IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

DIVISION 4

AYERS, ET AL,
Plaintiffs,

v.

Case No. 05CV6934
Division 4

PRICE RESIDENTIAL, INC., ET AL,
Defendants.

MEMORANDUM DECISION

The Court has under consideration the Motions of the Price Defendants and of the Sub-Contractor Defendants for Summary Judgment on Plaintiffs' Kansas Consumer Protection Act claims. Those claims are set out in paragraph 3F of the Joint Proposed Pre-Trial Order filed May 8, 2007 and are detailed in Plaintiffs' Supplements to Exhibits 10, 11, and 12 Accompanying Joint Proposed Pre-Trial Order.

SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a

dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. Farha v. City of Wichita, 284 Kan. 507, 511, ___P.3d___(2007). Where reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. An issue of fact is not genuine unless it has legal controlling force as to a material issue. A disputed fact which is immaterial to the issues does not preclude summary judgment. If a disputed fact, however resolved, could not affect the judgment it does not present a genuine issue of material fact. Crandall v.Grbic, 36 Kan. App. 2d 179, 138 P.3d 365(2006). Summary judgment is appropriate in a KCPA case if there is no evidence of deceptive or unconscionable acts. Gonzalez v. Associates Financial Serv. Co. of Kansas, 266 Kan. 141, 166, 967 P. 2d 312 (1998).

Rule 141 of the Rules of the Supreme Court of the State of Kansas provides:

> No motion for summary judgment shall be heard or deemed finally submitted for decision until:
>
> (a) The moving party has filed with the court and served on opposing counsel a memorandum or brief setting forth concisely in separately numbered paragraphs the uncontroverted contentions of fact relied upon by said movant (with precise references to pages, lines and/or paragraphs of transcripts, depositions, interrogatories, admissions, affidavits, exhibits, or other supporting documents contained in the court file and otherwise included in the record); and
>
> (b) Any party opposing said motion has filed and served on the moving party within twenty-one (21) days thereafter, unless the time is

extended by court order, a memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment (with precise references as required in paragraph [a], supra).

Compliance with Supreme Court Rule 141 is mandatory. McCullough v. Bethany Med. Center, 235 Kan. 732, SYL. ¶ 1, 683 P.2d 1258 (1984); McCaffree Financial Corp. v. Nunnik, 18 Kan App. 2d. 40, 57 847 P.2d 1321 (1993).

"Rule 141 is not just fluff-it means what it says and it serves a necessary purpose." McCullough v. Bethany Med. Center, 235 Kan. at 736. Lyndon State Bank v. Price, 33 Kan. App. 2d 629, 632, 106 P.3d 511 (2005) points out that K.S.A. 60-256, is likewise not fluff.

The "necessary purpose" to which McCullough v. Bethany Med. Center refers is to enable the trial or appellate court to determine what facts are controverted, on what evidence the parties rely, if the fact is material and if the issue is genuine. This is necessary because the movant must show there is no genuine issue of material fact and a party opposing the motion must come forward with specific facts showing that there is a genuine issue of material fact for trial. Mark Twain Kansas City Bank v. Kroh Bros. Dev. Co., 250 Kan. 754, 762, 829 P.2d 907 (1992). Compliance is also necessary so that the trial court can resolve, as required, all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom

the ruling is sought. Connor v. Occidental Fire & Casualty Company of North Carolina, 281 Kan. 875, 881, 135 P.3d 1230 (2006).

When a party opposing a motion for summary judgment fails to comply with Rule 141 (b), the trial court is vested with the discretion to deem that the opposing party has admitted the uncontroverted contentions of fact. Danes v. St. David's Episcopal Church, 242 Kan.822, 830, 752 P.2d 653 (1998).

Although hyper-technical enforcement of Rule 141 is not encouraged Business Opportunities Unlimited v. EnviroTech Heating & Cooling, Inc., 26 Kan. App. 2d 616, 618, 992 P.2d 1250 (1999), an opposing party must comply (1) with Rule 141(b) and set out whether each factual contention of the movant is controverted, and (2) if controverted, set out a concise summary of the conflicting testimony or evidence, (3) with precise supporting references.

For example in Ruebke v. Globe Communications Corp., 241 Kan. 595, 603-04, 738 P.2d 1246 (1987) the Court found that a response pursuant to Rule 141(b) which "... rather than making ' precise reference to pages,' ...merely referred to the entire trial transcript ...makes it almost impossible for the district court...to determine where the additional factual contentions are located... ."

In Danes v. St. David's Episcopal Church, supra, the Supreme Court held that a party opposing summary judgment does not properly respond to contentions of uncontroverted fact when it "...in most instances, merely alleged that the cited contentions of uncontroverted fact were`controverted` or `contested` without any citation to any factual authority."

The non-movant must come forward with specific facts, showing that there is a genuine issue. Mark Twain Kansas City Bank v. Kroh Bros. Dev. Co., supra.

It is not sufficient to deny the relevance of statements without controverting them and providing a concise summary of conflicting testimony or evidence. Connor v. Occidental Fire & Casualty Company of North Carolina, supra.

The Supreme Court in Hammig v. Ford, 246 Kan.70, 75, 785 P.2d 977 (1990) stated:

> "We require a party opposing a statement of uncontroverted fact in a motion for summary judgment to come forth with a concise summary of conflicting testimony or evidence."

It is not the trial court's duty to seek out the record. Rather counsel is required to designate the portions of the record which support that party's position

Slaymaker v. Westgate State Bank, 241 Kan. 525, 531, 739 P.2d 444 (1987);

Knight v. Myers, 12 Kan. App. 2d 469,478 P.2d 896 (1988).

An appropriate summary of the controlling and guiding principles applicable at this point is found in the unpublished Court of Appeals Opinion in Dill v. Barnett Funeral Home, Kan. App. 2004. 2004 WL 292124, 83 P.3d 1270 pp. 1-2 as follows:

> This court, like the district court, is required to resolve all facts and reasonable inferences in favor of the party opposing summary judgment. In re Estate of Brodbeck, 22 Kan. App. 2d 229, 235, 915 P.2d 145, *rev. denied* 260 Kan. 993 (1996).
>
> *2 Nevertheless, a court is not obliged to seek out the record to determine whether the moving party's factual contentions are controverted. Knight v. Myers, 12 Kan. App. 2d 469, Syl. ¶ 5, 748 P.2d 896 (1998). It is the duty of the party opposing summary judgment to direct the court to evidence within the record which

controverts the moving party's contentions, according to the procedure provided by Supreme Court Rule 141 (2003 Kan. Ct. R. Annot. 191). Bus. Opportunities Unlimited, Inc. v. Envirotech Heat & Cooling, Inc., 26 Kan. App. 2d 616, 617-618, 992 P.2d 1250 (1999).

*2 While substantial compliance with Rule 141 is sufficient, a party must attempt to follow the spirit of the rule by specifically addressing the contentions of the moving party with reference to supporting evidence within the record. Vague statements opposing summary judgment, unsupported assertions, or contentions without legal controlling force will not prevent summary judgment. Bus. Opportunities Unlimited, Inc., 26 Kan. App. 2d at 618, 992 P.2d 1250; Ruebke v. Globe Communications Corp., 241 Kan. 595, 604-05, 738 P.2d 1246 (1987). Where a party opposing summary judgment fails to substantially comply with the requirements of Rule 141(b), the district court, in its discretion, may adopt the contentions of the moving party as having been admitted by the opposing party. Ruebke, 141 Kan. at 604, 738 P.2d 1246.

Although the citation includes binding precedent, Dill, as an unpublished opinion is not itself binding Supreme Court Rule 7.04(f). Nevertheless the opinion is attached to this ruling. The language quoted serves to point out that there must be substantial compliance, not just facial compliance, with Rule 141.

In the instant case the number of separate parties, both Plaintiffs and Defendants, their respective fact roles, their alignment, the number of joint claims made, the number of individual claims made, the theories on which they are asserted and the facts upon which they are based,

make for a complex case by any standard. Our Supreme Court has observed that compliance with Rule 141 is even more crucial in complex cases than in simple ones. McCullough v. Bethany Med. Center, supra at 736. Relevant to complex cases such as this, although in a different context, our Court of Appeals has noted that " refusal to follow [Rule 141] may often indicate a lack of substance in the party's argument that is attempted to be camouflaged through vagueness. A party ignores Rule 141 at its peril." Bus. Opportunities Unlimited, Inc. v. Envirotech Heat & Cooling, Inc., supra at 618.

No such attempt or indication is implied here certainly, but the extraordinary amount of material, it's detail, repetition, and duplication, in the context of the obvious complexity, does camouflage just as effectively, the issues of fact and their genuineness; likewise, it does frustrate the Court's effort to discern on what facts the parties rely, whether there is a genuine issue, and whether the issue is material. This is readily apparent from the discussion which follows.

CONTROLLING FACTS

Price Defendants' Statement of Uncontroverted Contentions of Fact

The Price defendants assert twenty-six uncontroverted contentions of fact; Contentions 1, 2, 4, 8, 10, 12, 14, & 16 are uncontroverted. They have been reviewed and are adopted by the Court.

Contentions 3, 5, 6 & 7 are each responded to using the same words. For each the Plaintiffs' entire response consists solely of: "Controverted for the reasons stated Statement of Fact ("SOF") ¶¶ 27-32 *infra*." That is an insufficient response; it is not a concise summary of conflicting testimony or evidence with precise references as is required by Supreme Court Rule 141(b). On review, SOF 27-32 to which reference is made, does not provide the required concise

summary of conflicting testimony or evidence with precise references either. The statements consist for the most part, of legal argument and conclusions. SOF 30 demonstrates this when it begins: "PRI is the **named** and **disclosed seller and general contractor** of plaintiffs' residences (SOF ¶¶ 3, 7), not the only one." That paragraph also asserts that "PRI does business as, is 'the same' as, and operates interchangeably with Price Residential, LLC ('PRLLC'), ..." Elsewhere in the paragraph it is stated that the sub-contractors recognize them as the same entity. These are pure argument and legal conclusion. They are not a summary of conflicting testimony or evidence and do not rise to the level of "inference." They are argument and conclusory at most. The Court has studied those cited references and does not find that the facts and inferences Plaintiffs wish to draw are reasonable.

The Court recognizes the Plaintiffs want the Court to find that the Price Affiliates have a contractual duty to plaintiffs, and to accomplish that Plaintiffs set out SOF 27-32. The Court finds that "SOF 27-32" does not justify that finding by facts stated, reasonable inference, or legal conclusion. The response to Price contentions 3, 5, 6 & 7 is not sufficient; those Price contentions are deemed admitted.

