

1988

# George K. Schoney and Erma J. Schoney, et al., v. Memorial Estates, Inc., et al. : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Earl Jay Peck; Stephen L. Henriod; Nielsen and Senior; Counsel for Respondents.

Daniel F. Bertch; Robert J. Debry; Robert J. Debry and Associates; attorneys for appellant.

---

## Recommended Citation

Brief of Respondent, *Schoney v. Memorial Estates*, No. 880630 (Utah Court of Appeals, 1988).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/1410](https://digitalcommons.law.byu.edu/byu_ca1/1410)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
KFU  
50  
.A10  
DOCKET NO.

88 0630

---

IN THE UTAH COURT OF APPEALS

---

GEORGE K. SCHONEY and ERMA J.	)	
SCHONEY, et al.,	)	BRIEF OF THE RESPONDENTS
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. 880630-CA
	)	
MEMORIAL ESTATES, INC., et al.,	)	
	)	Category No. 14(b)
Defendants/Respondents.	)	

---

---

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY

JUDGE RICHARD H. MOFFAT

---

Earl Jay Peck  
Stephen L. Henriod  
Nielsen & Senior  
Counsel for Respondents  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 532-1900

Daniel F. Bertch  
Robert J. DeBry  
Robert J. DeBry & Associates  
Counsel for Appellant  
4001 South 700 East, Suite 500  
Murray, Utah 84107  
Telephone: (801) 262-8915

---

IN THE UTAH COURT OF APPEALS

---

GEORGE K. SCHONEY and ERMA J.	)	
SCHONEY, et al.,	)	BRIEF OF THE RESPONDENTS
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. 880630-CA
	)	
MEMORIAL ESTATES, INC., et al.,	)	
	)	Category No. 14(b)
Defendants/Respondents.	)	

---

---

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY

JUDGE RICHARD H. MOFFAT

---

Earl Jay Peck  
Stephen L. Henriod  
Nielsen & Senior  
Counsel for Respondents  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 532-1900

Daniel F. Bertch  
Robert J. DeBry  
Robert J. DeBry & Associates  
Counsel for Appellant  
4001 South 700 East, Suite 500  
Murray, Utah 84107  
Telephone: (801) 262-8915

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
JURISDICTION . . . . .	1
NATURE OF THE PROCEEDINGS . . . . .	1
ISSUES PRESENTED . . . . .	1
DETERMINATIVE STATUTES AND RULES . . . . .	2
STATEMENT OF THE CASE . . . . .	3
COURSE OF PROCEEDINGS AND DISPOSITION . . . . .	5
STATEMENT OF FACTS . . . . .	10
SUMMARY OF ARGUMENT . . . . .	15
ARGUMENT . . . . .	16
POINT I           PLAINTIFF FAILED TO SUBMIT FACTS TO THE TRIAL COURT SUFFICIENT TO PROVIDE A GENUINE ISSUE OF MATERIAL FACT AND FAILED TO CONTROVERT THE FACTS SUBMITTED BY MEMORIAL ESTATES . . . . .	16
POINT II          PLAINTIFF'S ARGUMENTS ARE MOOT BECAUSE THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S FIFTH AMENDED COMPLAINT BECAUSE OF PLAINTIFF'S FAILURE TO ANSWER DEFENDANTS' FOURTH SET OF INTERROGATORIES . . . . .	25
POINT III         THE "FACTS" STATED IN PLAINTIFF'S STATEMENT OF FACTS WERE NOT BEFORE THE TRIAL COURT AND ARE NOT PART OF THE RECORD ON APPEAL . . . . .	30
POINT IV          GEORGE K. SCHONEY WAS PROPERLY DISMISSED AS A PARTY . . . . .	32
POINT V           PLAINTIFF IS LIMITED ON APPEAL TO THOSE ARGUMENTS CONTAINED IN APPELLANT'S BRIEF . . . . .	34
CONCLUSION . . . . .	35

# TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE</u>
<u>Berkeley Bank v. Meibos</u> , 607 P.2d 798, 801 (Utah 1980) . . . . .	19
<u>Cheever v. Schramm</u> , 577 P.2d 951, 954 (Utah 1978) . . . . .	19
<u>Conder v. A.L. Williams &amp; Associates, Inc.</u> , 739 P.2d 634 (Utah App. 1987) . . . . .	30, 31
<u>Lecky v. Warren</u> , 635 S.W.2d 752, (Tex. App. 1982) . . . . .	35
<u>Merrill Lynch, Peirce, Fenner &amp; Smith, Inc. v. Echols</u> , 138 Ga. App. 593, 226 S.E.2d 742, 743 (1976) . . . . .	28
<u>Pace v. Parrish</u> , 122 Utah 141, 144-145, 247 P.2d 273, 274-75 (1952) . . . . .	19
<u>People v. Dougherty</u> , 188 Cal. Rptr. 123 (Dist. Cal. 1982) . . . . .	34, 35
<u>Rice, Melby Enterprises, Inc. v. Salt Lake County</u> , 646 P.2d 696, 698 (Utah 1982) . . . . .	20
<u>Samms v. Eccles</u> , 11 Utah.2d 289, 358 P.2d 344 (1961) . . . . .	23
<u>State v. Eder</u> , 704 P.2d 465, 469 (N.M. App. 1985) . . . . .	34
<u>Thompson v. Ford Motor Co.</u> , 14 Utah 2d 334, 384 P.2d 109 (1963) . . . . .	31
<u>W.W. &amp; W.B. Gardner, Inc. v. Park West Village, Inc.</u> , 568 P.2d 734 (Utah 1977) . . . . .	27, 28, 29

<u>RULES CITED</u>	<u>PAGE</u>
Rule 37, Federal Rules of Civil Procedure . . . . .	27
Rule 9, Rules of the Utah Court of Appeals . . . . .	34
Rule 11, Rules of the Utah Court of Appeals . . . . .	10
Rule 4-501, Utah Code of Judicial Administration . . . . .	10
Rule 4-502, Utah Code of Judicial Administration . . . . .	10
Rule 25(a), Utah Rules of Civil Procedure . . . . .	1, 3, 8, 16, 32, 33
Rule 9, Utah Rules of Civil Procedure . . . . .	20
Rule 33, Utah Rules of Civil Procedure . . . . .	26, 28
Rule 37, Utah Rules of Civil Procedure . . . . .	1, 4, 15, 27, 28, 29, 30
Rule 56(e), Utah Rules of Civil Procedure . . . . .	31
Rule 68, Utah Rules of Civil Procedure . . . . .	6
Utah Code Annotated, Section 8-4-2 . . . . .	13
Utah Code Annotated, Section 22-4-1 . . . . .	8, 16, 22
Utah Code Annotated, Section 78-2-2(3)(j) . . . . .	1
Utah Code Annotated, Section 78-2-2(4) . . . . .	1
Utah Code Annotated, Section 78-12-25 . . . . .	19, 24
Utah Code Annotated, Section 78-12-25.5 . . . . .	19

## JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Annotated, Sections 78-2-2(3)(j), as amended, and 78-2-2(4), as amended.

