

MOFFETT CEMETERY, INC.

PLAINTIFF

LYTLE HILLTOP CHAPEL, LLC, *et. al.*

DEFENDANTS

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND MEMORANDUM IN SUPPORT

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It is impossible for Defendants to prevail in this declaratory action, therefore comes now the Plaintiff, through counsel, and pursuant to CR 56.01, moves the Court for summary judgement. Plaintiff acknowledges the procedure as provided in Trimble Local Rule 2.4(A).

MEMORANDUM IN SUPPORT

I. SUMMARY JUDGEMENT STANDARD

CR 56.01 provides that Plaintiffs may move for a summary judgment upon all or any part of their claim. The purpose of the rule providing for summary judgment is to promote the expeditious disposition of cases and to avoid unnecessary trials when no genuine issue of any material fact is raised.<sup>1</sup> A motion for summary judgment may be based solely upon the pleadings and affidavits submitted by the parties, and it is not precluded by the denial contained in the answer of the Defendant.<sup>2</sup> When a motion for summary judgment is made as provided in CR 56, an adverse party may not rest upon

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<sup>1</sup> *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476, 480 (Ky. 1991).

<sup>2</sup> *Smith v. Hilliard*, 408 S.W.2d 440, 442 (Ky. App. 1966).

the mere allegations and denials of its pleadings, but the response must set forth specific facts showing there is a genuine issue for trial.<sup>3</sup> Once the movant has established its right to recovery, the opposing party must present, “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.”<sup>4</sup>

Summary judgment should be granted when, “as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor against the movant.”<sup>5</sup> Furthermore, when the adverse party cannot prevail, the court’s duty is to “render a judgment forthwith [as] there is no genuine issue as to any material fact and the moving party is entitled to Judgement as a matter of law.”<sup>6</sup>

## II. FACTS

The Moffett Cemetery Corporation was organized on March 22, 1882, for the purpose of, “...raising funds to purchase, improve, keep up and embellish said Cemetery ground and way.”<sup>7</sup> Moffett Cemetery was deeded its original parcel of land on October 2, 1898, and was deeded a second substantive parcel of land on September 19, 1978.<sup>8</sup>

Moffett Cemetery is a “community cemetery,” which is a designation signifying that it is not owned by a family, church or Trimble County. In this case, Moffett is owned by the lot owners and managed by the Moffett Cemetery Corporation as controlled by its articles of incorporation.<sup>9</sup>

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<sup>3</sup> 7 Clay, *Kentucky Practice*, 3<sup>rd</sup> Edition, Section 251.

<sup>4</sup> *Steelevest*, at 482.

<sup>5</sup> *Steelevest*, at 483, citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985).

<sup>6</sup> *Bennett v. Southern Bell Telephone & Telegraph Co.*, 407 S.W.2d 403, 405 (Ky. App. 1966).

<sup>7</sup> See Moffett Cemetery Company articles of incorporation attached as TAB A.

<sup>8</sup> Seed Deed attached as TAB B.

<sup>9</sup> See Moffett Cemetery Company articles of incorporation attached as TAB A.

In November of 2001, Moffett Cemetery's status as a community cemetery was confirmed in correspondence with the Kentucky Attorney General's Office. In response to statutory requirements regarding the pre-need sale of funeral services and cemetery plots, Donald Oakley, then an owner of a funeral home in Milton, inquired as to whether Moffett Cemetery was a "cemetery company" falling within the purview of the statute. The Attorney General's Office affirmed that Moffett Cemetery: "...operates non-profit, has no salaried employees in connection with the operation of the cemetery, is owned and controlled by the lot owners and does not sell any pre-need merchandise or services."<sup>10</sup>

Donald Oakley and Wilma Oakley, were in possession of some records for Moffett Cemetery that they kept stored in their funeral home, the Wood-Oakley Funeral Home, LLC. (hereinafter "Wood-Oakley") in Milton, Kentucky. On January 5, 2016, Wilma Oakley sold the funeral home to Mark Trevor Lytle. Whatever records held for Moffett Cemetery that were in Wood-Oakley's possession were transferred to Mark Trevor Lytle at the time of the sale.