To the Price defendants' Statement of Uncontroverted Contentions of Fact paragraphs 9, 11, 13, 15 & 17 Plaintiffs respond: "Controverted; the Price corporate defendants were jointly general contractors for Deer Creek Reserve ("DCR") for the reasons given in SOF ¶¶ 29-32 *infra*." Again this is a mere legal conclusion without fact cited to back it up. This response is not compliant with Supreme Court Rule 141(b) and is insufficient. On its face it is not a concise summary of conflicting testimony or evidence. The reference to "SOF 29-32" does not serve to provide a concise summary of conflicting testimony or evidence. The only factual contention

controverted is that PRI was the general contractor; but no concise statement of evidence is provided. In their responses Plaintiffs state that the Price Corporate defendants were jointly general contractors; that is merely the desired legal conclusion, but it is not a specific fact nor is it a reasonable inference as is required by Supreme Court Rule 141(b). Paragraphs 29-32 contain, and refer in footnotes, to many highly detailed assertions, exhibits, footnotes, documents and affidavits, but none of them or their content refers to any of the Price defendants as being general contractors nor do they provide reasonable support for such an inference. Price Contentions 9, 11, 13, 15 & 17 are deemed admitted.

The Price defendants' contention eighteen asserts in substance that Kent Price was the president of PRI and with respect to the matters alleged in this action was acting within the course and scope of his authority as PRI's president. Plaintiffs' response is: "Controverted; Kent Price was acting as an agent for all of the Price corporate defendants and in some instances outside the scope of this authority. See SOF ¶¶ 29-33 *infra*." This does not comply with Supreme Court Rule 141 (b); the sentence consists of two legal conclusions and it does not include a concise summary of conflicting testimony or evidence. The purpose of response to movant's uncontroverted facts is so that the court can ascertain whether there is a genuine issue of material fact, the purpose is not to make legal arguments or draw legal conclusions.

The Court has reviewed the referenced Plaintiffs' Additional Material Facts 29-33 ("SOF ¶¶ 29-33 *infra*") and their references in detail multiple times. There is nothing in paragraphs 29-33 or the footnotes, treated as "precise references" if they are so construed, supporting a reasonable inference that Kent Price was acting as agent for all of the Price Corporate defendants with respect to all of the matters alleged in this action. Furthermore, there is nothing in those

paragraphs allowing or justifying the Court to draw the reasonable conclusion that Kent Price was acting "in some instances outside the scope of his authority."

The Court notes that a response which sets out legal conclusions the opposing party seeks and cites to other "additional material facts" which in turn refer to multiple pages, footnotes, additional Statements of Fact, multiple exhibits, deposition citations, miscellaneous invoices, certificates of insurance, a market brochure, and change orders of individual Plaintiffs does not constitute a response within Rule 141 which requires a *concise summary* of conflicting testimony or evidence with specific facts supported by precise references. Price defendants' contention eighteen is deemed admitted.

The Price defendants in Uncontroverted Contention nineteen states that from 1999 through 2005 Scott Barnes was an employee and agent of PRI with the title of project manager and with respect to the matters alleged in this action was acting within the course and the scope of his authority as such. Plaintiffs controvert the statement and assert that "Scott Barnes was acting as an agent for all of the Price corporate defendants and in some instances outside the scope of his authority. See SOF ¶¶ 29-35 *infra.*" This is still legal argument and conclusion and does not controvert that Scott Barnes was an employee and agent of PRI with the title of project manager. Those assertions of the Defendants are supported by the precise references set out. There is no mention, or basis for a reasonable inference, in the paragraphs 29-35 of Plaintiffs Additional Material Facts that Scott Barnes acted "in some instances outside the scope of his authority." In addition as with Contention eighteen, response to Contention nineteen is not a concise statement of evidence but consists of legal conclusions. There is no evidence in the paragraphs 29-35 or the footnotes, exhibits, other statements of fact, and affidavits from which

the Court reasonably may draw facts or inferences either that Scott Barnes was acting as an agent for all the Price corporate defendants with respect to the matters alleged in this action or that in some instances he was acting outside the scope of his authority. Price defendants' Contention nineteen is deemed admitted.

Price defendants' Uncontroverted Contention of fact number twenty is: "Neither Kent Price or Scott Barnes entered into any contract with any of the Plaintiffs in connection with the construction or the sale of the Residences." Plaintiffs do not controvert the statement with respect to Kent Price, but assert that "Scott Barnes had oral contracts with Plaintiffs. See SOF ¶ 41." That concise summary controverts defendants' statement and SOF 41 does include the statement (along with others) "he entered into oral contracts with Plaintiffs."

The end of SOF 41 has footnote 26 which in turn cites (1)four and a half pages of Barnes' deposition, (2)Plaintiffs' other KCPA claims against individual defendant Scott Barnes attached as exhibit 80, (3)exhibits 35-56 (affidavits of Plaintiffs) each at paragraph eleven and (4)exhibits 125-146 (Plaintiffs' second affidavits) each at paragraphs four and seven. All of those references have been studied in detail. Paragraph four of exhibits 126, 127, 131, 134, 135, 136, 138 & 141 each contain exactly the same language in part,: "We had an oral contract with defendant Scott Barnes, a named employee of Price Residential, Inc., for him to ...[do some repair work on our residence]... ." Any fact issue thus created is not relevant to the KCPA issues in this case on the on the basis of the pre-trial order or the arguments made by counsel, accordingly they are immaterial and Contention twenty is deemed admitted.

Price Uncontroverted Contention twenty-one in substance is that Kent Price did not speak to any of the Plaintiffs before they purchased their residences and was not involved in the sale or

construction of the Plaintiffs' residences. Plaintiffs controvert the statement as follows: "Controverted by the defendants' own documents; Kent Price was actively involved in the sale and construction of the residences. See SOF ¶ 33." Treating SOF ¶ 33 as the precise reference required, the Court has reviewed the statement and materials there referenced. Those do refer to involvement in the construction in terms of Kent Price meeting with Scott Barnes to discuss the progress of Deer Creek Reserve. To the extent that creates an issue of fact, it is not material to any of the KCPA issues. Contention twenty-one is deemed admitted.

Price Contention twenty-two is that fourteen specified Plaintiffs have never spoken to Kent Price. Plaintiffs state this is controverted but state only that Price "communicated with all Plaintiffs" through marketing brochures and Stacy Schreft. That does not controvert the statement they had never spoken to him. Contention twenty-two is admitted.

Price Contention twenty-three is that Scott Barnes didn't speak with named Plaintiffs before they entered their real estate contracts or they do not claim he made false representations. Plaintiffs respond that this is controverted, but there is no summary of conflicting evidence or testimony in the response or in SOF ¶ 41. As stated any issue of fact is immaterial, and Contention twenty-three is deemed admitted.

Price Contention twenty-four is that the pre-trial order does not allege that any misrepresentation was "willful." Plaintiffs controvert the statement. The language of the pre-trial order does not include an allegation of willfulness, however, the Court's ruling will not be decided on that point. It is immaterial.

Price Contention twenty-five asserts that Scott Barnes chose the same sub-contractors PRI had used on other projects and with whom it had an established relationship and experience.

Plaintiffs state "Controverted by defendants' own documents. See SOF ¶ 36." The response continues to be noncompliant with Rule 141. It does not provide any conflicting testimony or evidence, nor does "SOF 36" to which it refers. The obvious fact that the sub-contractors listed in the brochure are not precisely the same as the list provided by Scott Barnes to Stacy Schreft does not controvert either directly or by reasonable inference anything in Contention twenty-five, which is deemed admitted therefore.

Price Contention twenty-six is that "the Plaintiffs' residences were constructed with a complete caulk and foam package." Plaintiffs state this is controverted and that

> "...the cited testimony only refers to caulk on the interior and between the windows and window trim on the exterior. Other locations requiring caulk on the exterior were not caulked. The foam used on the interior was the wrong kind of foam."

This does not provide conflicting evidence or facts. SOF 42 which is referenced states their expert will say the wrong foam was used on the interior and that on the exterior some areas were not caulked or not caulked properly. That may be evidence of insufficient workmanship but it doesn't create a genuine fact issue of whether the residences were constructed with a complete foam and caulk package. Contention twenty-six is deemed admitted. This explains the court's ruling and demonstrates clearly and in detail the lack of substantial compliance with Rule 141.

Plaintiffs' Additional Material Facts numbered 27 thru 57 and footnotes, have been reviewed in addition to those reviews set out above. Additional Material Facts 27 thru 57 do not demonstrate or establish additional genuine issues of material fact which preclude summary judgment.

Sub-Contractors' Statement of Uncontroverted Facts

Statements 1-3, and 6-7 are uncontroverted and adopted by the Court. Statements 4 and 5 are controverted but Plaintiffs do not support their response with a summary of conflicting evidence or testimony sufficient to comply with Rule 141; statements 4 and 5 are deemed admitted.

Statements Regarding KCPA Claims Against Elco

Statements 8-20, 22-26, 28-33 and 36-41 are uncontroverted and adopted by the Court. Responses made to those statements do not comply with Rule 141 and the statements are deemed admitted. Statements 21 and 27 are controverted but the responses do not comply with Rule 141. Petitioners concede they are not material; in any event on review the are deemed admitted and are adopted by the Court.

Statements 34 and 35 are controverted with an appropriate response in compliance with Rule 141.

Material Facts Regarding Plaintiffs' KCPA Claims Against Bricks and Stones

Statements 42 and 44-46 are not controverted in accordance with Rule 141 and a summary of conflicting evidence is not provided; the statements are deemed admitted.

Statement 43 is controverted and Plaintiffs' response contains evidence that the Plaintiff Lumsdun spoke with Bricks and Stones concerning the quality, craftsmanship, and maintenance of the exterior of that residence.

Material Facts Pertaining to Plaintiffs' KCPA Claims Against Epic Landscape

Statement 47 is controverted by Plaintiff but the response only provides evidence that Plaintiff Mooningham entered into a contract with Epic that may be related to the construction of

his residence. Statement 48 is controverted. Statement 49 is controverted but the reference only supports one Plaintiff receiving written documents from Epic. Statement 51 is controverted but the reference is to the affidavit of Jack Mooningham which contradicts his prior deposition and is therefore improper and disregarded. Statement 51 is deemed admitted.

Material Facts Pertaining to Plaintiffs' KCPA Claims Against Vaught Roofing

Statements 52-84 are uncontroverted and adopted by the Court. Statement 85 is controverted by Plaintiffs, but does not include a summary of conflicting testimony or evidence. The response states: "See also SOF ¶ 98" which states "Vaught also advertised in a PRB brochure that Vaught knew was being created to market and solicit sales of the houses at DCR." The references do not support that and even if they do, a genuine issue of material fact is not created. The issue as framed by the response to statement 85 is not material to the claims the Plaintiffs have made in this action. Statement 85 is adopted by the Court.

Plaintiffs' Additional Material Facts

Plaintiffs thereafter list Additional Material Facts 86-120. Plaintiffs' KCPA claims against the sub-contractors, highly summarized, are that each sub-contractor concealed or failed to disclose to each plaintiff in violation of K.S.A. 50-626 and 627 construction defects created by that sub-contractor in the residence that Plaintiff purchased. The Court has reviewed in detail Plaintiffs' Additional Material Facts 86-120 together with their precise references and declines to adopts any of them as stated for the reason that many of the Additional Material Facts paragraphs 86-120 do not "preclude summary judgement..." as provided in Rule 141(b) and others do not provide the precise references as required by Rule 141.

