

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

JOHN ZAWADSKI AND JOHN GASPARI

PLAINTIFFS

VS.

CIVIL ACTION NO. 55CI1-17-cv-00019-CM

BREWER FUNERAL SERVICES, INC.
D/B/A PICAYUNE FUNERAL HOME,
TED BREWER AND HENRIETTA BREWER

DEFENDANTS

ANSWER AND DEFENSES OF BREWER FUNERAL SERVICES, INC.

COMES NOW Defendant Brewer Funeral Services, Inc. ("BFS"), by and through counsel, and files its answer and defenses to the Plaintiffs' Amended Complaint, as follows:

BFS denies all factual allegations contained in the first unnumbered paragraph of the Amended Complaint "Introduction." The legal conclusions, subjective beliefs and opinions asserted in this paragraph require no response but to the extent required they are denied.

PARTIES

1. BFS is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the Amended Complaint and therefore denies the same.
2. BFS is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Amended Complaint and therefore denies the same.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.

JURISDICTION AND VENUE

8. Admitted.
9. Admitted generally but BFS denies that it committed any substantial acts and/or omissions that caused Plaintiffs' damages, if any.

FACTUAL BACKGROUND

10. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 10 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 10.

11. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 11 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 11.

12. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 12 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 12.

13. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 13 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 13.

14. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 14 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 14.

15. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 15 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 15.

16. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 16 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 16.

17. BFS is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 17 and therefore denies the same. BFS denies all legal conclusions, subjective beliefs, and opinions that are contained in Paragraph 17.

18. BFS is without knowledge or information to form a belief as to the truth of the allegations of Paragraph 18 concerning John's "research" and therefore denies the same. BFS admits has a website on the internet which sets forth its services and facilities.

19. Admitted.

20. BFS denies the allegations of Paragraph 20.

21. BFS denies the allegations of Paragraph 21.

22. BFS denies the allegations of Paragraph 22.

23. BFS denies the allegations of Paragraph 23.

24. BFS denies the allegations of Paragraph 24.

25. BFS denies the allegations of Paragraph 25 except to admit that Bob died on May 11, 2016.

26. BFS denies the allegations of Paragraph 26.

27. BFS is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 27 and therefore denies the same.

28. BFS denies the allegations of Paragraph 28.

29. BFS denies the allegations of Paragraph 29.

30. BFS denies the factual allegations of Paragraph 30. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

31. BFS denies the factual allegations of Paragraph 31. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

32. BFS denies the factual allegations of Paragraph 32. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

33. BFS denies the factual allegations of Paragraph 33. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

34. BFS denies the factual allegations of Paragraph 34. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

35. BFS denies the factual allegations of Paragraph 35. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

36. BFS denies the factual allegations of Paragraph 36. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

37. BFS denies the factual allegations of Paragraph 37. The legal conclusions and subjective beliefs asserted in this paragraph require no response but to the extent one is required, they are denied.

FIRST CAUSE OF ACTION

Intentional Infliction of Emotion Distress

(By all Plaintiffs against all Defendants)

38. In response to the allegations of Paragraph 38, BFS incorporates by reference its responses to the preceding paragraphs.

39. BFS denies the allegations of Paragraph 39.

40. BFS denies the allegations of Paragraph 40.

41. BFS denies the allegations of Paragraph 41.

42. BFS denies the allegations of Paragraph 42.

43. BFS denies the allegations of Paragraph 43.

44. BFS denies the allegations of Paragraph 44.

SECOND CAUSE OF ACTION

Negligent Infliction of Emotion Distress

(By all Plaintiffs against all Defendants)

45. In response to the allegations of Paragraph 45, BFS incorporates by reference its responses to the preceding paragraphs.

46. BFS denies the allegations of Paragraph 46.
47. BFS denies the allegations of Paragraph 47.
48. BFS denies the allegations of Paragraph 48.
49. BFS denies the allegations of Paragraph 49.
50. BFS denies the allegations of Paragraph 50.
51. BFS denies the allegations of Paragraph 51.
52. BFS denies the allegations of Paragraph 52.
53. BFS denies the allegations of Paragraph 53.
54. BFS denies the allegations of Paragraph 54.
55. BFS denies the allegations of Paragraph 55.