## NATURE OF PROCEEDINGS

Plaintiff Erma J. Schoney (hereinafter "plaintiff") appeals from the trial court decision granting summary judgment to defendants Memorial Estates, Inc. and Memorial Estates Cemetery Development Corp. ("Memorial Estates") for failure to present in the record sufficient substantive material and relevant evidence to support her causes of action. The trial court found that Memorial Estates did not breach its contract with plaintiff and was in compliance with Utah State statutes, and that plaintiff's other claims were time-barred. Plaintiff further appeals the trial court decision dismissing George K. Schoney from the case for failure to substitute a party after his death was suggested on the record, pursuant to Rule 25 of the Utah Rule of Civil Procedure.

## ISSUES PRESENTED

1. The trial court did not abuse its discretion in ruling that plaintiff failed to present in the record substantive material and relevant evidence to support her causes of action and controvert the material and relevant evidence presented by Memorial Estates in its Motion for Summary Judgment.

2. George K. Schoney was properly dismissed as a party plaintiff after more than 90 days had elapsed after his death was suggested on the record.

3. In light of plaintiff's request for an expedited trial setting, the trial court did not abuse its discretion when it struck plaintiff's complaint and entered judgment in favor of Memorial Estates under Rule 37(d) based on plaintiff's failure to respond to discovery:

- a) Within 30 days;
- b) Before the discovery cut-off;
- c) Prior to defendants' motion for sanctions; and,
- d) Plaintiff's failure to either request additional time, object or explain the failure to answer.

DETERMINATIVE STATUTES AND RULES

Section 22-4-1, Utah Code Annotated (before 1983 amendment)

Section 78-12-25, Utah Code Annotated, as amended

Rule 25(a), Utah Rules of Civil Procedure

Rule 37(d), Utah Rules of Civil Procedure

Rule 56(e), Utah Rules of Civil Procedure

The above rules and statutes are set out in full in the appendix hereto.



### STATEMENT OF THE CASE

Plaintiff has sued Memorial Estates for damages she claims arise out of her purchase of a pre-need contract for space in a mausoleum which was to be built in the future. She claims that Memorial Estates intentionally and fraudulently delayed construction of the now completed mausoleums. She alleges that the buildings do not appear as she believed they would appear when she purchased them. She further claims that the purchase funds were not properly accounted for and held in trust during the period of construction. Finally, she alleges that Memorial Estates wrongfully failed to disinter and move her father's remains when she requested it.

Memorial Estates claims they have either fully performed all duties under the contract, or that they were able to perform had performance been requested. Memorial Estates further asserts that the claim that they failed to disinter Mr. Wheeler is spurious and time-barred.

Plaintiff appealed the determinations by the trial court that: (1) Memorial Estates was entitled to summary judgment on all of the causes of action contained in plaintiff's Fifth Amended Complaint for the reason that there was an absence of evidence to withstand defendants' motion; and, (2) George K. Schoney's dismissal from the action pursuant to Rule 25 of the Utah Rules of Civil Procedure was proper, due to his death and the failure to substitute a party in his stead.

It is defendants' position that the trial court did not abuse its discretion, and (1) plaintiff failed to show sufficient evidence to support her case and withstand the facts and argument supporting the Motion for Summary Judgment; (2) George K. Schoney's death was suggested on the record without substitution and he was accordingly properly dismissed; and, (3) the court acted within its discretion in striking plaintiff's complaint for failure to answer defendants' interrogatories. Plaintiff has not argued that dismissal was improper. Plaintiff has therefore waived any argument to the contrary.

### COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiff and George K. Schoney originally filed a complaint on June 17, 1982, alleging:

- a) A class action;
- b) Tortious bad faith;
- c) Breach of contract;
- d) Fraud; and,
- e) Violation of the Utah Consumer Sales Practices

Act. (R. at 2-11)

Memorial Estates filed an Answer denying the allegations in support of each cause of action. (R. at 39-44) Plaintiff and George K. Schoney pursued their discovery from 1982 to 1988. Plaintiff and George K. Schoney amended their complaint June 8, 1983 to allege:

- a) Tortious bad faith (failure to complete mausoleum);
- b) Breach of contract (failure to complete mausoleum);
- c) Fraudulent conveyance;
- d) Violation of Utah Consumer Sales Practices Act;
- e) Breach of contract to provide chapel;
- f) Breach of trust;
- g) Breach of statutory trust;
- h) Invasion of trust corpus;
- i) Fraud;
- j) Failure to establish a statutory trust;
- k) Outrage and intentional infliction of emotional distress (failure to complete mausoleum); and,
- l) Class allegations.

(R. at 292-308) (Appendix, Exhibit "A")

Plaintiff alleged the class action was certified, (R. at 202-204), but when evidence failed to support the certification, it was decertified on June 24, 1984. (R. at 704-705)

#### A. Summary Judgment

On December 29, 1987, defendants moved for summary judgment. (R. at 1200-1225, 1189-1190, 1191-1193, 1198-1199) (Appendix, Exhibits "B," "C," "D" and "E") The motion

demonstrated there was insufficient evidence to support any of plaintiff's causes of action. Therefore, because there was no genuine issue of material fact at issue, defendants were entitled to judgment as a matter of law.