The Court finds that Plaintiffs have come forward with some evidence that (1) the four

moving sub-contractors performed work on the residences pursuant to written contracts with Price Residential Inc., (2) that some of the work was not in accordance with applicable building codes and/or ordinances, or not according to industry standards, or not performed in a workman like manner, (3) that there were construction deficiencies in some residences, and that (4) none of the four sub-contractors defendants informed any of the plaintiffs of those alleged construction deficiencies.

DISCUSSION OF SUB-CONTRACTORS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' KCPA CLAIMS

Plaintiffs were consumers and the purchases of their residences were consumer transactions. The sub-contractors concede they were "suppliers" within the meaning of the KCPA, but deny they were suppliers with respect to Plaintiffs' consumer transactions.

The Kansas Consumer Protection Act provides that the commission of any act or practice declared to be a violation of the KCPA renders the violator liable to the agrieved consumer. K.S.A. 50-636

Acts or practices declared to be violations are: deceptive acts and practices, (K.S.A. 50-626) and unconscionable acts and practices (K.S.A. 50-627), each "in connection with a consumer transaction."

K.S.A. 50-626(a) declares "No supplier shall engage in any deceptive act or practice in connection with a consumer transaction ." K.S.A. 50-626(b) declares that "Deceptive acts and practices include, but are not limited to, the following each of which is hereby declared to be a violation of this act, whether or not any consumer has in fact been misled." This is followed with

subsections (1) thru (11). Subsection (b)(3), the basis for one of the Plaintiffs' common KCPA claims against all the sub-contractors, includes as a deceptive act or practice: "the willful failure to state a material fact or the wilful concealment, suppression or omission of a material fact; ... ."

The Plaintiffs' other three KCPA claims against the Sub-Contractors are based on the claim of unconscionable acts and practices.

K.S.A. 50-627(a) declares:

> No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction. An unconscionable act or practice violates this act whether it occurs before, during, or after the transaction.

K.S.A. 50-627(b) declares:

> The unconscionability of an act or practice is a question for the court. In determining whether an act or practice is unconscionable the court shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following that: ... .

This is followed by subsections (b)(1) thru (b)(7).

Plaintiffs' claims of unconscionable acts and practices are predicated on subsections, (1), (3), (5) and (6) of K.S.A. 50-627(b) which provide as follows:

> (1) The supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an

agreement or similar factor;

(3) the consumer was unable to receive a material benefit from the subject of the transaction;

(5) the transaction the supplier induced the consumer to enter into was excessively one sided in favor of the supplier;

(6) the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment; ... .

Plaintiffs claim each sub-contractor constructed Plaintiffs' residences with construction defects and failed to tell each Plaintiff of each such defect. Plaintiffs claim those failures constitute the deceptive acts and unconscionable acts sued upon.

The first argument of the sub-contractors is that an entity which is not a party to a consumer transaction cannot be liable under the KCPA. They point out the consumer transactions in this case are the sales of the residences and that the sub-contractor defendants were not parties to those transactions. The sub-contractors reason that because they did not engage in the consumer transactions with the Plaintiffs they cannot be held liable to the Plaintiffs under the Kansas Consumer Protection Act. In support of this argument they rely on First Nat'l Bank of Anthony v. Dunning, 18 Kan. App. 2d 518, 855 P.2d 493 (1993) rev. den. and Ellibee v. Aramark Corr. Services, ___ Kan. App. 2d ___, 154 P.3d 39, (2007) an unpublished opinion.

The Plaintiffs respond that First Nat'l Bank of Anthony and Ellibee are narrow rulings in cases with very unusual facts and are not applicable to the present fact situation. Plaintiffs argue

that although no Kansas case law exists addressing whether sub-contractors are suppliers under the Kansas Consumer Protection Act, Kansas courts have looked to the meaning of the language "whether or not dealing directly with the consumer" in finding a wide range business entities involved indirectly in consumer transactions to be suppliers under the KCPA. They cite Farrell v. General Motors, 249 Kan. 231, 815 P.2d 538 (1991), Alexander v. Certified Master builders Corp., 268 Kan. 812, 1 P.3d 899 (2000) and Cole v. Hewlett Packard Co. 84 P.3d 1047 (Kan. App. 2007) (an unpublished opinion).

Reviewing those opinions, parties who had not dealt directly with the consumer were held to be suppliers and in fact Alexander v. Certified Master Builders Corp., 268 Kan at 826 stated that "[a] party may be a supplier whether or not it deals directly with consumer. Under the particular facts outlined, we conclude that CMB is a supplier under the K.S.A. 50-624 (i)."

Later in the opinion, the Alexander decision analyzing the Farrell v. General Motors, supra ruling observed a significant distinction: "However, Farrell concluded that Hattan did meet the definition of a supplier under the KCPA but was not a supplier to that particular transaction. 249 Kan at 242." (Emphasis added.)

In Farrell on page 242 of 249 Kan. the court explained: "Hattan did not sell the van. Hattan did not sell the GMPP. Hattan is not a party to the GMPP. In this case, Hattan is acting as nothing more than an accommodating party." The fact analysis and application of the KCPA in Farrell and Alexander demonstrates that just because a party is a supplier, the party is not necessarily liable under the KCPA. The obvious implication of the analysis is that for a supplier to be liable its actions must have been "in connection with a consumer transaction" exactly as both K.S.A. 50-626 and K.S.A. 50-627 declare. Notwithstanding all of the evidence, facts, and

arguments both sides present there is no evidence or reasonable inference that any sub-contractor's failure to disclose to a construction defect to a Plaintiff purchaser was "in connection with that Plaintiff's purchase."

The Sub-Contractors entered into individual contracts with Price Residential which are exhibits in this proceeding. There is no evidence, nor is there any reasonable inference, that these sub-contractors did anything or made any statements in connection with the consumer transaction of the residence purchase. An argument that the sub-contractors were in the "supply chain" does not make their construction work"in connection with" the Plaintiffs' consumer transactions.

On the facts of this case as presented by this motion for summary judgment there is no evidence nor reasonable inference that would support a finding that the defendant sub-contractors engaged in any unconscionable act or practice or in any deceptive act or practice in connection with the consumer transaction; the subcontractor Defendants are entitled to summary judgment for that reason alone.

The subcontractors also argue that Plaintiffs have failed to establish that the conduct alleged to be unconscionable and/or deceptive was made knowingly or was willful as required by the KCPA. Sub-contractors argue that although the Plaintiffs are not required to establish the defendant suppliers intentionally violated the KCPA, that the Plaintiffs are required to show that the Defendants' conduct was either knowingly or with reason to know or was willful. They argue that the record is devoid of any evidence that their conduct was made knowingly or willfully. The sub-contractors rely on Beltz v. Dings, 27 Kan. App. 2d 507, 6 P.3d 424 (2000) and Remco Enterprises, Inc. v. Houston, 9 Kan. App. 2d 296, 677 P. 2d 567, rev. den. 235 Kan. 1042 (1984)

and also direct attention to Tufts v. Newmar Corp., 53F. Supp. 1171 (D. Kan. 1999). Defendants argue that Plaintiffs have failed to establish a genuine issue of material fact regarding whether the subcontractor defendants provided information to them about the residences that Defendants knew or should have known was false or even whether the Defendants willfully provided false information to them.

The Plaintiffs respond that the Defendants' argument that an intent to deceive is required for all of Plaintiffs' KCPA claims is in error citing Moore v. Bird Engineering Co., 273 Kan. 2, 41 P.3d 755 (2002). Plaintiffs provide extensive argument that each of the construction defects on which they rely is material and that the sub-contractors had a duty to disclose each. Plaintiffs cite Williamson v. Amrani, 283 Kan. 227, 246, 152 P.3d 60 (2007) in support of their duty argument. Plaintiffs contend they have evidence to support a willful failure to disclose and discuss a "sizable gap" rule at length.

This argument is controlled and disposed of, by the analysis in Williamson v. Amrani, 283 Kan. 227, 246, 152 P.3d 60 (2007) which Plaintiffs themselves cited in part. The Court provided this analysis:

> Under K.S.A. 50-626 (b)(3) of the KCPA, an allegation of deception by failing to fully disclose material facts requires proof of the willful failure to state a material fact or the willful concealment, suppression, or omission of a material fact. Before one can willfully fail to disclose a fact, there must be an obligation to communicate the fact. In other words, there must be a duty to disclose the fact. Although addressing the duty element of common-law fraud and not addressing the KCPA, in OMI Holdings, Inc. v. Howell, 260 Kan.305, 918

P.2d 1274 (1996), the Court made a statement which is applicable to a determination of whether there was an intentional failure to disclose a material fact under the KCPA, stating that a party has a duty to disclose material facts if the party knows the other party is entering a transaction under a mistake as to the facts and the other " "" because of the relationship between them, the customs in trade, or other objective circumstances, would reasonably expect disclosure of such fact." ' " 260 Kan. at 347 (quoting Boegel v. Colorado Nat'l Bank of Denver, 18 Kan. App. 2d 546, 550, 857 P.2d 1362, rev. den. 253 Kan. 856 [1993]).

Although the facts and liability questions in Williamson are different, the law and the guiding legal principles do not change and are squarely applicable. They are binding on this Court in its decision. There is no evidence, or reason to believe, (1) that because of the relationship between the subcontractors and the Plaintiff consumers, or(2) because of any custom in trade, or (3) because of any other objective circumstances, that the subcontractors would know that the Plaintiff consumers would reasonably expect the subcontractor to disclose such information. Thus there was no duty to disclose and could be no willful failure to state a material fact or willful concealment, suppression, or omission of a material fact in accordance with K.S.A. 50-626(b)(3) or as Plaintiffs suggest K.S.A. 50-626(a). The subcontractor defendants are entitled to judgment on Plaintiffs' claims for failure to disclose construction defects, either under K.S.A. 50-626(a) or K.S.A. 50-626(b)(3).

The Court now turns to the Sub-Contractors' argument that there is no evidence to support a claim of a violation of unconscionable practices pursuant to K.S.A. 50-627(b)(1), (3), or (5).

Plaintiffs state their claims under K.S.A. 50-627 to be as follows:

For each Defendant subcontractor's failure to disclose each defect for which it is responsible, each Plaintiff brings claims for violations of K.S.A. 50-627 under K.S.A. 50-627(a) and K.S.A. 50-627(b)(1), (b)(3), and (b)(5). (Plaintiffs Response in Opposition page 45.)

As relevant K.S.A. 50-627 provides as follows:

"K.S.A. 50-627. Unconscionable acts and practices. (a) No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction. An unconscionable act or practice violates this act whether it occurs before, during, or after the transaction.

(b)The unconscionability of an act or practice is a question for the court. In determining whether an act or practice is unconscionable, the court shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following that:

(1) the supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor;

...

