>The amendments to § 193.145.4 in 2005 became effective on August 28, 2005. Laws 2005, at vii. S.B. 49, 93<sup>rd</sup> Gen. Assembly, 1<sup>st</sup> Reg. Sess'n. Meeks forged the certifiers' signatures on all of the death certificates listed in Finding of Fact 17 before the effective date. Even so, the amendments did not change the substance of the provisions as far as a licensed funeral director is concerned.

During closing argument, the Board's counsel stated:

.... What the statute requires is that the supervising funeral director bears responsibility for assuring the accuracy of the certificate that's filed.

And I think that we have a situation here where it's pretty clear that there weren't checks, there weren't procedures in place that made that possible. **That's not a matter of dishonesty as much as an issue of competence** in general oversight of the funeral home. Again, I'll stress that in the brief.

But I think it's a different case than the one we initially pleaded but still one where there are issues under the section of the statute 333.121.2, especially Section (5). Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty. That's a fairly broad definition. **I think we're talking mainly about competence issues rather than dishonesty issues** because the procedures were not in place.<sup>5</sup>

Accordingly, in the Board's proposed conclusions of law, it contends that Harvey's conduct constitutes incompetency, misconduct, and gross negligence.

Misconduct is the commission of wrongful behavior, intending the result which actually comes to pass or being indifferent to the natural consequences.<sup>6</sup> On the other hand, gross negligence is a deviation from the standard of care so egregious as to demonstrate a conscious indifference to a professional duty. We may infer the requisite mental state from the conduct of the licensee "in light of all surrounding circumstances."<sup>7</sup>

Harvey also knew, or at least was responsible for knowing, that as part of the running of a funeral establishment it was his duty to obtain the medical certification from the doctor or medical examiner. The Board offered no evidence to show that Harvey should have known that a trusted employee was regularly forging signatures on medical certifications. Unless Harvey had been comparing the medical examiner's and private physicians' signatures to exemplars, he

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<sup>5</sup>Tr. at 98.

<sup>6</sup>*Grace v. Missouri Gaming Commission*, 51 S.W.3d 891, 900 (Mo. App., W.D. 2001).

would have no way of discovering forgeries. There is no evidence that making such comparisons was a standard practice among funeral directors, especially in a metropolitan area where there are many physicians. Harvey's reliance on his employee, without more, fails to establish misconduct or gross negligence under § 333.121.2(5).

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>8</sup> Incompetence is a state of being.<sup>9</sup> Therefore, proving incompetence involves a broader-scale analysis, requiring more than proving incompetent acts. It must be shown that the complained-of acts flowed from the funeral director's incompetence – that is, being unable or unwilling to function properly as a funeral director.<sup>10</sup>

As just explained in regard to the misconduct and gross negligence issues, there is no evidence that Harvey's supervision of and reliance upon Meeks to properly prepare the death certificates was anything out of the ordinary. Significantly, we had no testimony from experts that Harvey's conduct was incompetent.<sup>11</sup> Therefore, we find no cause to discipline Harvey under § 333.121.2(5) for incompetence.

The Board contends that Harvey's conduct is cause for discipline under § 333.121.2(15), which authorizes discipline for “[v]iolation of any of the provisions of chapter 193[.]” Although other causes for discipline set forth in § 333.121.2 contain language requiring a scienter element, subdivision (15) contains none. Therefore, Harvey's failure to meet his duty under § 193.145.4 to obtain medical certifications from the proper person violates that statute regardless of whether

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<sup>7</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>8</sup>*Tendai v. Missouri Bd. of Regis'n for Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005).

<sup>9</sup>*Id.*

<sup>10</sup>*Albanna v. State Bd. of Regis'n for the Healing Arts*, 293 S.W.3d 423, 435-36 (Mo. banc 2009).

<sup>11</sup>*See Tendai*, 161 S.W.3d at 370.

he knew or should have known that Meeks was forging the signatures on the nine death certificates at issue.<sup>12</sup> Those violations are cause for discipline under § 333.121.2(15).