THIRD CAUSE OF ACTION

Breach of Contract

(By all Plaintiffs against Defendant PFH)

56. In response to the allegations of Paragraph 56, BFS incorporates by reference its responses to the preceding paragraphs.
57. BFS denies the allegations of Paragraph 57.
58. BFS denies the allegations of Paragraph 58
59. BFS denies the allegations of Paragraph 59.
60. BFS denies the allegations of Paragraph 60.
61. BFS denies the allegations of Paragraph 61.
62. BFS denies the allegations of Paragraph 62.
63. BFS denies the allegations of Paragraph 63.

64. BFS denies the allegations of Paragraph 64.
65. BFS denies the allegations of Paragraph 65.
66. BFS denies the allegations of Paragraph 66.
67. BFS denies the allegations of Paragraph 67.

FOURTH CAUSE OF ACTION

Negligent Misrepresentation

(By all Plaintiffs against PFH)

68. In response to the allegations of Paragraph 68, BFS incorporates by reference its responses to the preceding paragraphs.

69. BFS denies the allegations of Paragraph 69 except to admit it has a website which sets forth its services and facilities.

70. BFS denies the allegations of Paragraph 70 except to admit it has a website which sets forth its services and facilities.

71. BFS denies the allegations of Paragraph 71.
72. BFS denies the allegations of Paragraph 72.
73. BFS denies the allegations of Paragraph 73.
74. BFS denies the allegations of Paragraph 74.

In response to last unnumbered paragraph of the Amended Complaint beginning with the word "WHEREFORE," Brewer Funeral Services, Inc. denies that Plaintiffs are entitled to the relief requested and to any relief whatsoever in the premises and demands to be dismissed with prejudice with its costs.

Having responded to each paragraph of the Amended Complaint, BFS pleads the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint was filed without substantial justification, is frivolous, and is groundless in fact and law and was filed for purposes other than to seek relief under Mississippi tort law. As such it should be dismissed with prejudice and BFS awarded its attorneys' fees and legal expenses.

SECOND AFFIRMATIVE DEFENSE

BFS moves to dismiss this action pursuant to Mississippi Rule of Civil Procedure 12(b)(6) because the Amended Complaint fails to state a claim against BFS upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

BFS pleads and affirmatively avails itself of any and all good faith defenses available to it under Mississippi Rule of Civil Procedure 12(b) and reserves the right to subsequently assert any defense which might be or become available as the case develops.

FOURTH AFFIRMATIVE DEFENSE

BFS affirmatively pleads any and all good faith defenses available to it under Mississippi Rule of Civil Procedure 8(c), specifically including, but not limited to estoppel, laches, the statute of frauds, contributory negligence, statute of limitations, waiver, assumption of the risk, payment, and accord and satisfaction.

FIFTH AFFIRMATIVE DEFENSE

The sole proximate cause of Plaintiffs' injuries and damages, if any, was the negligence of the Plaintiffs or other third parties for which BFS can have no liability and should be dealt with according to the law of contributory and/or comparative negligence.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' alleged claims and damages, if any, were caused by the independent acts and/or omissions of other parties over whom BFS had no control and such acts and/or omissions are not imputable to BFS. Such acts and/or omission of said third parties bar Plaintiffs' claims against BFS.

SEVENTH AFFIRMATIVE DEFENSE

No action or omission by BFS caused or contributed to Plaintiffs' alleged injuries or alleged damages, and therefore, BFS can have no liability, and is entitled to immediate dismissal with prejudice of all allegations against.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' alleged injuries and damages may be the result of a superseding, and/or intervening causes for which BFS can have no liability.

NINTH AFFIRMATIVE DEFENSE

Certain statutes and/or regulations allegedly relied upon by Plaintiffs were not enacted in effect at the relevant time.

TENTH AFFIRMATIVE DEFENSE

Certain statutes and/or regulations allegedly relied upon by Plaintiffs do not, as a matter of law, provide for a private cause of action.

ELEVENTH AFFIRMATIVE DEFENSE

BFS did not owe or breach any duty owed to Plaintiffs, nor did BFS violate any right or privilege to the Plaintiffs, and BFS is, therefore, not liable for damages in this matter.

TWELFTH AFFIRMATIVE DEFENSE

BFS affirmatively pleads an absence of reliance by Plaintiffs on the alleged acts and representations of BFS.