(3) the consumer was unable to receive a material benefit from the subject

of the transaction;

...

(5) the transaction the supplier induced the consumer to enter was excessively one-sided in favor of the supplier; ..."

Our Supreme Court in State ex rel. Stovall v. ConfiMed.Com, 272 Kan. App. 1313, 1320-21, 38 P. 3d 707 (2002), reviewed factors by which a Court should consider and determine unconscionability. The Court stated as follows:

In State ex rel. Miller v. Midwest Serv. Bur. of Topeka, Inc., 229 Kan. 322, 324, 623 P.2d 1343 (1981), this Court cited the comment to K.S.A. 50-627 (Weeks) in noting the three general categories of conduct proscribed: "[T]hat section forbids 'unconscionable advertising techniques, unconscionable contract terms and unconscionable debt collection practices.'" Limitation of implied warranties added as an example to the statute after the Midwest decision, would be a fourth category. See L. 1983, ch. 180, §1.

Although unconscionable contract terms were somewhat expanded by the decision of Willman v. Ewen, 230 Kan. App 262, 266, 634 P.2d 1061 (1981), in which the contract itself was found to be valid but the subsequent deceptive conduct tainted the transaction as unconscionable, this Court has held to general guidelines in determining unconscionability. After reviewing several cases, we concluded: "The cases seem to support the view that there must be some element of deceptive bargaining conduct present as well as unequal bargaining power to

render the contract between the parties unconscionable." Willman, 230 Kan. at 266. Further support is the comment to K.S.A. 50-627 which references unconscionability in the context of the UCC, clearly a contractual-based form of the doctrine: "As under the UCC (K.S.A. 84-2-302), unconscionability typically involves conduct by which a supplier seeks to induce or require a consumer to assume a risk which materially exceed the benefits to him of a related consumer transaction." See also Wille v. Southwestern Bell Tel.Co., 219 Kan. App 755, 758-59, 549 P.2d 903 (1976) (lists ten factors that aide in applying the doctrine of unconscionability but in situations involving the Uniform Commercial Code).

The Court has reviewed Plaintiffs' claims in light of the statute, and the discussions in ConfiMed.Com, Wille, and Willman. In Wille, 219 Kan. at 759, the Court said:

> In summary, the doctrine of unconscionability is used by the courts to police the excesses of certain parties who abuse their rights to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, ...

The cases as well as the provisions of K.S.A. 50-627(b) one thru seven inclusive, each contemplate the role of a contract in a claim of unconscionability. There are no facts or reasonable inferences that these Defendants had any role, responsibility or involvement with the consumer transaction contracts. The general guidelines referred to in ConfiMed.Com of deceptive bargaining conduct as well as unequal bargaining power are not found in this fact pattern either. There was no bargaining between these Defendants and the Plaintiffs, nor were the

Defendants responsible for or involved with any unconscionable advertising techniques, unconscionable contract terms, or unconscionable debt collection practices as referred to in State ex rel. Miller v. Midwest Serv. Bur. of Topeka, Inc.. Finally, the facts in this case do not involve conduct by which a supplier sought to induce or require a consumer to assume a risk which materially exceed the benefits to him of a related consumer transaction as stated in the Kansas Comment 1973 to K.S.A. 50-627.

Plaintiffs claim violation of K.S.A. 50-627(b)(1) and argue the subcontractors took advantage of the inability of the Plaintiffs to protect their interests because of their ignorance. Plaintiffs argue that they were ignorant of the language and practice of construction and point to certain terms related to the defects that were not in Plaintiffs' vocabulary; they also argue that Plaintiffs lack the x-ray vision to see the stucco defects. The Court finds that there is no evidence or reasonable inference that any of the Sub-Contractors took advantage of any Plaintiffs' infirmities or inabilities by failure to disclose the alleged defects. To suggest that the subcontactors' failure to disclose was unconscionable because the Plaintiffs did not know or understand some particular words of construction jargon describing the defects is simply without any merit. It is not within the legislative intent as expressed in subsection (b)(1) and the Court finds Defendants are entitled to judgment the claim of a violation of 627(b)(1).

Plaintiffs' second claim is under K.S.A. 50-627(b)(3) that makes it an unconscionable transaction when the supplier knew that the consumer was unable to receive a material benefit from the subject of the transactions. Plaintiffs have conceded they received material benefits from their consumer transactions. Plaintiffs' Response in Opposition, page 50 states as follows:

> Likewise, Plaintiffs' houses were marketed as providing several material

benefits: They were patio homes, offered a desirable location, and were a low maintenance community. They also were brand new. (SOF ¶ 105) Plaintiffs received the material benefits of patio homes in a desirable location. They even received the benefits of new interiors. They paid for, but did not receive, the benefits of low maintenance exteriors. Now they face the expense of paying for a low maintenance exterior a second time, ...

Plaintiffs' have defeated their own claim. But along with the stated benefits the Plaintiffs' have had the benefit of living in the homes. Any claim under K.S.A. 50-627(b)(3) or similar claim is without merit and the subcontractor defendants are entitled to summary judgment on that claim.

Plaintiffs third claim is under K.S.A. 50-627(b)(5) which proscribes suppliers from inducing consumers to enter into transactions that are "excessively one-sided in favor of the supplier." There is and there was no evidence whatsoever that the consumer transactions, that is the purchase of the homes, were one-sided in favor of any of the subcontractors. The subcontractors were not even a party to the contract, nor were they alleged to be a party to any of the contracts. That the Plaintiffs paid the full price charged for the houses and that the subcontractors received full payment for their work as subcontractors does not constitute a violation of (b)(5) on its face. The (b)(5) claim has no merit on behalf of any Plaintiff as against any of the subcontractors either on the facts which the Court has found or on the facts which Plaintiffs attempted to assert or their additional material facts. The Defendant subcontractors are entitled to judgment on the claim of a (b)(5) violation.

Plaintiffs' KCPA Claims Against the Price Corporate and Individual Defendants.

Plaintiffs make three groups of KCPA claims against the Price Corporate and Individual defendants; they are set out in the pretrial order together with the notebook dated April 12, 2007 and captioned: "Supplements to Exhibits 10, 11, and 12 Accompanying Joint Proposed Pretrial Order." Although the pretrial order does not refer to that notebook no objection has been made by any defendant.

In Plaintiffs' Response in Opposition page 20, Plaintiffs articulate their first group of claims as follows:

> Plaintiffs have brought claims under the KCPA for omissions and affirmative misrepresentations, both written and oral, by each Price defendant. The majority of the claims for omissions are identical to the claims brought against the defendant subcontractors: The Price corporate defendants, in their joint role as general contractor, are each responsible for each construction defect made by the subcontractors and for the construction defects they made independent of the subcontractors. They had a duty to disclose the defects to Plaintiffs and did not disclose them, for which they are liable. Plaintiffs' seek civil penalties for each violation.

The Court notes that those claims are set out in Exhibit 10 contained in the "Supplements" notebook and are stated in more detail in attachments in the notebook which are also provided as Ex. 22 thru 25 in support of Plaintiffs' Opposition.

Plaintiffs describe their second group of KCPA claims against the Price defendants in their Response as follows:

> Plaintiffs' also bring claims against all Price defendants for omissions that

are not shared with the subcontractors. These claims are for the failure to disclose that (1) they had not installed a weather-resistant exterior cladding system, (2) they were not sealing exterior openings and joints, (3) they were not adequately supervising the construction and sequencing work, (4) the Price Affiliates were participating jointly and interchangeably with PRI in the construction of the houses, and (5) defective items would not be repaired when brought to the builder's attention.

These claims are set out in Exhibit 11 in the "Supplements" notebook and in the accompanying pages of the "Supplements" notebook as well as in exhibits 75(for the Price defendants), 77(for Kent Price), and 79(for Scott Barnes).

The Plaintiffs' describe their third group of claims as follows:

"The claims for affirmative written and oral misrepresentations are brought against the Price Corporate defendants; some are also brought against the individual defendants. These claims will all be discussed further below."

The Court notes that these claims for misrepresentations are set out in Exhibit 12 in the "Supplements" notebook together with the pages accompanying that Exhibit. They are also set out in Exhibits 76, 78, and 80 filed in support of Plaintiffs' opposition to the Defendant's motions for summary judgment. The Plaintiffs have further summarized these claims in Exhibits 86 thru 89 inclusive filed in support of their Opposition to the defendants' motions.

The above information is contained in the Plaintiffs' Response in Opposition page 7 footnote number 8, page 20, page 32 footnote number 49, and page 51 footnote number 68 and footnote 69.

Plaintiffs state that:

> Each claim for each Plaintiff is annotated with reference to interrogatory responses, deposition testimony, or expert disclosure or reports. The interrogatory responses and deposition testimony are attached for each Plaintiff, in alphabetical order, in exhibits 103-124.

The expert disclosures or reports are Exhibits 59 thru 62. Plaintiffs' further inform the Court in footnote 69 on page 51:

> In the PTO supplements, attached herein as **Ex. 76, 78, 80** as described in n. 68, supra, plaintiffs' claim for oral and written misrepresentations are summarized and divided into four types: I, II, III, and IV. **Ex. 86-89**, attached herein, further summarize plaintiffs' claims, omitting the annotation in **Ex. 76, 78, 80**, and present them in a format most suitable for rulings on the issues raised in defendants' MSJ.

The Court will first address the first group of claims against the Price Corporate defendants, those in their joint role as general contractor which claims are "identical to the claims brought against the defendant subcontractors..." which were ruled on above with respect to the subcontractors. The claim in substance is that for each of the subcontractors' alleged construction defects, each of the Price Corporate defendants in their joint role as general contractor had a duty to disclose each defect to each plaintiff and did not do so for which they are liable. The claims are brought, as they were against the subcontractors, pursuant to K.S.A. 50-626(a) and (b)(3) and K.S.A. 50-627(a)(b)(1), and (b)(3), and (b)(5).

The Court has previously analyzed the statements of fact and responses thereto. The Court finds that there are no facts or reasonable inferences establishing any defendant other than Price Residential Inc. (PRI) to be a general contractor or seller of the Plaintiffs' houses. The Court further finds that there are no facts from which the Court could draw a reasonable inference that the Price Corporate defendants other than PRI were contractors or sellers. Considerable legal argument was made in the papers and in oral argument, and some legal arguments and conclusions regarding this were included in the Plaintiffs' Additional Material Statements of Fact, however, the Court has determined that neither the facts, nor the inferences, nor the law presented raise a genuine issue of material fact concerning whether the Price Corporate defendants were as general contractors.