Plaintiff opposed the motion, filing an affidavit raising new issues. (R. at 1262-1265) (Appendix, Exhibit "F") The court denied defendants' motion and granted plaintiff leave to amend the complaint and to address the new issues and narrow the issues before the Court. The court, on its own Motion, continued the trial date. (R. at 1301) (Appendix, Exhibit "G")

On January 26, 1988, plaintiff filed her Fifth Amended Complaint, alleging:

- a) Breach of contract for delayed performance;
- b) Breach of warranty;
- c) Common law fraud;
- d) Violation of the Utah Consumer Sales Practices Act;
- e) Breach of contract, unjust enrichment, interference with easement;
- f) Breach of common law trust;
- g) Breach of statutory trust;
- h) Invasion of trust corpus;
- i) Failure to establish a statutory trust;
- j) Outrage and intentional infliction of emotional distress (disinterment of Mr. Wheeler); and,
- k) Class allegations.

(R. at 1312-1342) (Appendix, Exhibit "H")

On February 11, 1988, defendants answered again and denying the allegations in support of the Fifth Amended Complaint.

(R. at 1343-1357)

Defendants had offered judgment in the sum of \$4,000.00, pursuant to Rule 68 of the Utah Rules of Civil Procedure on January 8, 1988, after the Fifth Amended Complaint

was filed. (R. at 1294-1295) The tender was renewed February 11, 1988. (R. at 1359-1359) Neither offer was accepted.

On February 17, 1988, pursuant to plaintiff's express request for an expedited trial date, (R. at 1338-1341), the court ordered a scheduling conference. (R. at 1360) Although plaintiff's attorneys did not appear at the scheduling conference and were not available by telephone, (R. at 1360), the court granted the request for an expedited schedule and set the following schedule:

Discovery cutoff, June 10, 1988;

Motion cutoff, June 17, 1988;

Final pre-trial, June 21, 1988; and,

Trial, July 6 and 7, 1988.

Memorial Estates submitted Defendants' Fourth Set of Interrogatories to plaintiff by mail on April 29, 1988, addressing the new claims raised in plaintiff's Fifth Amended Complaint. (R. at 1361-1362) Plaintiff never responded, either by answer, objection or request for more time prior to defendants' motion for sanctions. On June 14, 1988, Memorial Estates moved for Summary Judgment, together with a Motion to Strike plaintiff's complaint and enter judgment against plaintiff, based upon plaintiff's failure to answer the interrogatories within the cut-off period and faced with an expedited trial setting of July 6.

The parties agreed to extend the time to hear pre-trial motions to June 21, 1987. (R. at 1365)

On June 21st, at the hearing on defendants' motions, plaintiff's attorneys hand-delivered to counsel for Memorial Estates plaintiff's purported answers to Defendants' Fourth Set of Interrogatories. Memorial Estates did not have the benefit of said interrogatory answers in connection with its Motion for Summary Judgment or its preparation for trial.

The court, after hearing argument, granted both defendants' Motion for Summary Judgment and Motion to Strike. (R. at 1377-1379) (Appendix, Exhibit "I")

B. Death of Plaintiff George K. Schoney.

At the June 21, 1988 hearing, the court also dismissed George K. Schoney as a party, inasmuch as his death had been suggested on the record in Plaintiff's Answers to Interrogatories, (copies of Plaintiff's Answers to Interrogatories were filed with defendants' Motion for Summary Judgment on December 29, 1987. (R. at 1217) Thereafter, no party was substituted for him, pursuant to Rule 25 of the Utah Rules of Civil Procedure. (R. at 1377-1379)

Plaintiff argues in her brief that the trial court erred in granting summary judgment on only a portion of her claims. She claims the record contains sufficient evidence to preclude the granting of summary judgment with respect to the following causes of action:

1. Breach of Utah Code Ann. § 22-4-1 (75% trust);
2. Breach of contract by delay;

3. Breach of warranty regarding appearance of mausoleum;
4. Breach of contract for availability of chapel;
5. Common law fraud; and,
6. Intentional infliction of emotional distress for refusal to disinter Mr. Wheeler.

Plaintiff further argues that the death of George K. Schoney was not properly suggested on the record, and therefore, he should not have been dismissed.

The pleadings contain no significant admissions regarding material facts. The only material facts which were drawn to the attention of the trial court in connection with the **dispositive** motions are those stated in the attachments to Defendants' Memorandum in Support of Motion for Summary Judgment and in the affidavits of John MacKay, Kenith M. Hughes and Warren J. Christensen supporting defendants' Motion for Summary Judgment and those stated in the Affidavit of Erma Schoney opposing said Motion.

The alleged statements of fact in Appellant's Brief (excepting those statements from plaintiff's affidavit) were not raised in connection with defendants' Motion for Summary Judgment filed December 27, 1987, defendants' Motion for Summary Judgment filed June 14, 1988, or any other proceeding. These statements are not supported by the Record on Appeal. A majority of plaintiff's alleged facts are taken from the

unfiled and unpublished depositions of plaintiff, George K. Schoney and other individuals, which plaintiff failed to make available to the trial court as required by Rule 4-501 and 4-502 of the Utah Code of Judicial Administration. Furthermore, these depositions have not been made part of the record on appeal by plaintiff, as required by Rule 11 of the Rules of the Utah Court of Appeals.

Memorial Estates therefore submits the following statement of facts which were properly before the trial court and supported by the record on appeal.

