

*Arkansas State Board of Embalmers, Funeral Directors, Cemeteries, and Burial Services
Board Meeting Minutes*

Tuesday, February 23, 2021

1 Commerce Way
Riverview Room– 2nd Floor
Little Rock, AR
9:35 A.M. – 2:44 P.M.

Chairman Bill Booker, Professional Member called the meeting to order. Member(s) present: Rausch Hodges, Professional Member, Commissioner Appointed Designee, Dan Honey, Compliance Attorney, Josephine Perry, Senior Citizens Member, James Bruce Smithson, Professional Member, and Steve Whitwell, Professional Member and Vice-Chair.

Member(s) absent Billy Curl, Professional Member, Commissioner Alan McClain, Professional Member, and Stephanie Neipling, Consumer Member.

Staff present: Eddie Davis, Security Director, Darriel Ezell, Inspector/Investigator, Amy Goode, Executive Secretary, and Amanda Gibson, Arkansas Insurance Department, Associate Counsel.

1. **Call to Order** – Introduction of Board members and staff.
2. **Approval of the Agenda**

Chairman Booker inquired if there was any desire to change or deviate from the proposed agenda. Hearing none, the Board preceded with the agenda as prepared by staff.

3. **Hearings**

- a) **IN THE MATTER OF
Phillips Funeral Home, Board ID # 20493, John Kale Phillips, a licensed Funeral Director and Manager, Board ID #22919, AND Ermert Funeral Home, Board ID #20189, and Richard Ermert, a licensed Funeral Director and Manager, Board ID #22852, Respondents, Case No. 20-04.**

Jim Brader, Chief Legal Counsel | Arkansas Insurance Department, served as Hearing Officer.
Amanda Gibson, Board Counsel, represented the Board.

Tiffanie Harrison, Court Reporter.

Richard Ermert and Ermert Funeral Home, Respondents, represented by Jim Robertson, Barber Law Firm.

John Kale Phillips and Phillips Funeral Home, Respondents, represented by Don Taylor, Friday Law Firm

Witnesses: Calvin, Rebecca, and Donnie Johnson, Complainants.

Darriel Ezell, Inspector

Court Reporter swore in witnesses.

Hearing Officer, Jim Brader called the hearing on the record at 9:40 A.M. and explained the purpose of the hearing. Mr. Brader explained the hearing would be conducted pursuant to the Arkansas Administrative Procedures Act. The strict rules of introducing evidence do not apply and all parties will be given latitude in presenting testimony and evidence, to promote a fair hearing. This hearing is subject to the Arkansas Freedom of Information Act and therefore all parts of the hearing, including deliberations are open to the public. The Board will base its decision solely on evidence presented today.

Ms. Gibson stated she had Board's Exhibit Packet 1-7 (pages 1-125) prepared to enter into the record. Exhibit 8 photos provided by Calvin Johnson. There were no objections to the exhibits. Ms. Gibson also noted to strike charge 2, counsels had agreed to strike this charge prior to the hearing.

Respondents Ermert Exhibit Packet, which was adopted by Phillips was introduced into the record with no objections.

Jesse Lorenzo Johnson died May 23, 2019. The family contracted with Phillips Funeral Home to perform the services of Mr. Johnson. He was to be buried in the Bond Cemetery, which is a rural cemetery. A cemetery that is managed by an association and it's in Mr. Ermert's area of operation. The family that once owned the Bond Cemetery gave a map of the plots to Mr. Ermert many years ago and perhaps why consumers reach out to him routinely to open graves in the cemetery. Mr. Phillips contacted Ermert Funeral Home to open the grave of Mr. Johnson in the Johnson plot. There was a communication between the Phillips Funeral Home and the Ermert Funeral Home, where instructions were given to open the grave in the Johnson plot between two black markers. Mr. Ermert gets the information and goes out to the Bond Cemetery. He finds the Johnson plot and sees the marker on the left, which is a gray stone, an open spot, and then he sees two black markers. He marked it, based on the instructions given, but went back to the funeral home and contacted Phillips to ensure it was correct. Mr. Phillips gives Mr. Ermert the phone number for the family representative Nathan Davis, that had the knowledge of the placement of the grave. Mr. Davis gives him two pieces of information, between the two black markers and that he can come out there. Mr. Ermert knew there was only one spot to dig that grave that was between two black markers. He finished the call and knew there was only one place to put that grave. He saw the open spot but was told to dig between two black markers. Lonnie Green the grave digger went out the next morning to dig the grave. There was only 3 feet to dig that grave and why Mr. Ermert was there to observe. Mr. Green stops digging when he touches the vault of Wanda Johnson, marks the edge of the vault, and then continues digging the grave. It was uneventful until the last bucket of dirt that uncovered a cloth.