Although that disposes of the Price Affiliate obligation, the Court notes that the guiding principles quoted from Williamson v. Amrani, 283 Kan. at 246 are similarly applicable here:

> Under K.S.A 50-626(b)(3) of the KCPA, an allegation of deception by failing to fully disclose material facts requires proof of the willful failure to state a material fact, or the willful concealment, suppression, or omission of a material fact. Before one can willfully fail to disclose a fact, there must be an obligation to communicate the fact. In other words there must be a duty to disclose the fact. Although addressing the duty element of common-law fraud and not addressing the KCPA, in OMI Holdings, Inc. v. Howell, 260 Kan. App 305, 918 P.2d 1274 (1996), the Court made a statement which is applicable to a determination of whether there was an intentional failure to disclose a material fact under the KCPA, stating that a party has a duty to disclose material facts if the party knows

the other party is entering a transaction under a mistake as to the facts and the other " ' " because of the relationship between them, the customs in trade, or other objective circumstances, would reasonably expect disclosure of such facts." ' "

260 Kan. App 347, 918 P. 2d 1274 (quoting Boegle v. Colorado Nat'l Bank of Denver, 18 Kan. App 2d 546, 550, 857 P. 2d 1362, rev. den. 253 Kan. 856[1993]).

As the Court observes with respect to the sub-contractors, no evidence has been brought forward by either party or even attempted by either party to demonstrate that because of the relationship between the Plaintiffs and the Price Affiliates, or because of the custom in trade, or because of other objective circumstances that the Plaintiffs would reasonably expect the disclosure of the construction defects from the non PRI Price Affiliate defendants. As was true with respect to the sub-contractors since there was no duty to disclose there is no obligation to communicate the defect and since there is no obligation to communicate the defect the claim under 626(b)(3) fails as a matter of law. The notion that there might be a separate claim under 626(a) for the failure to disclose the defect that somehow is of a lower standard of proof is without merit for the obvious reason that if there is no duty to disclose and therefore no duty to communicate there will be no cause of action entitling Plaintiffs to recover.

The Court now addresses the unconscionable claims pursuant to K.S.A. 50-627(a), and (b)(1), and (b)(3), and (b)(5). Those claims of course are subject likewise to a similar analysis as with the subcontractors. The Court incorporates the analysis with respect to the subcontractors and for the reasons stated determines the Price defendants except for PRI are entitled to summary judgment on the claims for failure to disclose the construction defects made pursuant to K.S.A. 50-627(a), and (b)(1), and (b)(3), and (b)(5).

Remaining claims to be considered are the Group Two and Group Three claims.

The Group Two claims are those against all Price defendants for omissions not shared with the sub-contractors and are set out in Ex. 11 Accompanying the Joint Pretrial Order.

Those claims are for the failure to disclose:

(1)They had not installed a weather resistant exterior cladding system

(2) They were not sealing exterior joints and openings

(3) They were not adequately supervising construction and sequencing the work.

(4) The Price Affiliates were participating jointly and interchangably with PRI in the construction,

(5) Defective items would not be repaired when brought to the builders attention.

Plaintiffs' claims against the Price Corporations are set out in Ex. 75, the claims against Kent Price are set out in Ex. 77 and those against Scott Barnes are set out in Ex. 79. The content of those exhibits is also set out in the Supplemental pages to Ex. 11 in the Notebook.

The Third Group consists of claims of affirmative misrepresentations. Those are set out in Ex. 12. The claims made against the Price Corporate defendants are set out also in Ex. 76, those against Kent Price in Ex. 78, and those against Scott Barnes in Ex. 80. The content of those exhibits is also set out in greater detail in the Supplemental Notebook. Plaintiffs have divided these Group Three misrepresentations into four types and restated them in four Exhibits 86-89 submitted and supported their opposition to this motion. Plaintiffs state (Plaintiffs' Response page 51, footnote 69) that this division in the four types as set out in Exhibits 86-89 presents their claims for oral and written misrepresentations " in a format most suitable for ruling on the issues raised in defendants' MSJ." These are as follows:

Exhibit 86, Type I claims written and oral misrepresentations that houses had low or minimum maintenance exterior features and complete foam and caulk packages.

Exhibit 87, Type II claims written and oral misrepresentations about the quality of construction.

Exhibit 88, Type III claims misrepresentations and omissions regarding the corporate control and organizational structure of the Price companies.

Exhibit 89, Type IV claims misrepresentations and omissions regarding the water-resistance of and problems with the exterior cladding systems and the repairs performed or proposed.

Taken together the claims in Group Two and Group Three identify nine sets of facts plaintiffs claim violate the KCPA. The motion of the Price defendants for summary judgment on all claims is presented by four arguments. Three of the Price arguments address the nine claims and the fourth addresses the liability of the defendants generally contending that none of them are suppliers.

The first argument is that the alleged representations by the Price defendants that the residences were constructed with low maintenance or minimum maintenance exteriors with high quality material and craftsmanship is sales talk or puffing which is not actionable under the KCPA. This responds to Group Three, Type I claims.

Second, Price defendants argue that representations that the residences would be built by sub-contractors used by PRI before was in fact true and not deceptive or unconscionable and there was no duty to disclose the relationship between PRI and the Price Affiliates. This responds to Group Three, Type III.

Third the Price defendants argue there is no evidence any of the alleged representations were made knowingly or with reason to know which responds to Group Three, Type I and Type II. They also make the argument that there is no allegation that any misrepresentations claimed to violate K.S.A. 50-626(b)(2) or (b)(3) were willful as required. All Group Two claims are alleged to be violations of K.S.A. 50-626(b)(3) and all Group Three claims are alleged to be violations of K.S.A. 50-626(b)(2).

The Price defendants' fourth argument is that plaintiffs did not engage in a consumer transaction with Kent Price, Scott Barnes, or the Price Affiliates, and were not aggrieved by any alleged deceptive or unconscionable act by any of them.

The Price argument is that "defendant Kent Price, Scott Barnes and the Price Affiliates were not 'suppliers' in a 'consumer transaction' with the plaintiffs" Price Memorandum page 25.

The Price defendants concede that within the meaning of the KCPA plaintiffs were consumers, their residence purchases were consumer transactions, and that the defendants were suppliers. Their argument however, is that none of them were parties to a "consumer transaction" and therefore none can be liable under the KCPA. In support they cite CIT Group/Sales Financing, Inc. v. E-Z Pay Used Cars, Inc., 29 Kan. App. 2d 676, 32 P.3d 1197 (2001), First Nat'l Bank of Anthony v. Dunning, 18 Kan. App. 2d 518, 855 P.2d 493, 498, and Ellibee v. Aramark Correctional Services, 154 P.3d 39, 41(Kan. App. 2d, 2007).

The Price defendants further argue that since neither Kent Price, nor the Price Affiliates spoke to or contracted with the plaintiffs and did not participate in the construction, they did not commit any unconscionable or deceptive act and plaintiffs could not be aggrieved by any KCPA violation by them. They make similar arguments on behalf of the defendant Scott Barnes.

The plaintiffs respond, and the Court agrees, that CIT Group, First Nat'l Bank of Anthony, and Ellibee are factually and significantly dissimilar from the present fact situation and that those cases are not controlling in light of K.S.A. 50-624(j) which provides that a person may be a supplier whether or not they deal directly with the consumer.

In addition plaintiffs also argue that the Price defendants operated interchangeably, that all were principals, that all Price Corporate defendants were thus general contractors and builders and responsible for all of the violations collected by the plaintiffs. This series of arguments which also relies on the obligations of disclosed, undisclosed, and partially undisclosed principals relies primarily on the plaintiffs' responses and statements of fact which the Court has previously and very carefully considered, reviewed and rejected. Furthermore the theories of principal and agency whether partially or completely undisclosed or disclosed, the principles of alter ego or anything similar, and the principles of interchangeable corporations are not set out in the pretrial order and are not theories of liability available to the plaintiffs. These arguments have been made on other occasions and the court has consistently explained those were not issues in this case.

Plaintiffs also direct the Court's attention to Farrell v. General Motors Corporation, 249 Kan. 231, 815 P.2d 538 (1991) and Alexander v. Certified Master Builders Corporation, 268 Kan. 812, 1 P.3d 899 (2000) in connection with their argument that it is not necessary to deal directly with a consumer in order to be a supplier. The Court has reviewed these cases and find that they provide guidance on the points under consideration.

In Farrell, the trial court found defendant Hattan in violation of KCPA for seeking a release that waived implied warranty. On appeal the Supreme Court noted (1) a supplier was

prohibited from committing unconscionable acts, (2) that Hattan met the KCPA's definition of a supplier, and (3) that a consumer transaction was the disposition of property or services to a consumer. However, the Court then pointed out that the warranties Hattan was charged with disclaiming did not arise from the bodywork the defendant Hattan had provided. The Supreme Court pointed out that the warranties in question arose from the sale of the vehicle. The Court noted Hattan did not sell the vehicle nor did he sell the "GMPP" to which Hattan was not a party. The Supreme Court then concluded "in this case Hattan is acting as nothing more than an accommodating party [not a supplier]." 249 Kan. at 242. Accordingly the Supreme Court held Hattan did not violate the KCPA (249 Kan. at 243) and reversed the trial court on that point.

In Alexander v. Certified Master Builder Corp., 268 Kan. 812, 1 P.3d 899 (2000) the defendant CMB also argued it was an accommodating party under Farrell and not a supplier. The Court rejected that argument and explained its rational and the Farrell decision as well as follows:

> Clearly, CMB through its use of newspaper advertising and the distribution of its brochure, "solicited" consumers to contract with its member builders. The building of a home is a consumer transaction. ...A party may be a supplier whether or not it deals directly with the consumer. Under the particular acts outlined, we conclude that CMB is a supplier under K.S.A. 50-624(i).
>
> ...CMB is not a guarantor of the performance of its members. However, CMB is responsible for statements it makes in soliciting customers to contract with its members. CMB did not warrant that its members would do flawless work. However, CMB did represent to consumers that certain benefits would be

obtained as the result of contracting with a CMB member builder and that such builders had met certain standards for membership. Such representations fall within the ambit of the KCPA.

CMB argues that it was merely an accommodating party and, thus, should not be termed to be a supplier under Farrell v. General Motors Corp., 249 Kan. 231, 815 P.2d 538 (1991). This argument is not well taken. In Farrell, this Court held that Hattan, the body shop which did warranty work for General Motors, but did not sell the vehicle or the warranty to the consumers, was an accommodating party and therefore not liable for a warranty which violated the KCPA. 249 Kan. App. 242-43. However, Farrell concluded that Hattan did meet the definition of a supplier under the KCPA but was not a supplier to that particular transaction. 249 Kan. App. 242. ... ." (268 Kan. at 826)(Emphasis added.)

The Supreme Court's emphasis that Hattan was not a supplier is an implicit statement and a reminder to the trial courts and to the parties that for liability to exist under the KCPA not only must a defendant be a supplier, but it must be a supplier to the particular transaction in question.

It may be observed that this should be obvious since the prohibited conduct is for a supplier to engage in deceptive or unconscionable acts or practices "in connection with a consumer transaction." Hattan did not sell the vehicle or the GMPP and therefore did not engage in an unconscionable act in connection with the consumer transaction, the purchase of the vehicle, and or the purchase of the GMPP.