#### STATEMENT OF FACTS

Clinton and Anna Wheeler, plaintiff's parents, owned four ground burial lots located at Memorial Estates Redwood Road Cemetery. (R. at 1191-1192) On December 29, 1973, the Wheelers gave two of their ground burial lots to plaintiff and her husband, George Schoney. (R. at 1169, 1192) The Wheelers and Schoneys subsequently traded in their ground burial lots as down payments toward the purchase of pre-need mausoleum spaces from Memorial Estates. (R. at 1192) Plaintiff and her husband entered into the "Mausoleum Estate Agreement" (hereinafter "Agreement") on January 29, 1974, made the first payment under the Agreement in February 1974 and continued making monthly payments for 36 months until the contract price was paid in full in January of 1977. (R. at 65, 111-112, 1192)

Clinton Wheeler died August 13, 1974, prior to the time that either Memorial Estate's mausoleum at Redwood Road or at Mountain View were completed, and his funeral services were



held at the Memorial Estates' Chapel, located at 5858 South 900 East, Murray, Utah. (R. at 241, 1192, 1203) No crypt was then available at the Mountain View mausoleum, and so, at the request of the family, his remains were interred at the Mountain View location in a ground burial plot. (R. at 1192) This was in accordance with the Agreement which provided that if a client died before the construction of the pre-need mausoleum crypt was completed, Memorial Estates would offer an alternative mausoleum location or interment in a ground burial plot. If the latter option was chosen, the family would have the right to have the deceased's remains relocated to the designated crypt, upon its completion, at Memorial Estates' expense. (R. at 10, 409)

Mrs. Wheeler passed away on May 22, 1982. Memorial Estates' services and facilities were not requested, and Mrs. Wheeler was interred at a mausoleum having no relationship with defendants (Sunset Lawn). At the family's request, Mr. Wheeler's remains were disinterred from the Mountain View ground plot vault and re-interred at the mausoleum at Sunset Lawn on the day of Mrs. Wheeler's funeral. (R. at 1192, 1271)

Plaintiff and her husband, George K. Schoney, also purchased mausoleum spaces at the mausoleum when her parents, the Wheelers had purchased spaces. (R. at 244) In 1976, Memorial Estates completed a 128 space mausoleum at the Memorial Estates' Redwood Cemetery. The Redwood Mausoleum is part of Memorial Estates' pre-need program. The mausoleum

remains only partially filled. (R. at 173, 352) Additional crypts will be added as the need arises. (R. at 408) In April 1985, Memorial Estates also completed a 276 space mausoleum at the Memorial Estates' Mountain View Cemetery, where plaintiff claims she wanted her spaces to be. Spaces have also been available in this mausoleum at all times since completion, but further additions will be built as the need may arise. (R. at 74, 173, 1192) In addition, Memorial Estates has held separate and reserved specific mausoleum spaces for plaintiff and her husband at its Redwood Road Cemetery since at least January 1977. (R. at 1191-1193)

Plaintiff's husband, George K. Schoney, died February 19, 1986, after Memorial Estates had completed construction of both the Redwood Road and the Mountain View mausoleums. However, George K. Schoney was also interred at the mausoleum space at Sunset Lawn as had plaintiff's parents, Mr. and Mrs. Wheeler. (R. at 1217-1218) Plaintiff has never requested the use of Memorial Estates' facilities and services in connection with any lot, space or contract right owned by her. (R. at 583, 1192) She has made it clear that with respect to Mr. Schoney's death, or her own, (R. at 1219-1221), she has never intended to utilize the mausoleum space available at either Mountain View or Redwood Road, or Memorial Estates' chapels. Plaintiff had never made a request upon Memorial Estates for the use of a chapel or other facilities either at, or following Mr. Schoney's death. (R. at 1221)

Memorial Estates has always been ready, willing, and able to provide plaintiff with interment spaces in any of its completed mausoleums. Further, Memorial Estates has always been ready, willing, and able to provide plaintiff with the use of a chapel upon request as provided by the contract. (R. at 10, 146, 583)

By statute, Memorial Estates is required to retain certain funds for cemetery endowment care. There are sufficient funds for the cemeteries and mausoleums operated by Memorial Estates at both the Redwood and Mountain View locations. This fact has not been contested by plaintiff. (R. at 353, 358-359, 1199) Memorial Estates has complied fully and completely with the statutes and regulations of the State of Utah regarding cemeteries and mausoleums. (R. at 1190) In addition, Memorial Estates' endowment care contains sufficient funds to meet the requirements of Utah Code Ann. § 8-4-2. (R. at 1199)

The only documents containing averments of fact which were part of the record before the trial court were interrogatory answers, responses to requests for admission, affidavits and the depositions of Delmar Holt, Jr. and Richard Bentley, (both unsealed) as set forth below:

Document

Record  
Page No(s).

Answers to Plaintiffs' First Set  
of Interrogatories to Defendant  
Memorial Estates, Inc.

45-49

<u>Document</u>	<u>Record Page No(s).</u>
Answers to Second Set of Plaintiffs' Interrogatories	50-108
Affidavit of Kenith Hughes	141-145
Counter Affidavit of George Schoney	148-149
Affidavit of Kenith Hughes	173-176
Answers to Defendants' First Set of Interrogatories	236-250
Answers to Defendants' Request for Admissions	251-256
Answers to Defendants' Second Request for Admissions	352-355
Answers to Defendants' Second Set of Interrogatories	356-364
Affidavit of Delmar Holt, Jr.	405-406
Affidavit of Kenith Hughes	407-409
Affidavit of Kenith Hughes	582-584
Affidavit of Paul Moore	992-994
Affidavit of John MacKay	1189-1190
Affidavit of Kenith M. Hughes	1191-1193
Affidavit of Warren J. Christensen	1198-1199
Affidavit of Erma Schoney	1262-1265
Affidavit of Erma Schoney	1271-1274
Deposition of Delmar Holt, Jr.	1399
Deposition of Richard Bentley	1400

Assertions in the Statement of Facts submitted by  
plaintiff appear to raise questions regarding such matters as

representations by Memorial Estates' salespeople, release of Mr. Wheeler's remains for removal to Sunset Lawn and discussions plaintiff alleges took place with unnamed persons on the mausoleum construction sites. As stated above, those assertions come solely from unfiled depositions, and cannot be rebutted by facts contained in the record. Unfortunately, those assertions will have been reviewed before the arguments pointing out why those assertions are not properly before the Court. Therefore, defendants, submit that in the event the Court finds said assertions worthy of consideration, for any reason, the depositions should be located, filed and reviewed in their entirety, in which case, the Court will find that (1) there is no foundation for many assertions, and (2) the assertions do not rise to the level of issues of material fact.

#### SUMMARY OF ARGUMENT

1. Plaintiff failed to submit sufficient relevant evidence to the trial court to withstand defendants' motion for summary judgment with the affidavits submitted in support thereof.

2. The trial court properly entered judgment against plaintiff pursuant to Rule 37(d) of the Utah Rules of Civil Procedure, and plaintiff has failed to argue that said entry of judgment was improper.

