

1988

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880630

IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and
ERMA J. SCHONEY, et al.

Plaintiffs/Appellants,

vs.

MEMORIAL ESTATES, INC.,
et al.,

Defendants/Respondents.

APPELLANT'S BRIEF

Case No. 880630-CA

Category No. 16(b)

ON APPEAL FROM THE THIRD DISTRICT COURT SALT LAKE COUNTY

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FILED
Clerk
Utah Court of Appeals

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)	APPELLANT'S BRIEF
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JURISDICTIONAL STATEMENT

Appellate jurisdiction is conferred pursuant to §78-2-2(3)(1) Utah Code Ann.. This case was poured over to the Court of Appeals pursuant to §78-2-2(4) Utah Code Ann.

STATEMENT OF FACTS

Defendant is in the business of providing cemetery and mausoleum spaces, funeral services, markers, caskets, and similar products. From 1972 to 1974, Defendant began a mausoleum sales program called "public relations sales program." (Moore depo. p.12). Mausoleums were to be located at a Redwood Road location and one at 3115 East 7800 South called the "Mountain View" location. Under this program, one-half the spaces of a proposed mausoleum were sold to families before construction (Id. at 9, 14-15). Once one-half of the mausoleum spaces were sold, construction would begin. (Id.) This is called "pre-need" because the sale is made before the time of death. (Id. at 8.) The sales program represented to consumers that the pre-need price was at cost and did not include a profit. (Id. at 9.)

Sometime in 1973 or 1974, a salesman for defendant, Bill Nordin, called on the Schoney family to sell them spaces in a mausoleum. (Nordin depo. p.8.) After hearing Nordin's

"usual presentation," the Schoneys purchased two spaces in an unconstructed mausoleum. (Nordin depo. p.9; Exhibit 1 to plaintiff's Complaint.) The purchase agreement (labeled the "Mausoleum Estate Agreement") obligated defendant in part:

To provide use of the full service chapel ...

* * *

To complete the mausoleum with construction. . . within one year from the date that the Public Relations Development Program on that is completed.

(Exhibit 1 to plaintiff's Complaint). The contract does not specify whether the spaces were to be at the Redwood Road or Mountain View Mausoleum.

Nordin showed the Schoneys a drawing that laid out the crypt locations in the mausoleum. (George Schoney depo p. 10.) George and Erma selected two specific crypts located "at eye level". (Id. at 10,11). George Schoney testified that the mausoleum space he purchased was "the Memorial Estates in the east side" (Id. at 19) commonly known as the Mountain View location (Id. at 20). See also George Schoney depo. p. 21, 22 "[the family] didn't want to be buried over there on the west side anyway. . ." Erma Schoney depo. p. 4-5, 9) Nordin represented that a chapel had been started at the Mountain View location (Id. at 22). He further stated that the Schoneys would have access to the Mountain View chapel and be able to have funeral services at the chapel. (Id. at 22).

Nordin promised that the Schoneys would have use of the chapel at no charge (Erma Schoney depo. p. 8). He also

stated that the money from the Schoney's purchase would be specifically used for construction of the mausoleum. (Id.) Paul Moore, former general sales manager for defendant from 1960-1966, and a sales representative from 1972-1974 (Moore depo. p. 4, 5) confirmed that it was his understanding that the money would be used for building the mausoleum. (Id. at 9, 14, 15).

During Nordin's presentation, he showed the Schoneys pictures of the chapel and proposed mausoleum at Mountain View. (George Schoney depo. p. 9). Moore agreed that it was a standard policy to show an artists drawing of what the mausoleum would look like. (Moore depo. p 22, 23). The drawing was identified as Exhibit 1 to the Moore deposition.

Several months after the Schoneys had purchased pre-need spaces at Mountain View, Erma's father (Clint Wheeler) died. (Erma Schoney depo. p. 9). It had always been the intent of the Schoneys and Erma's parents to be interred together at Mountain View. (Affidavit of Erma Schoney, 1/5/88 para. 1, 2). Because the Mountain View mausoleum was not built, Erma had no choice but to have her father buried in the ground as a temporary arrangement. (Erma Schoney depo. p. 9). This temporary ground burial was induced by defendant's promise that "he [Erma's father] would only be there [i.e. in the ground] about six months." (Id.) (See also George Schoney depo. p. 41 "he would be moved in six months.") Erma and her family were "strongly opposed to ground burial" for personal reasons. (Erma Schoney affidavit, para. 5; Erma Schoney depo. p. 18.) Because the

Schoneys were assured that Clinton Wheeler's ground burial was only temporary, no marker was placed on his grave. (Affidavit of Erma Schoney, para. 5).

After Clinton Wheeler's burial in 1974, Erma and her mother went to the Mountain View cemetery "lots of times" to "see if they were building it [i.e. the mausoleum]." (Erma Schoney depo. p. 11). Erma was "very concerned" about it and "worried". (Id.) Erma asked the defendant when the mausoleum was to be built. (Id.) George also testified that he went "once a year" to see about the building of the mausoleum (George Schoney depo. p. 40). Defendant "told George that it would be started in the near future; this went on for 8 years. (Id. at 42).

Eventually, George was told that "there wasn't enough people interested at the present time for them to build a mausoleum." (Id. at 48-49). George got the impression that "they would never build it." (Id.). It was in 1981 that George decided defendant wasn't going to build a mausoleum, and so he and Erma and Mrs. Wheeler purchased alternate spaces at Sunset Lawn mausoleum. (Id. at p. 43, 45). The Schoneys alleged that this was on or before March 29, 1981. (Second Amended Complaint, para. 11).