The Board also contends that Harvey's conduct constituted criminal violations of Chapter 193 pursuant to § 193.315, which provides:

2. Any person who, without lawful authority and with the intent to deceive, makes, counterfeits, alters, amends, or mutilates any certificate, record, or report required by sections 193.005 to 193.325, certified copy of such certificate, record, or report shall be guilty of a class D felony.

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7. Any person who knowingly neglects or violates any of the provisions of sections 193.005 to 193.325 or refuses to perform any of the duties imposed upon him by sections 193.005 to 193.325 shall be guilty of a class A misdemeanor.

The Board's burden of proving a criminal offense in a professional licensing proceeding is a preponderance of the evidence.<sup>13</sup>

“Preponderance of the evidence” is defined as that degree of evidence that “is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.”<sup>14</sup>

The Board has failed to establish any violation of § 193.315.2 because it failed to show that Harvey had any intent to deceive. Further, the Board has failed to show that Harvey “knowingly neglected or violated” § 193.145.5 or that he refused to perform his duties.

The Missouri Supreme Court has interpreted the term “knowingly neglected,” as used in § 198.070.11, when reviewing convictions for knowing neglect of residents in a long-term care

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<sup>12</sup>*Seeger v. Downey*, 969 S.W.2d 298, 299-300 (Mo. App., E.D. 1998).

<sup>13</sup>*State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000) (citation omitted).

<sup>14</sup>*Id.*

facility. The defendants had held ownership or supervisory positions in the home. An inspector had brought to their attention after several inspections that sanitation and medical conditions were unacceptable and, in some cases, deteriorating both generally in the facility and for specific residents. Eventually, the defendants were charged and convicted of having knowingly neglected three of the residents, all of whom had died.

The court held that proving knowing neglect requires more than showing that a defendant has ownership or supervisory authority over the facility.<sup>15</sup> The court relied on the definition of knowingly provided in § 562.016.3:<sup>16</sup>

3. A person “acts knowingly”, or with knowledge,

(1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or

(2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

The court held that the State proved a defendant had knowingly neglected a resident when the State showed that although the inspector had repeatedly made the defendant aware of the inadequate sanitary and medical conditions of the resident, the conditions remained inadequate or got worse.<sup>17</sup>

The Board presented no evidence showing that Harvey's conduct was tantamount to being “practically certain” that Meeks would produce death certificates with forged signatures on the medical certifications. The Board has failed to prove that Harvey violated subsection 2 or 7 of § 193.315 and, therefore, failed to establish such violations as cause for discipline under § 333.121.1(15).

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<sup>15</sup>*State v. Dale*, 775 S.W.2d 126, 131 (Mo. banc 1989).

<sup>16</sup>RSMo 1986. Section 562.016 has remained unchanged to the present.

<sup>17</sup>*Id.* at 133-34.

## Count II – Life Insurance Proceeds

The Board contends:

By accepting funds from an insurance company and beneficiaries which he knew had been assigned to Jackman and for which he had already received an advance payment, depositing those funds into his business account, using them for his own use and benefit, and failing to disburse the funds upon request to their rightful owner, Harvey committed acts of misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of a licensed funeral director, in violation of Section 333.121.2(5), RSMo.[<sup>18</sup>]

Fraud is an intentional perversion of truth to induce another to act in reliance upon it.<sup>19</sup> It requires the intent that others rely on the misrepresentation.<sup>20</sup> “Concealment of a material fact of a transaction, which a party has the duty to disclose, constitutes fraud as actual as by affirmative misrepresentation.”<sup>21</sup> That duty arises when the concealer is a fiduciary or has superior knowledge.<sup>22</sup> We may infer fraudulent intent from the circumstances of the case.<sup>23</sup> A misrepresentation is a falsehood or untruth made with the intent of deceit rather than inadvertent mistake.<sup>24</sup> To “deceive” is “to cause to accept as true or valid what is false or invalid.”<sup>25</sup>

We have already set forth the definitions of misconduct and gross negligence regarding Count I, above.