3. The suggestion of George K. Schoney's death, made by plaintiff's interrogatory answer in the course of this

matter was sufficient to satisfy Rule 25 of the Utah Rules of Civil Procedure.

### ARGUMENT

#### I

PLAINTIFF FAILED TO SUBMIT FACTS TO THE LOWER COURT  
SUFFICIENT TO PROVIDE A GENUINE ISSUE OF MATERIAL  
FACT AND FAILED TO CONTROVERT THE FACTS  
SUBMITTED BY MEMORIAL ESTATES.

Plaintiff does not address the trial court's ruling on five of the causes of action in Plaintiff's Fifth Amended Complaint, (R. at 12-42), apparently accepting the trial court's ruling on those causes of action.

Those causes of action that are argued in plaintiff's brief from Plaintiff's Fifth Amended Complaint include the following: "Breach of Contract for Delayed Performance," "Breach of Warranty" regarding mausoleum appearance, "Common Law Fraud," "Breach of Contract" for availability of chapel; "Breach of Utah Code Ann. § 22-4-1 (75% trust)," and "Outrageous & Intentional Infliction of Emotional Distress" for refusal to disinter Mr. Wheeler. With respect to each of those causes of action, plaintiff failed to show sufficient evidence to support the claim, and failed to controvert those facts submitted by Memorial Estates in defense of the claim.

A. Plaintiff failed to produce evidence that Memorial Estates had breached the Schoney's contract.

Plaintiff claims that Memorial Estates failed to perform its contractual obligations. The facts in the record

reveal that Memorial Estates has fully performed its contractual obligations.

Those obligations are:

- 1) To provide rights to mausoleum crypts for Mr. and Mrs. Schoney;
- 2) To construct a mausoleum;
- 3) To bury, disinter and place remains in mausoleum if space was not constructed at time of death;
- 4) To make available a full service chapel; and,
- 5) To place \$20.00 in Trust "A" and \$20.00 in Trust "B" to be applied to endowment care.

Performance was as follows:

- 1) Memorial Estates is holding two spaces for plaintiff at the Redwood Road mausoleum, and has space available at the Mountain View mausoleum, as well, which is available for plaintiff.
- 2) Memorial Estates has constructed two mausoleums.
- 3) Plaintiff chose to inter her husband at Sunset Lawn and has no intention to be interred at Memorial Estates.
- 4) Plaintiff chose not to use a Memorial Estates provided chapel for her husband's funeral and has no intention to use a Memorial Estates' chapel at her own funeral.

5) Memorial Estates has an endowment care fund which meets the requirements of the State of Utah and which exceeds the requirements of Trust "A" and Trust "B".

The trial court did not abuse its discretion in granting summary judgment. Memorial Estates has always been ready, willing, and able to perform each of its duties pursuant to the contract entered into with plaintiff. (R. at 10, 74, 146, 583, 1192-1193) Even if the contrary had been true, no evidence of damage could have been presented at trial.

B. Plaintiff's claim for breach of warranty is without merit.

Plaintiff's claim for breach of warranty is based upon the allegation that the mausoleums constructed by the defendants are different in appearance and quality from the appearance and quality the plaintiff believed they would have, based upon an artist's rendering plaintiff claimed was shown to her at the time she purchased her pre-need contract. First, The record contains no evidence of representations or warranties made by the defendants with respect to the appearance or quality of the mausoleum to be built pursuant to the pre-need contract. Second, the first mausoleum was finished in 1976. The claim for breach of warranty was first constructed in January 1988. The mausoleum appearance was obvious to the plaintiff from 1976, and therefore, she was on notice regarding the appearance and quality she now complains



of, 12 years prior to the first filing of this cause of action. Third, plaintiff has admitted she is not offended by the appearance of the Mountain View cemetery. (R. at 353-358) No issue has been raised to the effect that the appearance is inferior in any way. Finally, the statute of limitations had run long before the Fifth Amended Complaint was filed commencing in 1976 and running in 1980. (Utah Code Ann. § 78-12-25, § 78-12-25.5, as amended)

C. Because plaintiff failed to allege the elements of fraud, or raise issues sufficient to justify a finding of fraud.

In order to recover for fraud plaintiff must specifically plead and prove the following: (1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) recklessly made knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did, in fact, rely upon it; (8) and was thereby induced to act; (9) to its injury and damage. Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978); Pace v. Parrish, 122 Utah 141, 144-145, 247 P.2d 273, 274-75 (1952). In addition, the plaintiff must plead the conduct constituting fraud with particularity, (Utah Rules of Civil Procedure, Rule 9(b)), and the evidence of fraud must be "clear and convincing." Berkeley Bank v. Meibos, 607 P.2d 798, 801 (Utah 1980).

Plaintiff argues that the fraudulent conduct relates to defendants' representations that they would perform in the future by building mausoleums. Plaintiff's argument fails because there was no misrepresentation. Memorial Estates has built two mausoleums and has more than adequate crypt space available. Plaintiff's argument also fails because she has pled the allegations of fraud insufficiently. Because Memorial Estates' representation relates to future performance. The party pleading fraud must show that the defendants did not intend to perform at the time the promise was made. Rice, Melby Enterprises, Inc. v. Salt Lake County, 646 P.2d 696, 698 (Utah 1982). A subsequent change of mind or nonperformance is insufficient to prove fraud. Id. Plaintiff failed to show how Memorial Estates did not intend to perform at the time the promise was made. Plaintiff, in fact, would never be able to show Memorial Estates did not intend to perform, since Memorial Estates has in fact performed the promise. Finally, it should be noted that plaintiff never presented a submission which would raise the issue of any damage having been caused, even if her claim could be proven.

Those facts argued in the Brief of Appellant are not supported in the Record. Plaintiff does not point out a single fact from the Record from which it can be inferred that Memorial Estates did not intend to perform each of its obligations under the contract, at the time the contract was entered into.