There will be testimony that the area this was dug, was the area where that baby Johnny was buried in that vicinity, but you will also hear that babies are routinely buried at 2-3 feet deep and not 5 to 6 which is when the cloth was found. Everything had gone well up until when the funeral procession arrived at the cemetery and they reached the grave. That is when everything seemed to fall apart. The family noticed the grave was in the wrong space. They did intend for it to be in the vacant space and not the between the two black markers. They finished the service, so non-essential family could leave, so that Mr. Phillips could speak to family about what they

wanted to do. There were offers made that day to move the grave at no additional charge. There was testimony that the family had been told by Lonnie Green that the infant Johnny would have only been buried 2-3 feet deep. They knew this the day of the funeral before they elected to go ahead and keep Johnny buried with Jesse. Anywhere between days to months later, Rebecca Johnson calls Mr. Ermert about moving the grave. He stated he would have to use other equipment besides Lonnie Green's to move the vault. He offered to do it for \$400, which was a substantial discount to move the grave. Mr. Ermert made that offer and instead of any other response a lawsuit was filed against Mr. Ermert, Mr. Phillips, and Lonnie Green for millions. There was only one place to dig that grave based on the directions given. Mr. Nathan Davis was concerned that Mr. Ermert was not clear, but he did nothing. There was a photo he could have given to Mr. Ermert but did not supply it. He had 24 hours to do something about it but did nothing to clarify or address the concerns he had.

Calvin Lorenzo Johnson, from Bay Minette, Alabama, and son of the deceased. Mr. Johnson was a pallbearer, so when they arrived at the cemetery, the hearse was already behind the grave site, so they rushed around to get him on the rollers. When he came back around to the tent with his wife, she stated there was a problem and when he looked again, he knew that they had dug up his baby brother. That is when a lot of things were said, and he talked to the vault people and his brother-in-law talked to Lonnie Green and a call was made to Mr. Ermert. During this time, they were told his baby brother would be under his dad. That is when they decided, if he was under his dad, that wouldn't be so bad. They completed the service, and everyone left except immediate family. There was discussion about moving his father at that time by his mother where he belonged, but at that point Lonnie had told them he had seen cloth when he dug the grave. Mr. Johnson became concerned that if they move the grave now, that all dirt is sitting where his dad belonged, they will have to move it to dig another grave. How are they going to know where baby Johnny really was? So, at that time, his thought was it was best to go ahead and bury his dad and then have someone come to sift through dirt to find what they could find.

They were led to believe that the baby was under their father and then when they were told he would have only been buried 2-3 feet deep with a shovel they were concerned his remains were in the pile of dirt.

Rebecca Johnson, from Bay Minette, Alabama, and daughter-in-law of the deceased. She explained, in about the same amount of detail, the events that day in the cemetery, that Mr. Johnson had already explained. She further added that after they had decided to leave the grave where it was due to their concerns that the baby brother's grave had been disturbed and that his remains were possibly in that pile of dirt. In the first scoop of dirt and from down deep in the pile, contained the white cloth. The scoop had a white cloth that was dangling from the bucket of the backhoe. Mr. Phillips also saw it, but he was not sure what it was. After she returned home from the funeral, she contacted Mr. Ermert and he told her, that he did what he was told to do and that was to dig between two black markers. She asked him what names he was given to dig between, and he told her between Wanda Johnson and John Johnson. However, that is not where he dug. He was adamant that he was told to dig by Nathan Davis to dig between the two black markers.

Lunch break 12:06 PM. James Bruce Smithson had to leave by 1 PM, so he departed before the meeting resumed. The Board still had a quorum to conduct business.

Meeting resumed at 12:55 PM.