The Court of Appeals interpreted “functions or duties” in an identical licensing statute, as:

The ordinary meaning of “function” applicable here is: “1: professional or official position: OCCUPATION, 2: the action for which a person or thing is specially fitted or used or for which a

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<sup>18</sup>Amended Compl. ¶ 46.

<sup>19</sup>*Hernandez v. State Bd. of Regis'n for Healing Arts*, 936 S.W.2d 894, 899 n.2 (Mo. App., W.D. 1997).

<sup>20</sup>*Sofka v. Thal*, 662 S.W.2d 502, 506 (Mo. banc 1983); see also *Missouri Dental Board v. Bailey*, 731 S.W.2d 272, 274-275 (Mo. App., W.D. 1987).

<sup>21</sup>*Daffin v. Daffin*, 567 S.W.2d 672, 677 (Mo. App., K.C.D. 1978).

<sup>22</sup>*Nigro v. Research College of Nursing*, 876 S.W.2d 681, 686 ((Mo. App., W.D. 1994).

<sup>23</sup>*Essex v. Getty Oil Co.*, 661 S.W.2d 544, 551 ((Mo. App., W.D. 1983).

<sup>24</sup>*Hernandez*, 936 S.W.2d *supra* at 899 n.3.

<sup>25</sup>MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 321 (11<sup>th</sup> ed. 2004).

thing exists.” The shared meaning elements of synonyms of “function” is “the acts or operations expected of a person or thing.” *Webster’s New Collegiate Dictionary*, 465 (1977). The ordinary meaning of “duty” applicable here is: “2a: obligatory tasks, conduct, service, or functions that arise from one’s position (as in life or in a group). 3a: a moral or legal obligation.” *Webster’s New Collegiate Dictionary*, 355 (1977).<sup>[26]</sup>

The practice of funeral directing includes “engaging in the general control, supervision or management of the operations of a funeral establishment.”<sup>27</sup> The evidence makes clear that the arrangement that Harvey had with Jackman was to the funeral establishment’s advantage because it provided funds to pay for the funeral almost immediately, without having to wait for the insurer to pay out the proceeds. This arrangement was an integral part of Harvey’s provision of funeral arrangements for decedents and their families. Therefore, Harvey’s conduct with regard to his arrangements with the beneficiaries and Jackman was in the performance of his functions or duties as a licensed funeral director.

#### Robinson-Richie and Goulden

Harvey admits that the insurers mistakenly sent him the proceeds from the Robinson-Richie and Goulden policies. The Board also showed that Harvey refused to pay the proceeds to their right owner. Harvey emphasized in his testimony how he ran the equivalent of a “mom and pop” business and was always in need of money. Accordingly, Harvey had every reason to keep track of which funerals were paid for and which were not. The transactions between Harvey and Jackman were a regular feature of Harvey’s functions or duties as a funeral director, which made Harvey familiar with the procedures. The evidence establishes misconduct and dishonesty on the part of Harvey because he knew that the funds did not belong to him and yet retained them. Section 333.121.2(5) authorizes discipline for such conduct.

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<sup>26</sup>*Board of Regis’n for the Healing Arts v. Levine*, 808 S.W.2d 440, 442 (Mo. App., W.D. 1991), interpreting § 334.100.2(5), RSMo Supp. 1983 and RSMo 1986.

<sup>27</sup>Section 333.011(7).

We do not believe Harvey's protestations at the hearing that sloppy bookkeeping prevented him from knowing what was going on. Even if that were the reason, his conduct would constitute gross negligence, for which 333.121.2(5) also allows discipline.

The Board has also failed to establish fraud and misrepresentation. The evidence shows that his receipt of the proceeds regarding Robinson-Richie and Goulden was the result of the insurers' mistakes. We have no evidence of how he retained the funds other than that he just refused to pay them to Jackman. This fails to establish fraud and misrepresentation.