The essential truth is this: Defendant Moffett Cemetery Board (distinguishable from Plaintiff "Moffett Cemetery Corporation") cannot demonstrate that it was *ever* properly constituted, staffed and functioned according to the articles of incorporation. At best, Defendant Lytle believes that the current Moffett Cemetery Board can trace its origins back to approximately 2010, although he is unable to verify this or point to any

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<sup>10</sup> See letter from Kentucky Attorney General at TAB C.

documentation to support his belief.<sup>11</sup>

The catalyst for the questions this declaratory action seeks to answer occurred on July 11, 2020. On that date the Defendant Board desecrated Moffett Cemetery: they removed almost all graveside mementos, American flags, floral arrangements and plants...and tossed it in a dumpster they rolled in especially for the occasion.

The community was stunned and outraged. A group of Trimble County citizens, distraught over the desecration and looking for an opportunity to address the Defendant Board about their concerns, became aware of an August 9, 2020, meeting of the Defendant Moffett Board at the Milton City Park.<sup>12</sup> At that meeting, dozens of people came to speak against the desecration that had occurred. People addressed the board for over 2.5 hours. At the end of that meeting, the Defendant Board agreed to meet on September 5, 2020, at the cemetery, but then the meeting was cancelled with no explanation.<sup>13</sup> The Defendant Moffett Board cancelled the meeting, upon information and belief, after hearing that this group of citizens were coming to again hold the Defendant Moffett Board accountable.

The Defendant Board met in secret, in violation of the articles of incorporation, on August 30, 2020.<sup>14</sup> Several citizens found out about the meeting and showed up unannounced. At this meeting the Defendant Board was presented with a copy of the articles of incorporation for Moffett Cemetery for their benefit. The Defendant Board

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<sup>11</sup> *Defendants Mark Trevor Lytle, Lytle Hilltop Chapel, LLC & Lytle Funeral Chapel, Inc., Response to Plaintiff's First Set of Discovery Requests*, answer to Interrogatory #3 at p. 2. Attached as TAB D.

<sup>12</sup> See August 9, 2020, meeting agenda, attached as TAB E.

<sup>13</sup> <https://www.facebook.com/Moffett-Cemetery-387512325065168/>.

<sup>14</sup> See Jan Hill's notes from her attendance at this meeting, attached as TAB F.

responded that they were appointed by Trimble County magistrates, although the Defendant Board has been unable to produce one shred of evidence in support of this assertion.

Rather than quietly go away, and based upon a reasonable belief that the Defendant Moffett Board was never properly constituted or populated, on September 5, 2020, approximately 35 Trimble County citizens held their own meeting and determined to properly create a board, pursuant to the Moffett Cemetery bylaws, to oversee Moffett Cemetery.<sup>15</sup> An invitation was issued to all for a subsequent meeting on September 16, 2020, for further organizational work.

This group met again on October 3, 2020, to set up rules for an election and accept nominations for a properly constituted board.<sup>16</sup>

On October 19, 2020, a meeting was held so that voters could meet the candidates for the board. The meeting was videotaped and posted on Facebook.<sup>17</sup> From this meeting Plaintiff began the process of distributing ballots, which were placed in the local newspaper, local libraries, posted on Facebook, mailed to eligible voters, placed in the Trimble County courthouse, local banks, churches, stores and laundromats.<sup>18</sup> The Plaintiff rented a post office box so that ballots could be submitted by mail.

On or about November 30, 2020, the newly formed committee received a Cease-and-Desist letter from counsel for Trevor Lytle<sup>19</sup>, attached as TAB D. In that letter,

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<sup>15</sup> See attendees list and agenda attached as TAB G.

<sup>16</sup> See agenda and moderator's notes attached as TAB H.