In accordance with the statutory law provided by the legislature as well as the case law developed by our courts if a defendant is not a supplier to a particular transaction it is not in violation of the KCPA.

This Court now holds that the Price Affiliates are not suppliers to the consumer transactions at issue in this case, the plaintiffs' residence purchases. There are no facts or reasonable inferences establishing an issue of whether the affiliates were suppliers to the plaintiffs' purchases. Contrary to plaintiffs' assertion, they cite no authority for their statement that "affiliated companies" can be held liable for state consumer protection act statute violations of related companies. Federal Trade Commission v. Verity International Ltd., 194 Supp. 2d 270 has been reviewed and is not authority for that proposition.

Furthermore, the Court finds and determines that there is no evidence or reasonable inference supporting Kent Price as a supplier to the plaintiffs' transactions or to support such a finding with respect to the defendant Scott Barnes.

The Court finds that the motion of the Price Affiliate Corp. defendants, except for of PRI, for summary judgment on the KCPA claims should be and is hereby granted. The Court further finds that the claims of the plaintiffs against Kent Price and Scott Barnes on the theory of KCPA violations should be granted.

The Court acknowledges and recognizes that certain claims of specific KCPA violations as set out in Exhibits 11 and 12 have not been ruled upon and the Court will discuss those claims further with counsel before taking further action.

The motion of the defendant PRI for summary judgment on the KCPA claims is denied.

IT IS SO ORDERED.

This Memorandum Decision, when signed by the Judge and filed with the Clerk, shall constitute the judgment of the court. The clerk is requested to serve a copy of this Order on the attorney of record and party plaintiff within three (3) days from the filing of same with the clerk all as provided by K.S.A. 60-258.

Dated this 23 day of May, 2008.

Judge of the District Court
Gerald T. Elliott

Westlaw.

83 P.3d 1270
83 P.3d 1270, 2004 WL 292124 (Kan.App.)
(Cite as: 83 P.3d 1270, 2004 WL 292124 (Kan.App.))

H

Dill v. Barnett Funeral Home, Inc.
Kan.App.,2004.
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
Patricia A. DILL, Appellant,
v.
BARNETT FUNERAL HOME, INC., Winchester Reformed Presbyterian Cemetery, and August A. Barnett, Appellees.
No. 90,653.

Feb. 13, 2004.
Review Denied May 26, 2004.

Background: Widow brought action against funeral home and municipal cemetery district, relating to handling of her husband's funeral and burial. The District Court, Jefferson County, Gary L. Nafziger, J., granted summary judgment for defendants. Widow appealed.

Holdings: The Court of Appeals held that:
(1) trial court lacked jurisdiction over claims against municipal cemetery district, because widow failed to comply with Kansas Tort Claims Act's (KTCA) notice of claim requirements;
(2) widow did not establish negligent infliction of emotional distress;
(3) widow did not establish intentional mishandling of corpse;
(4) widow did not establish negligent misrepresentation;
(5) widow did not establish negligence per se; and
(6) widow did not establish violation of Kansas Consumer Protection Act (KCPA).

Affirmed.

West Headnotes

[1] Municipal Corporations 268 ⚿742(6)

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k742 Actions
268k742(6) k. Trial, Judgment, and Review. Most Cited Cases
Trial court lacked jurisdiction over widow's action against municipal cemetery district, and therefore could not grant summary judgment to district as to widow's tort claims against district relating to her husband's funeral, where notice of claim to the district, under the Kansas Tort Claims Act (KTCA), had not been properly effectuated. K.S.A. 12-105b(d).

[2] Municipal Corporations 268 ⚿741.25

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.25 k. Applicability in Particular Cases. Most Cited Cases
Cemetery district, as a distinct taxing entity, was a "municipality," for purposes of Kansas Tort Claims Act (KTCA), which prohibits a plaintiff from filing any claim subject to the KTCA against a municipality until the municipality has received written notice of the basis for the claim and either has replied to the claim or has allowed 120 days to lapse. K.S.A. 12-105b(d), 15-1013 et seq., 75-6102(b).

[3] Dead Bodies 116 ⚿9

116 Dead Bodies
116k9 k. Civil Liabilities for Illegal Acts. Most Cited Cases
Widow's allegations of lack of sleep, recurring dreams, and general fatigue, without her having

sought professional medical assistance, did not establish physical injury or impact as result of emotional distress, as element of negligent infliction of emotional distress, in action against funeral home, relating to funeral home's handling of her husband's body and of his funeral.

[4] Dead Bodies 116 ⚿9

116 Dead Bodies
116k9 k. Civil Liabilities for Illegal Acts. Most Cited Cases
Funeral home's alleged negligence in allegedly procrastinating the retrieval of dead body from hospital morgue, intentionally misdirecting cemetery as to proper burial plot, and sending obituary drafts containing errors to newspapers, did not constitute intentional mishandling of a corpse.

[5] Dead Bodies 116 ⚿9

116 Dead Bodies
116k9 k. Civil Liabilities for Illegal Acts. Most Cited Cases
Funeral home's conduct in embalming husband's body within 24 hours of his death, without obtaining widow's consent, did not constitute intentional mishandling of a corpse; funeral home acted in compliance with state law requiring a dead body to be embalmed, interred, or cremated within 24 hours of death, and thus, funeral home did not intentionally oppose widow's wishes. K.A.R. 63-3-11(d).

[6] Dead Bodies 116 ⚿9

116 Dead Bodies
116k9 k. Civil Liabilities for Illegal Acts. Most Cited Cases
Federal regulation allowed funeral home to charge widow for embalming services, even though funeral home had not obtained widow's consent to embalming her husband's body within 24 hours of death, where state law required a dead body to be embalmed, interred, or cremated within 24 hours of death. 16 C.F.R. § 453.5; K.A.R. 63-3-11(d).

[7] Fraud 184 ⚿11(1)

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k11 Matters of Fact or of Opinion
184k11(1) k. In General. Most Cited Cases
Funeral home's recommendation to widow, that she needed to purchase an oversized casket, was based upon a statement of opinion that husband would appear less crowded in the casket, not a statement of fact, and thus, widow could not bring claim against funeral home for negligent misrepresentation.

[8] Fraud 184 ⚿20

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k19 Reliance on Representations and Inducement to Act
184k20 k. In General. Most Cited Cases
Widow, who did not rely on funeral home's recommendation that she purchase an oversized casket from funeral home, and instead purchased a flared casket from another source, could not bring claim against funeral home for negligent misrepresentation.

[9] Dead Bodies 116 ⚿9

116 Dead Bodies
116k9 k. Civil Liabilities. Most Cited Cases
(Formerly 13k3)
Statute requiring funeral services to be supervised by a licensed funeral director or licensed assistant funeral director did not provide for private cause of action, and thus, widow could not use the statute as basis for claim against funeral home for negligence per se, relating to funeral home's alleged representation that two of its employees were licensed funeral directors. K.S.A. 65-1713b.

[10] Dead Bodies 116 ⚿9

116 Dead Bodies

116k9 k. Civil Liabilities. Most Cited Cases
(Formerly 13k3)
Regulation requiring funeral homes to provide pricing information did not provide for private cause of action, and thus, widow could not use the statute as basis for claim against funeral home for negligence per se. K.A.R. 63-3-17(a, c).

[11] Dead Bodies 116 ⚷9

116 Dead Bodies
116k9 k. Civil Liabilities for Illegal Acts. Most Cited Cases
Widow could not bring breach of contract claims against funeral home, relating to husband's funeral and burial; widow did not allege diminution in value between expected performance and actual performance, nor did she allege claims arising from breach of specific contract provisions, and instead, she alleged breach of implied duties under the contract and sought damages for mental strain and emotional distress.

[12] Antitrust and Trade Regulation 29T ⚷ 229

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regula- tions
29Tk229 k. Funeral and Burial Services. Most Cited Cases
(Formerly 92Hk6 Consumer Protection)
Funeral home's failure to disclose to widow that the employees supervising her husband's funeral lacked funeral director's licenses was not willful concealment or omission of material facts, and thus, widow could not bring claim against funeral home under Kansas Consumer Protection Act (KCPA). K.S.A. 50-626.

[13] Antitrust and Trade Regulation 29T ⚷ 229

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regula- tions
29Tk229 k. Funeral and Burial Services. Most Cited Cases
(Formerly 92Hk6 Consumer Protection)

Antitrust and Trade Regulation 29T ⚷477

29T Antitrust and Trade Regulation
29TV Price Regulation
29TV(A) In General
29Tk477 k. Representations About Prices; Advertising and Labeling. Most Cited Cases
(Formerly 92Hk6 Consumer Protection)
Funeral home's alleged failure to provide widow with price list during initial funeral negotiations, and funeral home's recommendation that widow buy oversized casket, did not constitute unconscionable conduct, as basis for action under Kansas Consumer Protection Act (KCPA). K.S.A. 50-627(b).

[14] Dead Bodies 116 ⚷9

116 Dead Bodies
116k9 k. Civil Liabilities for Illegal Acts. Most Cited Cases
Widow's allegations of lack of sleep, recurring dreams, and general fatigue, without her having sought professional medical assistance, did not establish distress so extreme that no reasonable person should have been expected to endure it, as element of intentional infliction of emotional distress, in action against funeral home, relating to funeral home's handling of her husband's body and of his funeral.

Appeal from Jefferson District Court; Gary L. Nafziger, judge. Opinion filed February 13, 2004. Affirmed.
Shane Lillich, of Perry and Trent L.L.C., of Bonner Springs, for appellant.
Teresa L. Sittenauer, of Fisher, Patterson, Sayler & Smith, L.L.P. , of Topeka, for appellees August A.

Barnett and Barnett Funeral Home, Inc., and James F. Swoyer, Jr., of Swoyer and Swoyer, of Oskaloosa, for appellee Winchester Reformed Presbyterian Cemetery.

Before RULON, C.J., HILL, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Plaintiff Patricia A. Dill appeals the district court's decision to grant summary judgment to the defendants, Barnett Funeral Home, Inc. (BFH), Winchester Reformed Presbyterian Cemetery (WRPC), and August A. Barnett. We affirm.

As the parties are well acquainted with the underlying factual circumstances of this dispute, our discussion of the facts will be limited to those necessary for a clear understanding of the issues.

Winchester Reformed Presbyterian Cemetery

[1] The plaintiff contends the district court improperly considered the merits of the summary judgment motion filed by WRPC. First, because the district court ruled the plaintiff had failed to serve proper notice under the Kansas Tort Claims Act (KTCA), K.S.A. 12-105b, the plaintiff argues the district court lacked jurisdiction to consider the relative merits of the plaintiff's substantive claims against WRPC.

[2]K.S.A. 12-105b(d) prohibits a plaintiff from filing any claim subject to the KTCA against a municipality until the municipality has received written notice of the basis for the claim and either has replied to the claim or has allowed 120 days to lapse. A "municipality" within the meaning of KTCA encompasses any political or taxing subdivision of the state. K.S.A. 75-6102(b). Because a cemetery district is a distinct taxing entity, see K.S.A. 15-1013, *et seq.*, such entity qualifies as a municipality within the meaning of K.S.A. 12-105b(d).