THIRTEENTH AFFIRMATIVE DEFENSE

BFS is not in privity with the Plaintiffs.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have not suffered any damages. Alternatively, Plaintiffs have failed to mitigate their alleged damages as required by law.

FIFTEENTH AFFIRMATIVE DEFENSE

BFS would show punitive damages cannot be justified against BFS in this case, for the following reasons:

(A) Any award of punitive damages to Plaintiffs against BFS would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States of America in that the basis for awarding punitive damages is vague, standardless, and not rationally related to any legitimate governmental interest.

(B) Any award of punitive damages to Plaintiffs against BFS would be violative of the procedural safeguards provided to BFS under the Fifth and Sixth Amendments to the Constitution of the United States of America (as applied to Mississippi and other individual states through the

Fourteenth Amendment to the Constitution of the United States of America) in that punitive damages are penal in nature.

(C) Any award of punitive damages to Plaintiffs against BFS would violate BFS's right to protection against "excessive fines" as provided in the Eighth Amendment to the Constitution of the United States of America (as applied to Mississippi and other individual states through the Fourteenth Amendment to the Constitution of the United States of America).

(D) Any award of punitive damages to Plaintiffs against BFS would violate the due process clause in Article 3, Section 14, of the Constitution of the State of Mississippi in that the basis for awarding punitive damages is vague, standardless, and not rationally related to any legitimate governmental interest.

(E) BFS raises all Mississippi statutes, Mississippi and Federal Court decisions and decisions of the United States Supreme Court in defense of the imposition of punitive damages and/or which limit the amount of such damages, including but not limited to all defenses raised and set forth in *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1598 (1996), *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001), and *State Farm Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). Plaintiffs' claims for punitive damages should, accordingly, be dismissed with prejudice.

(F) Moreover, BFS pleads the applicability of Miss. Code Ann. § 11-1-65, as amended, including, but not limited to, the evidentiary requirements contained therein and the limits on the amount of damages recoverable. There is no act or omission or any type of gross negligence or willful, wanton, reckless, or intentional conduct that would give rise to the imposition of punitive damages in this case or even the consideration of the same.

(G) BFS's alleged conduct was neither motivated by evil intent, motive, nor involved reckless or callous indifference to Plaintiffs' constitutional rights, if any.

SIXTEENTH AFFIRMATIVE DEFENSE

At all times relevant to the allegations in the Amended Complaint, BFS's conduct was not intentionally wilful, wanton, malicious, reckless or callous or in any way motivated by any intent to evoke outrage or revulsion or to harm Plaintiffs.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have no basis, under the American Rule, for an award of attorneys' fees against BFS.

EIGHTEENTH AFFIRMATIVE DEFENSE

The Amended Complaint fails to plead special damages with specificity as required by Mississippi Rule of Civil Procedure 9(g).

NINETEENTH AFFIRMATIVE DEFENSE

The Plaintiffs have failed to join one or more necessary and indispensable parties to the action.

TWENTIETH AFFIRMATIVE DEFENSE

BFS hereby gives notice that it intends to rely on such other and further defenses that may become available or apparent during discovery in this action and reserve the right to amend their answer to assert any such defenses. BFS also reserves the right to rely upon any defense pleaded by any co-defendant.

This the 28th day of March, 2017

Respectfully submitted,

BREWER FUNERAL SERVICES, INC.

BY: /s/ Silas W. McCharen
OF COUNSEL

SILAS W. MCCHAREN - BAR # 2213

smccharen@danielcoker.com

EMILY H. WILKINS - BAR # 104782

ewilkins@danielcoker.com

DANIEL COKER HORTON & BELL, P.A.

4400 OLD CANTON ROAD, SUITE 400

POST OFFICE BOX 1084

JACKSON, MISSISSIPPI 39215-1084

TELEPHONE: (601) 969-7607

FACSIMILE: (601) 969-1116

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading with the Clerk of the Court using the MEC filing system which sent notification of such filing to the following:

Robert B. McDuff, Esq.

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Elizabeth Littrell, Esq.
Lambda Legal Defense & Education Fund, Inc.
730 Peachtree Street, NE, Suite 640
Atlanta, GA 30308

Susan L. Sommer, Esq.
Lambda Legal Defense & Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005

This the 28th day of March, 2017.

/s/ Silas W. McCharen