<sup>17</sup> <https://www.facebook.com/groups/323515415534816>.

<sup>18</sup> See a sample ballot, attached as TAB I.

<sup>19</sup> See 11/25/20 letter from attorney Joanne Pyc, attached as TAB J.

Lytle, through counsel, believed that the Defendant Moffett Board was the only legitimate cemetery board *and that he owned Moffett Cemetery, a position he has since retracted.*

The Moffett Cemetery, Inc., nonetheless persevered. On December 8, 2020, the votes were counted and December 9, 2020, the first meeting of the Moffett Cemetery, Inc., was held.<sup>20</sup> On December 15, 2020, the board registered with the Kentucky Secretary of State.<sup>21</sup> The board, on January 13, 2021, received a federal EIN #.<sup>22</sup> They then registered as a corporation.<sup>23</sup> Board meetings are scheduled for the second Thursday of each month and have been held continuously since January 14, 2021. On February 4, 2021, the Moffett Cemetery, Inc., sent in their membership application to the Kentucky Cemetery Association. Upon successful resolution of the declaratory action, Plaintiff can complete its application for non-profit status.<sup>24</sup>

**III. DEFENDANTS FAILED TO PRODUCE ANY PROOF THAT THE DEFENDANT BOARD WAS OR IS CONSITITUTED AND ACTS BASED UPON ANY COMPLIANCE WITH ANY PORTION OF THE MOFFETT CEMETERY CORPORATION'S ARTICLES OF INCORPORATION.**

**A. The Lytle Defendants**

Lytle initially asserted, pre-litigation, that he owned Moffett Cemetery<sup>25</sup>, but later Lytle corrected himself to say that he serves the Defendant Board in an advisory capacity, serves as caretaker of the Defendant Board's records and believes that the

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<sup>20</sup> See agenda and minutes attached as TAB K.

<sup>21</sup> See attached TAB L.

<sup>22</sup> See attached TAB M.

<sup>23</sup> See attached TAB N.

<sup>24</sup> See attached TAB O, demonstrating that at present the corporation is still responsible for paying taxes until it receives tax-exempt status.

<sup>25</sup> See letter from Joanne Pyc, Lytle's original counsel, attached as TAB J.

present Defendant Board was formed in 2010, although he produced no documents to support that belief.<sup>26</sup> Lytle asserted that he was without sufficient information to determine whether or not anyone associated with Moffett Cemetery, including the Defendant Board, has complied with the articles of incorporation as it relates to the formation, reconstitution or restaffing of the Defendant Board.<sup>27</sup>

#### B. Moffett Cemetery Board

When asked how the current Defendant Board was established, the Defendant Board replied:

In 2019, Trevor Lytle contacted Aaron Snelling who began soliciting volunteers willing to sit on the Board for Moffett Cemetery to tend to the cemetery. Prior to Lytle's purchase of Wood-Oakley Funeral Home, John Cleveland, Aaron Snelling and Terry Willis had previously served on the Board, along with Diana Sharber's father Norvel Barnes, Terry Coffin and Diana joined the board in 2019.<sup>28</sup>

This response is wholly inconsistent with the articles of incorporation, which requires an original election to be held in June of each year (unless the date is changed by an amended article) to elect five members who are then divided by lot into three classes of membership, and the class determines the number of years of service, and in subsequent years, each June, elections are held among lot owners and their family members to determine who will fill the spots of members rotating off.<sup>29</sup>

Defendant Board failed to produce even one page that demonstrated compliance

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<sup>26</sup> *Defendants Mark Trevor Lytle, Lytle Hilltop Chapel, LLC, and Lytle Funeral Chapel, Inc., Response to Plaintiff's First Set of Discovery Requests*, at 1-3. Attached as TAB D.

<sup>27</sup> *Defendants Mark Trevor Lytle, Lytle Hilltop Chapel, LLC, and Lytle Funeral Chapel, Inc., Response to Plaintiff's Request for Admissions*, at 1-2. Attached as TAB D.