Jim Robertson played the deposition of Nathan Davis. He had two conversations with Mr. Ermert. First conversation was on May 24th at the funeral home and 2nd conversation was at the cemetery. Mr. Davis explained that when Kale handed him the phone, he was trying to explain to Mr. Ermert about the empty space was where Jesse was going to be buried. Trying to explain to him there were two black markers and when he got to the two black markers, they were interrupted. Then he never went any further than that, Mr. Davis stated he could come out there and Mr. Ermert told it was okay, that they had it. He went on to say he was going to tell Mr. Ermert between the two black markers and John was the empty spot. That is when offered to come out there. Mr. Davis stated he did have concerns that Mr. Ermert did not know the location for certain, but he did not do anything more. He repeated he offered to come out and Mr. Ermert declined that they had it. The 2nd conversation was in the cemetery, when Lonnie Green phoned Mr. Ermert and Nathan Davis spoke to him, he asked Mr. Ermert what they had done, and his reply was he dug where you told me to dig. There were no other conversations or interaction with Mr. Ermert or Ermert Funeral Home.

Mr. Richard Ermert, 1979 graduate of Dallas Institute of Funeral Service and owner of Ermert Funeral Home. The Bond Cemetery was started in the 1800's by the Gibbs family. Over the course of the years, he worked with the Gibbs family when he buried clients there. At some point, he did gain possession of a map of the cemetery plots. The map does not show graves just plots by individual families. There is a non-profit cemetery association that oversees the cemetery. Donations are made to the association to help with the upkeep of the cemetery. Anyone can bury there, people come to Mr. Ermert due to his familiarity of the cemetery. Instructions were given for a grave space in the Johnson Family Lot between two black stones. He found the lot on the map to know where the general vicinity of the lot was, and he drove out there. He saw the vacant space beside the black marker, but his instructions were between the two black markers. The space between them was 3 feet, which was a tight space, but could be done. He marked the grave on all four corners. He had concerns that the instructions were not accurate, so he called Phillips Funeral Home. Mr. Phillips did not know where the grave was to be himself, so he gave him the number of Nathan Davis. Mr. Ermert told Mr. Davis that he had marked the grave and how he had marked it. He told Davis he needed to verify what he was told. He told Davis exactly where he had marked it between the two black stones, and he inquired if this is what his family wanted. He stated it was, that it was to be between two black stones. He over saw the grave being dug and Green did scrape the vault. He got off the backhoe and marked the edge of the vault so he could continue digging. The very last scoop of dirt he saw a small off-white cloth, but the grave was deep enough, so he stopped digging. He stated infants were never buried 5-6 feet deep, and they saw no evidence of a casket, bones, or any more cloth. Green took a shovel to finish out the grave and inspect it. He dug a trench to get cables out after lowering casket, which is normal. The map was not in their possession in 1974 and most of the graves were dug by volunteers. The baby would normally be buried near the headstone. When they dug Jesse Johnson's grave, they did go back two feet.

John Kale Phillips, owner of Phillips Funeral Home. Phillips stated that he wasn't aware there was a problem until they were pulling into the cemetery. His phone was on silent and didn't know Jeremy had tried to call. He advised to go ahead and have the service and then decide what to do. After the service, they discussed the options. He did his best to honor their wishes.

The funeral homes did make every reasonable attempt to honor the wishes of the family.

Motion made by Whitwell to find factual allegations 1-11 true with amendment to 7, 12 undetermined, and 13-22 to be found true, seconded by Hodges, all in favor. Motion carried.

Motion made by Hodges to dismiss charge 1, seconded by Whitwell, all in favor. Motion carried.

Motion made by Hodges, charge 3 is mute, since charge 1 was dismissed, seconded by Whitwell, all in favor. Motion carried.

Record was closed at 2:39 PM.

4. **Administrative**

a) **Approval of the January 19, 2021, meeting minutes.**

Motion made by Whitwell to approve the January 19, 2021, meeting minutes as submitted by staff, seconded by Hodges, all in favor. Motion carried.

b) **Approval of the February 9, 2021, special meeting minutes.**

Motion made by Whitwell to approve the February 9, 2021, meeting minutes as submitted by staff, seconded by Hodges, all in favor. Motion carried.

5. **Next Meeting Date(s)**

a) **Monday, March 15, 2021 (1:00 p.m.) Rules Sub-Committee**

b) **Tuesday, March 16, 2021 (9:00 a.m.) Board Meeting and Hearings**

6. **Future Meeting Date(s):**

a) **Monday, April 19, 2021 (1:00 p.m.) Rules Sub-Committee**

b) **Tuesday, April 20, 2021 (9:00 a.m.) Board Meeting and Hearings**

7. **Adjournment**

Motion made by Hodges to adjourn at 2:44 PM, seconded by Whitwell, all in favor. Motion carried.