D. Plaintiff failed to produce evidence that the chapel was not available for her use.

As set forth in the facts above, Memorial Estates has always been ready, willing, and able to provide a chapel for plaintiff's use. Plaintiff has never presented a submission to controvert the affidavit of Kenith Hughes on this issue. Plaintiff has never made request or demand on Memorial Estates for the use of a chapel. (R. at 583) In her Response to Defendants' First Request for Admissions, plaintiff admitted:

Request No. 9:

Admit that as of the date Plaintiffs filed their complaint they had not at any time requested the defendant to provide them the use of the chapel.

Response:

Deny in part. Plaintiffs have not requested chapel space for their own burial.

(R. at 254) See also Plaintiff's Answers to Interrogatories, dated August 13, 1987, ¶¶8 and 14.)

Not only is the evidence uncontroverted that a chapel was available and that plaintiff never asked to use the chapel; additionally, the plaintiff made a submission which would raise the issue of any damage having been caused even if this claim could be proven.

E. Memorial Estates has committed no breach of trust.

As revealed by the affidavits of John MacKay, Warren Christensen and Kenith Hughes, Memorial Estates has complied

with all the conditions required of it by state statute regarding the maintenance of any endowment trust funds. Memorial Estates is audited on a yearly basis and these audits have revealed that Memorial Estates maintains the necessary money available for mausoleum and cemetery construction.

(R. at 1190, 1199)

In addition, Section 22-4-1 of the Utah Code provided, at the time of acts complained of, that the 75% trust requirement did not apply to cemetery lots, vaults, mausoleum crypts, niches, cemetery burial privileges and cemetery space. The Schoneys had made their final payments in 1977. At that time, there was no requirement for any of that money paid to be set aside in trust pursuant to Section 22-4-1. In 1983, the legislature amended that section to include mausoleum space, but that provision is not applicable to the cause of action in this appeal because the last payment had been made six years before the amendment. Therefore, there can be no violation of that section as alleged by plaintiff.

The purpose of the 75% trust requirement is to ensure that funds are available to provide the services promised in the pre-need contract. In this case, the mausoleum promised was constructed, the construction trust requirement, if any, expired upon construction. Further, the facts reveal that Memorial Estates is in full compliance with all statutory endowment care requirements and, therefore, plaintiff cannot claim she has been damaged in any way.

Plaintiff's contract contains references to Trust "A" and Trust "B", endowment care trusts into which \$20 of plaintiff's purchase funds were to be placed in each. At the time the present parties who own and manage the defendant corporations first became involved, which was after the time the plaintiff entered into her purchase contract, but before she paid the last payment, Trust "A" was insolvent. Trust "B", however, contains, at the present time, more than the requirement in the contract for "A" and "B", and the additional endowment fund required by the State also exceeds the requirement in the contract regarding Trust "A" and Trust "B". In any event, the plaintiff has made no submission of any evidence to raise the issue of damages having been caused, even if her claim can be proven.

F. Plaintiff's claim for intentional infliction of emotional distress must fail.

In order to recover under an action for intentional infliction of emotional distress, plaintiff must show that Memorial Estates' conduct was "outrageous and intolerable." Samms v. Eccles, 11 Utah.2d 289, 358 P.2d 344 (1961). The facts in this case, even as alleged by plaintiff, do not rise to this standard. Plaintiff complains that Memorial Estates refused to disinter Mr. Wheeler's remains which had been temporarily placed in a vault in a ground burial plot because the family wished to eventually use the as then incompletd Mountain View mausoleum, rather than the completed Redwood Road

mausoleum. The only fact in the record is that Mr. Wheeler's remains were promptly disinterred after the request was made and they were placed in the mausoleum at Sunset Lawn on the very day of his wife's funeral service. Therefore, as a matter of law, this claim cannot stand.

In addition, the allegations in the pleadings referring to the disinterment of Mr. Wheeler state the disinterment occurred on or before May 22, 1982. The longest possible statute of limitation period that could apply is four years from the occurrence, Utah Code Ann. § 78-12-25, as amended, even though plaintiff alleged this claim as an intentional tort, and the period could be less than four years. The claim was first made in January 1988. Because the claim was first raised five years and seven months after the occurrence, Memorial Estates was not notified of plaintiff's intent to raise the claim. The claim is barred by the statute of limitations.

Plaintiff claims that this claim should relate back to the claim for intentional infliction of emotional distress contained in the Second Amended Complaint, filed in 1983. The facts upon which the claim in the Second Amended Complaint (R. at 308) was alleged were those plaintiff claims amount to intentional or wilful delay of construction of the mausoleum. The failure to disinter claim stands on completely separate and distinct factual allegations. The facts upon which the claim

in the Fifth Amended Complaint (R. at 1325-1326) is alleged concern a supposed refusal to disinter Mr. Wheeler, a claim never pled prior to the filing of the Fifth Amended Complaint. The identity between the labels on the two claims is not sufficient to tie the new set of facts in the Fifth Amended Complaint to the date of the Second Amended Complaint.

The trial court did not abuse its discretion in ruling as a matter of law that plaintiff could not prevail upon any of these claims, based upon the record before the trial court.

## II

PLAINTIFF'S ARGUMENTS ARE MOOT BECAUSE THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S FIFTH AMENDED COMPLAINT BECAUSE OF PLAINTIFF'S FAILURE TO ANSWER DEFENDANTS' FOURTH SET OF INTERROGATORIES IN A TIMELY FASHION. THIS MATTER HAS NOT BEEN APPEALED.

Plaintiff's brief does not contest the trial court's order granting defendants' Motion to Strike plaintiff's Fifth Amended Complaint. The ruling on that Motion, and consequent entry of judgment for Memorial Estates on all issues, renders all of plaintiff's arguments on appeal moot.

The original complaint was filed in 1982. Defendants' summary judgment motion, on December 29, 1987, demonstrated that the conditions alleged in the complaint could not be proven. By way of response to defendants' December 29, 1987 Motion for Summary Judgment, plaintiff requested and received leave of the court to file another amended complaint. It was filed January 26, 1988, over five and one-half years after the original complaint. (R. at 1312) The Fifth Amended Complaint

raised new issues and at least five new and additional causes of action, to wit: "Breach of Warranty," "Unjust Enrichment," "Interference with Contract," "Breach of Common Law Trust," and "Outrage and Intentional Infliction of Emotional Distress (Disinterment of Mr. Wheeler)". The new causes of action required additional discovery by defendants, but the plaintiff had also requested that the court set an expedited trial date. The court granted the request and set the date of July 6, 1988 to commence trial.