<sup>28</sup> *Defendant Moffett Cemetery Board's Answers to Interrogatories and Requests for Production Propounded Upon It by Plaintiff*, at 3. Attached as TAB P.

<sup>29</sup> *Moffett Cemetery Company's articles of incorporation*, at 2. Attached as TAB A.

with its own articles controlling the manner of constituting the board. The board meeting minutes provided in discovery reflect that the first meeting of the present Defendant Board occurred on February 11, 2021.<sup>30</sup> The date is noteworthy in that it was one week after the Plaintiff filed their application for membership with the Kentucky Cemetery Association and the minutes from that meeting give no indication that the board was created and operating according to its articles. In fact, there were *zero* documents produced that reflect that the Defendant Board was ever cognizant of, or required to abide by, the articles of incorporation.

When asked if the cemetery was ever abandoned, the question implying that history may have required re-creating the board according to the articles, the Defendant Board replied:

The cemetery was never abandoned. Day to day operations were tended to by Wood-Oakley Funeral Home for some time. At all times the cemetery has either been managed by a volunteer board or with the assistance of local funeral homes.<sup>31</sup>

Additionally, it should be noted that the articles of incorporation require that Moffett Cemetery Corporation function as a non-profit. Defendant Moffett Cemetery Board has never registered the cemetery as a non-profit and, conversely, they have never paid a penny in taxes. Their discovery responses, including the inability to produce even one page proving that the Defendant Board was created and is operating consistently within its own articles, demonstrate that there is no issue of fact regarding

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<sup>30</sup> *Defendant Moffett Cemetery Board's Answers to Interrogatories and Requests for Production Propounded Upon It by Plaintiff*, at 7. Attached as TAB P.

<sup>31</sup> *Id.*, at 4.

who owns and controls Moffett Cemetery.

## CONCLUSION

Plaintiff has demonstrated that there is no issue of material fact to be determined in this case. The Lytle defendants and the Defendant Moffett Board have produced zero proof as to awareness of, or compliance with, the articles of incorporation. Conversely, the Plaintiff is, based upon the Defendants' discovery responses, including document production, the only body cognizant of and compliant with the articles of incorporation in the entire modern history of the cemetery. Plaintiff asks this Court to grant summary judgment in favor of the Plaintiff, and in its order specify the following:

1. That Moffett Cemetery, a community cemetery, is owned by the lot owners and their families pursuant to the articles of incorporation;
2. That Plaintiff, the Moffett Cemetery, Incorporated, as a board properly constituted according to the articles of incorporation, is the rightful party to manage Moffett Cemetery;
3. That the Defendant Moffett Cemetery Board immediately cease all operations (including the sale of burial lots), disband, and transfer all materials (including but not limited to deeds, bank statements, maps, correspondence, and any other object or document related to Moffett Cemetery), in whatever form, to the Moffett Cemetery, Inc., within 30 days of the entry of summary judgment;
4. That the Defendant Moffett Cemetery Board freeze all of its accounts and transfer all funds, regardless of where held, to the Plaintiff within 30 days of the entry of summary judgment;

5. That Trevor Lytle and the Lytle defendants transfer all materials (including but not limited to deeds, bank statements, maps, correspondence, and any other object or document related to Moffett Cemetery), in whatever form, to the Moffett Cemetery, Inc., within 30 days of the entry of summary judgment;
6. That the Lytle defendants cease the sale of Moffett Cemetery lots as the Plaintiff will be the only legal entity capable of selling them.
7. Any/all additional relief the Plaintiff appears entitled to;
8. Any/all orders the Court determines would be appropriate in furtherance of its summary judgment determination.

Respectfully submitted,

JAMES & WELLS PSC

/s/ Ben Wyman

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#### CERTIFICATION

The above signature hereby certifies that this document was electronically filed via AOC's Kye-Courts system on March 2, 2022, with copies emailed to the following this same day:

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