As we understand, the plaintiff conceded that she did not substantially comply with the notice requirements of K.S.A. 12-105b, as plaintiff entered no objection to WRPC's factual assertions at the summary judgment hearing. When notice under K.S.A. 12-105b is not properly effectuated, the district court does not obtain jurisdiction of the claim, and the party failing to receive proper notice should be dismissed from the suit. *Gessner v. Phillips County Comm'rs,* 270 Kan. 78, 82, 11 P.3d 1131 (2000).

Where a district court lacks subject matter jurisdiction over particular claims, any ruling with respect to such claims is void. *Automatic Feeder Co. v. Tobey,* 221 Kan. 17, 21, 558 P.2d 101 (1976). As such, the district court's judgment with respect to the substantive merits of WRPC's summary judgment motion is vacated. Nevertheless, because the district court properly dismissed WRPC from the suit for lack of jurisdiction, the judgment in favor of WRPC is affirmed.

The plaintiff's second argument is that the district court should not have ruled on WRPC's motion for summary judgment because the plaintiff did not receive 21 days in which to file her response to WRPC's motion. As the district court properly dismissed WRPC from the suit, this issue has no legal effect upon the resolution of the plaintiff's case and is moot. *Shanks v. Nelson,* 258 Kan. 688, 690-91, 907 P.2d 882 (1995).

Barnett Funeral Home and August A. Barnett

The remainder of the plaintiff's claims are directed to challenging the district court's rulings granting summary judgment to BFH and August A. Barnett. Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits fail to demonstrate a genuine issue of disputed material fact so that the moving party is entitled to judgment as a matter of law. This court, like the district court, is required to resolve all facts and resonable inferences in favor of

the party opposing summary judgment. *In re Estate of Brodbeck,* 22 Kan.App.2d 229, 235, 915 P.2d 145,*rev. denied*260 Kan. 993 (1996).

***2** Nevertheless, a court is not obliged to seek out the record to determine whether the moving party's factual contentions are controverted. *Knight v. Myers,* 12 Kan.App.2d 469, Syl. ¶ 5, 748 P.2d 896 (1988). It is the duty of the party opposing summary judgment to direct the court to evidence within the record which controverts the moving party's contentions, according to the procedure provided by Supreme Court Rule 141 (2003 Kan. Ct. R. Annot. 191).*Bus. Opportunities Unlimited, Inc. v. Envirotech Heat. & Cooling, Inc.,* 26 Kan.App.2d 616, 617-18, 992 P.2d 1250 (1999).

While substantial compliance with Rule 141 is sufficient, a party must attempt to follow the spirit of the rule by specifically addressing the contentions of the moving party with reference to supporting evidence within the record. Vague statements opposing summary judgment, unsupported assertions, or contentions without legal controlling force will not prevent summary judgment. *Bus. Opportunities Unlimited, Inc.,* 26 Kan.App.2d at 618, 992 P.2d 1250;*Ruebke v. Globe Communications Corp.,* 241 Kan. 595, 604-05, 738 P.2d 1246 (1987). Where a party opposing summary judgment fails to substantially comply with the requirements of Rule 141(b), the district court, in its discretion, may adopt the contentions of the moving party as having been admitted by the opposing party. *Ruebke,* 241 Kan. at 604, 738 P.2d 1246.

Adoption of Uncontroverted Facts

The plaintiff directs a great deal of argument to convince this court that the district court improperly adopted, as uncontroverted, certain statements of fact from the defendants' motion for summary judgment. The plaintiff argues the factual statements were both controverted and immaterial to the resolution of the plaintiff's claims, presumably contending the district court erroneously relied upon the allegedly uncontroverted assertions to support its judgment in favor of the defendants.

We need not address the plaintiff's arguments. In granting summary judgment to the defendants, the district court was required to find that no genuine issue of material fact remained on any of the plaintiff's claims. *Estate of Brodbeck,* 22 Kan.App.2d at 235, 915 P.2d 145. The district court must articulate the controlling facts and legal principles supporting its decision. Rule 165 (2003 Kan. Ct. R. Annot. 202). Had the district court relied upon the defendants' "uncontroverted" factual assertions, the court's judgment still fails to address all of the claims raised within the plaintiff's complaint. At most, the court's decision addresses the plaintiff's claims that BFH improperly embalmed Mr. Dill's body without the plaintiff's consent and that BFH negligently instructed WRPC to bury Mr. Dill in the wrong plot. The district court's findings of fact and conclusions of law on the defendant's motion for summary judgment were clearly inadequate.

Yet, because summary judgment may be granted only where the plaintiff fails to state a legally cognizable claim, Kansas appellate courts have generally reviewed a challenge to summary judgment, even though the district court failed to properly comply with Rule 165. See *Hanks v. Riffe Constr. Co.,* 232 Kan. 800, 802, 658 P.2d 1030 (1983); *University of Kansas Mem. Corp. v. The Kansas Power & Light Co.,* 31 Kan.App.2d 177, 181, 61 P.3d 741 (2003).

Negligence Claims

***3** The plaintiff's primary cause of action is negligence. In her petition, plaintiff alleged that BFH committed negligence in the handling of her husband's funeral in the following respects: (1) BFH failed to promptly retrieve and preserve Mr. Dill's body after being notified of his death; (2) BFH embalmed Mr. Dill's body without the plaintiff's consent; (3) BFH failed to ensure that Mr. Dill was

placed in the proper burial plot; (4) BFH misrepresented the size of casket required; (5) BFH failed to provide the plaintiff with an accurate and thorough price list during negotiations; (6) BFH failed to ensure the proper printing of Mr. Dill's obituary; and (7) BFH utilized unlicensed staff members to arrange Mr. Dill's funeral.

To establish a prima facie claim for negligence, the plaintiff had to demonstrate that BFH owed the plaintiff a duty, that BFH breached that duty, and that the plaintiff suffered injury caused by this breach of duty.*Calwell v. Hassan,* 260 Kan. 769, 777, 925 P.2d 422 (1996). Assuming, for the sake of argument, that the plaintiff had been able to establish a breach of a duty in each factual allegation, her negligence claims fail for a lack of legally cognizable evidence of damages.

Negligent Infliction of Emotional Distress

[3] The only injury claimed by the plaintiff involves emotional distress caused by BFH's efforts in arranging Mr. Dill's funeral. However, in order to recover for the negligent infliction of emotional distress, a plaintiff must demonstrate physical injury or impact as a result of the emotional distress. General symptoms of headaches, insomnia, recurring nightmares, or even depression are not sufficient to state a cause of action. *Ely v. Hitchcock,* 30 Kan.App.2d 1276, 1289-90, 58 P.3d 116 (2002). Consequently, the plaintiff's affidavit claiming a lack of sleep, recurring dreams, and general fatigue without seeking professional medical assistance is clearly inadequate to support a claim for the negligent infliction of emotional distress.

Intentional Mishandling of a Corpse

[4] Although a cause of action for interference with a dead body provides an exception to the requirement of proof of physical symptoms, this cause of action requires intentional conduct, not merely negligent conduct. *Ely,* 30 Kan.App.2d at 1284, 58 P.3d 116. The record is absolutely devoid of any evidence to support finding that BFH intentionally procrastinated the retrieval of Mr. Dill's body from the hospital morgue, that BFH intentionally misdirected WRPC in the burial of Mr. Dill, or that BFH intentionally sent obituary drafts containing errors to the newspapers.

[5] While there is evidence that BFH intentionally embalmed the body of Mr. Dill, BFH did not intentionally oppose the wishes of the plaintiff but followed the requirements of state law. The plaintiff contends that federal law requires a funeral service to obtain the consent of the next-of-kin before embalming, regardless of the operation of state law, and that, where a conflict between state and federal regulations arises, the court should implement the federal regulations under the federal supremacy doctrine.

**4 The interpretation of a regulation is a question of law over which an appellate court possesses unlimited review. *In re Tax Appeal of Ford Motor Credit Co.,* 275 Kan. 857, 861, 69 P.3d 612 (2003). Having reviewed K.A.R. 63-3-11(d) and 16 C.F.R. § 453.5 (2003), we conclude the plaintiff's arguments are unfounded. According to K.A.R. 63-3-11(d), a body must be embalmed, interred, or cremated within 24 hours of death, unless religious law or customs prohibit transportation or interments within the 24-hour period and no public safety hazard or nuisance is caused by the delay.

Contrary to the plaintiff's position, 16 C.F.R. § 453.5 does not govern whether a funeral service may properly embalm a dead body but governs the conditions under which a funeral service may charge for such a service. Based upon the clear language of the regulations, a funeral service may charge for embalming services, if, by state law, embalming is required under the circumstances of the particular situation.

[6] Here, BFH was aware, from the outset of the business relationship, that the plaintiff did not wish to have the body interred within 24 hours of death. Plaintiff insisted on a visitation service and wanted

to delay the service until Mr. Dill's son could arrive from Pennsylvania. Under Kansas law, embalming was required, irrespective of the plaintiff's consent. Consequently, the federal regulation permitted BFH to charge the plaintiff for embalming services even though her consent was not specifically obtained.

Furthermore, even if the federal regulations were in conflict with the state regulations, a violation of 16 C.F.R. § 453.5 does not provide a private cause of action. 16 C.F.R. § 453 falls under the jurisdiction of the Federal Trade Commission through the authority conferred by Congress in Title 15 of the United States Code. See *United States v. Restland Funeral Home, Inc.*, 51 F.3d 56 (5th Cir.1995). The Federal Trade Commission Act provides no private cause of action; enforcement of the Act rests exclusively within the Federal Trade Commission. *Fulton v. Hecht,* 580 F.2d 1243, 1249 n. 2 (5th Cir.1978), *cert. denied*440 U.S. 981, 99 S.Ct. 1789, 60 L.Ed.2d 241 (1979); *Carlson v. Coca-Cola Company,* 483 F.2d 279, 280 (9th Cir.1973); *Holloway v. Bristol-Myers Corporation,* 485 F.2d 986, 991, 997 (D.C.Cir.1973).

Negligent Misrepresentation

[7][8] The plaintiff next alleges the defendants were negligent in representing the plaintiff's need for an oversized casket. A claim for negligent misrepresentation must prove that (1) the defendant made a false statement regarding a transaction in which he or she had a pecuniary interest; (2) the defendant failed to exercise reasonable care to ascertain or communicate the accuracy of the statement; (3) the plaintiff justifiably relied upon the statement; and (4) the plaintiff thereby incurred a loss. *Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 604, 876 P.2d 609 (1994) (citing Restatement [Second] of Torts § 552 [1976]).