On April 29, 1988, Memorial Estates submitted Defendants' Fourth Set of Interrogatories to Plaintiff by mail. The principal fact which had changed from the dates of the first and second complaints to the date of the fifth complaint had to do with defendants' construction of two mausoleums. Defendants' Fourth Set of Interrogatories addressed issues concerning the construction and appearance of those mausoleums, which were issues raised for the first time in the plaintiff's Fifth Amended Complaint.

The last day to answer interrogatories in accordance with the provisions of Rule 33(a) was June 1, 1988, only a month and six days before trial. The last day to respond to all discovery, pursuant to the Court's scheduling order, was June 10, 1988. Counsel for Memorial Estates requested the answers from counsel for plaintiff between June 2 and June 13 (Transcript of hearing, June 21, 1988 at 3), and, when no answers were forthcoming, on June 14, 1988, Memorial Estates



filed a Motion to strike plaintiff's Fifth Amended Complaint and to enter judgment on behalf of Memorial Estates for reason of plaintiff's failure to answer the interrogatories.

Purported answers to those interrogatories were delivered to counsel for defendants at the time of hearing. No certificate regarding service or filing of complete interrogatory answers is in the record.

Rule 37(d) of the Utah Rules of Civil Procedure provides that if a party fails to serve answers to interrogatories:

The court in which the action is pending, on motion, may make such orders in regard to the failure as are just, and among others, it may take any action authorized under paragraphs (A) (B) and (C) of subdivision (b)(2) of this Rule.

Rule 37(b)(2)(C) provides in part:

. . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . . .

In the case of W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977), the Utah Supreme Court addressed a situation comparable to the one in the instant matter. In that case, as in this case, the court granted a summary judgment and at the same time, granted judgment by default as a sanction pursuant to Rule 37(d). Addressing the issue of judgment by default as a sanction, the Court commented on the amendment in 1972 which changed Rule 37(d) of the Utah Rules of Civil Procedure to correspond with the 1970 amendment to Rule 37 of the Federal Rules of Civil Procedure and quoted

8 Wright & Miller, Federal Practice and Procedure § 2291, page 807-812 with approval as follows:

Rule 37(d) allows the imposition of sanctions against a party for especially serious disregard of the obligations imposed upon him by the discovery rules even though he has not violated any court order . . . . Until 1970, the rule applied only if a failure by a party was willful. This limitation has been eliminated. In addition, the rule now says, as Rule 37(b)(2) always has said, that the court is to make "such orders with regard to the failure as are just." Taken together, these two changes mean that any failure of the sort described in Rule 37(d) permits invocation of the rule, regardless of the reason for the failure, but that the court has discretion about the sanction to be imposed.

Gardner at 737.

In Gardner, the defendants contended the sanction was inappropriate because they had served answers to the interrogatories prior to the hearing on the motion for a default judgment. The court rejected that argument stating that if a party fails to answer within the specified time under the rule, that party has failed to answer and the court may appropriately invoke the sanctions.

In Gardner, as in the instant matter, the party that failed to answer also failed to object to the interrogatories, to request additional time or to explain or justify the failure to answer, and the Gardner Court ruled that the trial court was justified in finding there was no reasonable excuse for the failure to comply with Rule 33. The Court further stated, paraphrasing the case of Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols, 138 Ga. App. 593, 226 S.E.2d 742, 743 (1976):

. . . there was no significance in the fact plaintiff submitted answers to the propounded questions before the hearing on defendant's motion for sanctions. The court ruled once the motion for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response in the interim between the filing of the motion for sanctions and the hearing on the motion.

The Court reiterated that sanctions are appropriate whether a party has moved pursuant to Rule 37(a)(2) for an order compelling the other party to respond to discovery, or not, and further stated:

The extreme sanction of default or dismissal must be tempered by the careful exercise of judicial discretion to ensure its imposition is merited. Under Rule 37(d), sanctions are justified without reference to whether the unexcused failure to make discovery was willful. The sanction of default judgment is justified where there has been a frustration of the judicial process vis., where the failure to respond to discovery impeached trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit.

A defendant may not ignore with impunity the requirements of Rules 33 and 34 and the necessity to respond within 30 days, to request additional time or to seek a protective order under Rule 26(c). A party to an action has a right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial.

Gardner at 738.

Gardner applies to the instant case because plaintiff's failure to respond to the interrogatories impeded not only the defendants' presentation of their Motion for Summary Judgment,

but it also impeded preparation for trial on the merits and prejudiced the defendants by effectively preventing defendants from following up on their timely discovery request when trial was set to commence only two weeks away.

Plaintiff's arguments are moot because the trial court did not abuse its discretion in striking the plaintiff's complaint and entering judgment in favor of Memorial Estates, pursuant to the provisions of Rule 37(d) of the Utah Rules of Civil Procedure. Plaintiff never appealed this decision and accordingly, it stands, thereby mooting plaintiff's appeal.

### III

THE "FACTS" STATED IN PLAINTIFF'S STATEMENT  
OF FACTS WERE NOT BEFORE THE TRIAL  
COURT AND ARE NOT PART OF THE  
RECORD ON APPEAL.

In plaintiff's brief, plaintiff alleges facts that were not before the trial court and are not before this Court. Plaintiff has cited almost exclusively to depositions that were neither filed nor published, and were in fact not accessible to the trial court judge. The trial court judge was not apprised of plaintiff's reliance on said alleged facts either on defendants' December 27, 1987 Motion for Summary Judgment or upon Defendants' January 14, 1988 Motion for Summary Judgment.

In Conder v. A.L. Williams & Associates, Inc., 739 P.2d 634 (Utah App. 1987) this Court upheld the Utah Supreme Court's denial of a motion to supplement the record on appeal to

include depositions which had not been published in the trial court. In a concurring opinion, Judge Orme explains that it was the failure to file the depositions, which was fatal to the motion to supplement. A filed deposition may be relevant and material to a motion for summary judgment, and if so should be considered by the trial court and the appellate court.