The Board also cites § 333.121.2(4), which allows discipline for "[o]btaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation." As just stated, the Board failed to establish fraud, deception or misrepresentation regarding the Robinson-Richie and Goulden proceeds. Therefore, Harvey's conduct is not cause for discipline under § 333.121.2(4).

The Board contends that his conduct with Jackman over the insurance proceeds for the deaths of Robinson-Richie and Goulden is cause for discipline under § 331.121.2(13) for "[v]iolation of any professional trust or confidence." Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.<sup>28</sup> It may exist not only between the professional and his or her clients, but also between the professional and his or her employer and colleagues.<sup>29</sup> As we have already stated, Harvey's actions were in the performance of his licensed functions or duties. The special skills that a funeral director has include those relating to financial arrangements unique to the funeral business and allowing survivors to obtain a timely funeral for their decedent. Jackman, as the company providing the financing service, had a right to rely on Harvey's integrity as a licensed funeral director in regard to these matters.

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<sup>28</sup>*Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

<sup>29</sup>*Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).

Jackman's personnel tried to work these matters out with Harvey by asking for the money, but Jackman had to eventually obtain replacement proceeds from the insurers. In the meantime, Jackman lost interest that it was paying on the money and the opportunity to use the money to further its business. Harvey's conduct is cause for discipline under § 333.121.2(13).

#### Barbour

Harvey's conduct in regard to the insurance proceeds for the Barbour funeral differs from the other two. When Harvey instructed Hogan to give him the proceeds, he knew that he had already received payment for the funeral pursuant to the usual assignment-based agreement with Jackman. Harvey kept the full amount of the proceeds despite requests from Jackman to send it the amount, as it was entitled. Because Harvey refused to pay over the amount, Jackman had to file suit. Harvey did not pay Jackman until the eve of trial.

Harvey's defense at the hearing, that his retention of undeserved proceeds was the result of sloppy bookkeeping, simply does not hold up. Harvey had obtained the assignment for Jackman from Hogan, sent it to Jackman, received Jackman's advance on the proceeds minus its fee, and later directed Hogan to send the full amount of the proceeds to his funeral home. This shows that Harvey knew that he obtained and was refusing to turn over proceeds that belonged to Jackman.

Harvey's conduct is cause for discipline as misconduct and dishonesty, and in the alternative, gross negligence, under § 333.121.2(5). However, the Board, in its argument, fails to identify any evidence that constitutes fraud and misrepresentation regarding either how Harvey got Hogan to write him the check or the nature of his communications with Jackman. There is no basis to consider Harvey's insufficient funds check as a misrepresentation because there is no evidence that Harvey knew that he did not have sufficient funds in the checking account. Therefore, the Board has failed to prove that Harvey's conduct constitutes fraud and

misrepresentation under § 333.121.2(5). For the same reason, we conclude that the Board failed to show cause for discipline under § 333.121.2(4).

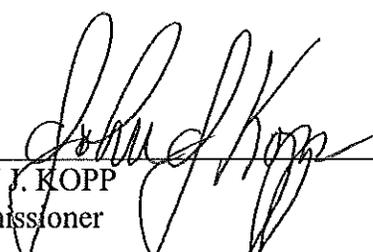
As already explained, Jackman had a right to rely on Harvey's integrity as a licensed funeral director regarding financial arrangements unique to the funeral business. Harvey violated this professional trust or confidence when he obtained the amount of the insurance proceeds from the beneficiary/assignee and then for a long while refused to pay that amount to Jackman. This is cause for discipline under § 333.121.2(13).

Hogan also had a relationship of professional trust or confidence with Harvey. However, there is no evidence as to how Harvey got Hogan to write him the check. She had no right to the funds, and Harvey's obtaining them may not have violated her trust in him as far as her part in the financing of the funeral was concerned. The Board has failed to show that Harvey's conduct violated the professional trust or confidence that Hogan had in him.

#### Summary

There is cause to discipline Harvey under § 333.121.2(5), (13) and (15).

SO ORDERED on December 9, 2009.

  
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JOHN J. KOPP  
Commissioner