***5** Whether a statement is presented as fact, opinion, or statement of intent is a question of law. An action for negligent misrepresentation may be premised upon a statement of fact only. *Wilkinson v. Shoney's, Inc.,* 269 Kan. 194, 218-19, 4 P.3d 1149 (2000). BFH's recommendation that the plaintiff needed to purchase an oversized casket was based upon a statement of opinion that Mr. Dill would appear less crowded in the casket, not a statement of fact that Mr. Dill could not possibly fit within a standard casket. As such, plaintiff's allegations do not support a claim for negligent misrepresentation. See *Wilkinson,* 269 Kan. at 218-19, 4 P.3d 1149.

More importantly, however, the plaintiff cannot demonstrate reliance upon BFH's recommendation. Plaintiff did not purchase the oversized casket but purchased a flared casket from another source.

Negligence Per Se

[9][10] With respect to the alleged representations that Mr. Stevens and Mr. Cole were licensed funeral directors, the plaintiff does not contend that either Stevens or Cole claimed to be licensed funeral directors. Rather, the plaintiff relies upon a violation of K.S.A. 65-1713b to provide a cause of action for negligence per se. However, a violation of this statute does not provide a private cause of action.

In order to file a private cause of action for the violation of a statute or a regulation, the plaintiff must convince this court that the statute or regulation was designed to protect a specific group of people rather than the public at large and that the legislature or regulatory agency intended to provide enforcement of the statute or regulation through private causes of action. *Nichols v. Kansas Political Action Committee,* 270 Kan. 37, 48, 11 P.3d 1134 (2000).

The plaintiff fails both prongs of this test. Similar to the Federal Trade Commission's authority to enforce the provisions of 16 C.F.R. § 453, see *Restland Funeral Home,* 51 F.3d at 57-58, supervisory and enforcement authority of the state funeral services industry is vested in a state mortuary arts

board, which has the authority to promulgate regulations to govern the industry which are consistent with the provisions of Chapter 65, Article 17 of the Kansas Statutes Annotated. See K.S.A. 65-1723.

While the Kansas statutes do not specifically limit enforcement of the applicable statutes and regulations to the mortuary arts board, there are only a few statutory provisions specifically granting a private cause of action for a violation. See K.S.A. 65-1764 and 65-1765. For a violation of any other section of Chapter 65, Article 17, the only penalties specifically provided are criminal penalties. See K.S.A. 65-1705; K.S.A. 65-1707; K.S.A. 65-1726; K.S.A. 65-1731; K.S.A. 65-1766(e). Any additional penalties are reserved to the state board of mortuary arts in the nature of licensing suspensions or revocations. See K.S.A. 65-1766.

Clearly, the statutes are designed to protect the general public health, not a defined class of which the plaintiff is a member. Moreover, the construction of the statutes indicates a legislative intent to treat violations of the pertinent statutes and regulations as misdemeanor offenses or licensing violations rather than torts.

*6 Similarly, the plaintiff's claim of negligence arising from BFH's alleged failure to provide pricing information also fails. Again, the plaintiff relies upon a theory of negligence per se as the result of a violation of K.A.R. 63-3-17(a) and (c), which does not support a private cause of action.

As a result, the plaintiff fails to establish a prima facie claim for negligence on any of her factual assertions. The district court properly granted summary judgment in favor of the defendants on such negligence claims.

Breach of Contract

[11] Based upon the same factual allegations supporting her negligence claims, the plaintiff alleged a breach of contract. Traditionally, Kansas courts have distinguished between an action brought in tort and in contract based upon the nature of the duty sought to be enforced. A breach of a duty arising from the specific terms of a negotiated agreement supports an action under the terms of the agreement, or an action in contract. Contrarily, where the performance of the duty has been imposed by law, an action for a breach is properly brought in tort. *KPERS v. Reimer & Koger Assocs. ., Inc.,* 262 Kan. 110, 114, 936 P.2d 714 (1997).

However, in cases like the present one, in which the duty arises under contract but the extent of the performance duties are governed to some extent by law, a particular set of facts may provide a basis for claims in contract and in tort. See *Bittel v. Farm Credit Svcs. of Central Kansas, P.C.A.,* 265 Kan. 651, 660, 962 P.2d 491 (1998). And, yet, a plaintiff may not merely frame a contract action as a tort action or a tort action as a contract action to avoid the legal limitations of one particular cause of action. *Robinson v. Shah,* 23 Kan.App.2d 812, 823, 936 P.2d 784 (1997). The inherent nature of a contract action differs from that of a tort action. Under contract theory, a party is entitled to the economic benefit for which he or she negotiated and provided legal consideration. *Steel v. Eagle,* 207 Kan. 146, 151, 483 P.2d 1063 (1971). Under tort theory, a person is entitled to monetary compensation for some personal injury recognized by law. See *White v. Rapid Transit Lines, Inc.,* 192 Kan. 802, 806, 391 P.2d 148 (1964).

While an injured party may recover for consequential damages arising out of another party's failure to adequately perform under a contract, such damages are generally limited to foreseeable economic injury arising from the breach. See 22 Am.Jur.2d, Damages § 46. Damages for emotional distress arising from breach of contract are limited to situations in which emotional distress is a foreseeable consequence of the breach and is accompanied by physical symptoms of the emotional distress. 22 Am.Jur.2d, Damages § 48.

Although the plaintiff framed her factual allegations as breach of contract claims as well as negli-

gence claims, the plaintiff provides no evidence of diminution in value between the expected performance and the actual performance in order to recover under the contract. Rather, the only evidence of any damages provided by the plaintiff involves mental strain and emotional distress. As the plaintiff's contract claims do not arise from a breach of specific contract provisions but from an alleged violation of implied duties under the contract, these claims are indistinguishable from the plaintiff's negligence claims. We have already determined that these claims possess no legal merit and need not reconsider them in the guise of breach of contract. See *Robinson,* 23 Kan.App.2d at 823, 936 P.2d 784.

Violations of the Kansas Consumer Protection Act

***7** [12] In charging BFH with violations of the Kansas Consumer Protection Act (KCPA), the plaintiff alleged that BFH committed deceptive practices in the following respects: (1) that BFH misrepresented that Stevens was a licensed funeral director; (2) that BFH misrepresented that the plaintiff had approved embalming services; (3) that BFH misrepresented the plaintiff's need to purchase an oversized casket; and (4) that BFH failed to provide the plaintiff with a price list when she was considering the purchase of funeral services.

Generally, whether a deceptive act or practice, within the meaning of the KCPA, has occurred is a question of fact. However, summary judgment may be appropriate if there is no evidence of deceptive conduct. *Queen v. Lynch Jewelers, L.L.C.,* 30 Kan.App.2d 1026, 1038, 55 P.3d 914 (2002).

K.S.A.2003 Supp. 50-626 provides an incomplete list of deceptive acts and practices, which includes false representations and willful concealment or omission of material facts. K.S.A. 50-626(b)(1), (2), (3), (7). Whether a statement is presented as fact, opinion, or statement of intent is a question of law. *Wilkinson,* 269 Kan. at 218-19, 4 P.3d 1149. Having throughly examined the record, we conclude that none of the representations made by employees of BFH were factually false or misleading. Furthermore, the omissions related to Stevens' and Cole's lack of a funeral director's license were neither willful nor material. Consequently, the district court properly granted summary judgment on the plaintiff's KCPA claims for deceptive practices.

[13] Similarly, this court cannot conclude that BFH's conduct was unconscionable within the meaning of the KCPA. Whether a particular act constitutes an unconscionable act or practice is a question of law over which this court may exercise independent review. *State ex rel. Stovall v. DVM Enterprises, Inc.,* 275 Kan. 243, 249, 62 P.3d 653 (2003).

K.S.A.2003 Supp. 50-627(b) provides a list of circumstances that a court should consider in determining whether a transaction was unconscionable, including taking advantage of the consumer's inability to protect his or her own interests because of physical infirmity, ignorance, illiteracy, or inability to understand the agreement; grossly exceeding the price offered by the market for similar services; enticing a consumer to enter an agreement without any material benefit to the consumer; enticing a consumer to enter an agreement with knowledge that the consumer would be unable to pay or perform his or her obligations; inducing a consumer to enter an agreement heavily favoring the supplier; making a misleading statement of opinion upon which the consumer was likely to rely to his or her detriment; and attempting to exclude or limit legally imposed warranties.

We conclude that neither BFH's alleged failure to provide a price list during the initial funeral negotiations nor BFH's recommendation that the plaintiff purchase an oversized casket, under the circumstances provided in the record, constituted an unconscionable act within the meaning of the KCPA.

Intentional Infliction of Emotional Distress

***8** [14] The final basis for the plaintiff's action

against the defendants involved damages for the intentional infliction of emotional distress, otherwise known as outrage. In order to establish this cause of action, the plaintiff was required to demonstrate (1) that the defendant acted intentionally or in reckless disregard of the effect upon the plaintiff, (2) in a manner that was extreme and outrageous, (3) and which was causally connected, (4) to the plaintiff's extreme and severe mental distress. See *Ely v. Hitchcock,* 30 Kan.App.2d 1276, 1288, 58 P.3d 116 (2002).

As previously discussed, the plaintiff's evidence of emotional distress was insufficient to support a claim for negligent infliction of emotional distress. See *Ely,* 30 Kan.App.2d at 1289-90, 58 P.3d 116. Similarly, this evidence is insufficient to support a claim for intentional infliction of emotional distress. "[T]he emotional distress suffered by the plaintiff must be 'of such extreme degree the law must intervene because the distress inflicted was so severe that no reasonable person should be expected to endure it.' " *Ely,* 30 Kan.App.2d at 1288, 58 P.3d 116. Clearly, the district court properly granted summary judgment on the plaintiff's claims for intentional infliction of emotional distress, or outrage.

Motion to Amend

The plaintiff further contends the district court erred in prohibiting her from amending her petition to allege that BFH violated the KCPA by engaging Mr. Cole in the unlicensed practice of funeral directing.

Review of a district court's decision to permit or prohibit the amendment of a pleading is subject to an abuse of discretion standard. A decision regarding the amendment of pleadings will not be reversed unless the aggrieved party demonstrates that the decision affected its substantial rights. *Klose v. Wood Valley Racquet Club, Inc.,* 267 Kan. 164, 173, 975 P.2d 1218 (1999).

Even if the district court improperly prohibited an amendment to add the KCPA claim relating to Cole, the decision has not affected a substantial right of the plaintiff. As previously discussed, K.S.A. 65-1713b, governing the licensing of funeral directors, does not provide a private cause of action upon the violation of a statute. See *Nichols v. Kansas Political Action Committee,* 270 Kan. 37, 48, 11 P.3d 1134 (2000).

Moreover, we have already determined that BFH's failure to inform the plaintiff that Stevens was not a licensed funeral director did not constitute a deceptive practice within the meaning of the KCPA. Cole had less contact with the plaintiff than Stevens. Consequently, his failure to inform the plaintiff that he was not a licensed funeral director also does not constitute a violation of the KCPA. The district court's decision to deny the plaintiff's request to amend her complaint to add a KCPA claim was not reversible error.

The judgment of the district court is affirmed.

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83 P.3d 1270, 2004 WL 292124 (Kan.App.)

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