Rule 56(e) entitles a party to summary judgment "if the pleadings, depositions, answers to interrogatories and answers to admissions on file, together with affidavits, if any" so warrant.

Id. at 641 (emphasis added).

Rule 56(e) specifically provides that the depositions be filed.

If the depositions are not filed, the trial court cannot consider them or allegations regarding their content, because said allegations cannot be verified. Likewise, if not filed, the depositions cannot be part of the record on appeal.

In Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963), both parties cited to depositions that had remained sealed. The depositions had never been seen by the trial court, and the supreme court therefore did not open the depositions. In a footnote, the Utah Supreme Court noted that the correctness of the depositions used by the parties could not be known. Thompson, at 109.

Because the statements relied upon by plaintiff are cited only to unfiled depositions, plaintiff's statement of facts should not be considered by this Court.

#### IV

GEORGE K. SCHONEY WAS PROPERLY DISMISSED AS A PARTY.

Rule 25(a) of the Utah Rules of Civil Procedure requires dismissal of a deceased party unless a motion for substitution is made with 90 days after the death of that party is suggested.

The suggestion of Mr. Schoney's death was made and filed with the Court. It was made in Plaintiff's Answers to Interrogatories, a copy of which was filed with the trial court attached to defendants' Memorandum in Support of their Motion for Summary Judgment filed December 29, 1987. (R. at 1202-1225) The suggestion was properly recorded and served on plaintiff through her attorney of record.

Ninety days after the suggestion of death was filed with the trial court, no party had been substituted for the deceased and no one had sought an extension of time in which to file a substitution. Finally, on June 21, 1988, Memorial Estates made a motion to dismiss George Schoney as a party to the action. At the time of the motion to dismiss, plaintiff showed no circumstances which could conceivably justify her failure to substitute another party as plaintiff. George Schoney had been deceased for over 27 months, long before the motion was made, giving plaintiff ample time to make a proper party substitution.

Plaintiff argues notifying and serving George Schoney's attorney is not sufficient to make a suggestion of death

because that attorney is not a representative of the deceased party's estate, and that therefore, no representative of George Schoney's estate was properly notified or served. However, notification and service on plaintiff was appropriate pursuant to Rule 25(a), because plaintiff is a successor heir and beneficiary of George Schoney and is represented by the same counsel that represented George Schoney up until his death in this action.

Plaintiff also argues the suggestion of death was improper because it was not made pursuant to Form 30 of the forms appended to the Utah Rules of Civil Procedure. The "Appendix of Forms," Introductory Statement, reads: "The following forms are intended for illustration only." Form 30 is not required to be used in a suggestion of death. In fact, Utah Rules of Civil Procedure, Rule 25(a) only requires that the suggestion be made "upon the record by service of a statement of the fact of the death." Here the suggestion of death was made upon the record by service of a statement of the fact of the death from the plaintiff herself in her answer No. 1 found in Plaintiff's Answers to Interrogatories. (R. at 1217)

For the foregoing reasons, the suggestion of death was properly stated, served, and recorded. Because plaintiff failed to make a motion within 90 days of the suggestion to substitute the deceased party, George Schoney was properly dismissed as a plaintiff.

V

PLAINTIFF IS LIMITED ON APPEAL TO THOSE ARGUMENTS  
CONTAINED IN APPELLANT'S BRIEF.

Plaintiff in her docketing statement has stated many issues. However, plaintiff has failed to support many of those issues in her brief, either with any references to the record on appeal or with authority for the proposition contained in the docketing statement. The docketing statement "is not a brief and should not contain arguments or procedural motions." Rules of the Utah Court of Appeals, Rule 9. The stating of an issue without argument does not serve to point out specific errors or points within the scope of some specific assignment of error.

Where a point is merely asserted by appellate counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court.

People v. Dougherty, 188 Cal. Rptr. 123 (Dist. Cal. 1982).

Issues listed in a docketing statement but not briefed are deemed abandoned. State v. Eder, 704 P.2d 465, 469 (N.M. App. 1985).

The docketing statement provides the court with a concise listing of the arguments expected to be raised by plaintiff and Memorial Estates. It is incumbent upon the plaintiff to state fully with record references and supporting authority the arguments which allegedly weigh counter to the trial court's findings. The reviewing court is not required to



make an independent search of the record for supporting authority when the plaintiff has failed to sufficiently state the basis of its claim. See Dougherty, 188 Cal. Rptr. at 123.

Where plaintiff has failed in her brief to support issues raised in the docketing statement, the plaintiff has not provided Memorial Estates with a fair opportunity to respond to the arguments. That failure, together with the failure to cite the record and/or authority in support of points of error, constitutes waiver of any argument regarding any such claimed error. See Lecky v. Warren, 635 S.W.2d 752, (Tex. App. 1982).

#### CONCLUSION

Plaintiff does not raise factual questions which could in any way lead to the relief she demands. Nowhere does she raise any issues as to how or in what amount she has been damaged. She has never made demand for performance. Defendants were and are ready, willing and able to perform all of their duties under the contract. Not only did the trial court not abuse its discretion; but, based upon the facts in the record, any other action by the trial court would have been an abuse of its discretion.

For a number of reasons the trial court judgment should be affirmed:

- 1) The trial court ruling of Memorial Estates Motion to Strike the Fifth Amended Complaint renders plaintiff's arguments on appeal on all issues moot.

- 2) Plaintiff failed to submit sufficient facts to the trial court to support the finding that plaintiff could have prevailed on any cause of action.
- 3) There are insufficient facts in the record on appeal to support any of the arguments advanced by plaintiff on this appeal.

RESPECTFULLY SUBMITTED this 10<sup>TH</sup> day of May, 1989.



---

Earl Jay Peck  
Stephen L. Henriod  
Nielsen & Senior  
Counsel for Respondent  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>TH</sup> day of May, 1989, I caused four true and correct copies of the foregoing Brief of Respondent to be placed in the United States Mail, first-class, postage prepaid, addressed to the following:

Daniel F. Bertch  
Robert J. DeBry  
Robert J. DeBry & Associates  
Attorneys for Appellant  
40001 South 700 East, 5th Floor  
Salt Lake City, Utah 84107



---

0452o