During the passing years, defendant failed to keep track of the unmarked grave of Clinton Wheeler. (Affidavit of Erma Schoney, para. 7). Erma and defendant disagreed as to where Wheeler was buried. (Erma Schoney depo. p. 16). As a result, defendant's agent "had to use a long metal probe to locate the

casket." (Affidavit of Erma Schoney, para. 7; Erma Schoney depo. p. 16). Erma averred that "to disturb his grave in this manner was very distressful to us." (Id.).

Sometime prior to about 1977, the cemetery chapel at Mountain View was completed. The Schoneys alleged that the cemetery chapel was rented as office space. (Fifth Amended Complaint, para. 31). This was conceded in Mr. Holt's deposition where he stated that the salesmen "know that the area of the building that will eventually house the pews and the whole operation is currently office space..." (Holt depo. p. 42; R. 1399). Defendant instead substituted use of L.D.S. chapels which were provided to defendant free of charge. (Id. at p. 44). The chapel was rented to defendant's previous company, Security National Life Insurance Co. (Quist depo. Ex. 1 and 2). The total proceeds received by defendant from renting the cemetery chapel is at least \$200,000. (Quist depo. exhibits 3-11).

After the Schoneys decided that defendant was not going to build a mausoleum at Mountain View in the foreseeable future, they purchased substitute mausoleum spaces in an existing mausoleum at Sunset Lawn. (Erma Schoney depo. p. 12). Erma averred that:

Before my mother died, we asked Memorial Estates to release my father's body so it would be placed next to his wife at Sunset Lawn when she died. Memorial Estates refused. Finally, on the morning of my mother's funeral, they released his body. This was severely distressing and upsetting to us, to be faced with the inability to lay my parents to rest together. Even more upsetting was the fact that my mother never

knew she would be able to be interred with her husband.

(Affidavit of Erma Schoney, paragraph 8.) George testified that "right up until the night before the funeral, we didn't know but what we were going to have him in one place and her in another place. . ." (Id.). George confirmed that Erma "spent a lot of nights worrying about it . . . it caused a lot of grief." (George Schoney depo. p. 47-48).

George stated that he "still had the nightmare, until we found another place [i.e. Sunset Lawn] that I could be there any time, the same way." (Id. at 46).

When defendant finally relented and allowed Mr. Wheeler to be disinterred and transferred to Sunset Lawn, the Schoneys learned that there had been water damage to Mr. Wheeler's casket due to what appeared to be poor materials used. (George Schoney depo. p. 47).

PROCEDURAL HISTORY

Class Certification:

The Schoneys brought their claims individually and on behalf of a class of pre-need consumers of defendant's services. On February 10, 1983, the action was certified as a class action by Judge Fishler. (R. 202). The class was defined as "all those persons who have signed a standard form agreement for the purchase of mausoleum space from the defendant." (R. 294). On February 10, 1984, defendant moved to have the class decertified. (R. 487). On June 24, 1985, Judge Dee entered an order

decertifying the class. (R. 704). Judge Dee refused to enter findings of fact and conclusions of law in support of the decertification order. (R. 681). Plaintiffs successfully obtained a writ of mandamus requiring Judge Dee to enter findings of fact and conclusions of law to support decertification. (R. 998). Judge Dee's findings and conclusions were entered on December 4, 1985. (R. 1053).

Discovery:

Plaintiffs served interrogatories on defendant on June 17, 1982. (R. 12). Defendant answered the interrogatories on August 27, 1982, approximately 26 days late. (R. 50). Plaintiff submitted to defendant a second request for documents on January 28, 1983. (R. 197). No answer has ever been filed. The Schoneys submitted a third request for documents on March 1, 1983. (R. 225). No response has ever been filed.

Defendant submitted a second set of interrogatories on July 11, 1983, to the Schoneys. (R. 328A). They timely responded 30 days later on August 11, 1983. (R. 356).

The initial round of discovery was completed by August 11, 1983. No further discovery was conducted until June 12, 1987, when plaintiffs submitted further interrogatories and another request for documents. Defendant sought and received an extension of time until September 15, 1987, to answer discovery. (R. 1121). A discovery cut-off was imposed of December 8, 1987, and a trial date of December 7, 1988 set. (R. 1136). Defendant did not answer by September 15. Finally, on October 28, 1987,

the Schoneys' counsel sent a letter reminding defendant of its discovery obligation and delay. (R. 1164). Defendant partially answered plaintiff's discovery by mailing interrogatory answers on November 24, 1987. (R. 1166). This was 13 days before discovery cut-off. Plaintiff was forced to bring a motion to compel further answers on December 8, 1987. (R. 1150). This motion was granted, in part, by order entered December 23, 1987. The Schoneys also requested more time to do follow-up discovery because of defendant's late and incomplete answers. This request was denied. (R. 1187).

Meanwhile, defendant sent discovery to plaintiffs on June 26, 1987. Plaintiffs' answers were filed (without objection from defendant) on August 13, 1987. Defendant claims to have sent a final set of interrogatories and requests for documents to plaintiffs' counsel on April 29, 1988. These were answered on June 20, 1988. Because the answers were 18 days late, Judge Moffat struck plaintiffs' complaint and entered default judgment against them.

Trial Settings:

Plaintiff first certified the case for trial on May 3, 1983. (R. 263). Defendant objected. (R. 269). Plaintiff again certified the case on September 13, 1983. (R. 390). Upon Judge Leary's poor health, plaintiff moved for a new trial judge to avoid delay. (R. 522).

Plaintiffs certified the case as ready for trial on April 22, 1986. (R. 1067). By scheduling order of September 22,

1986, the case was given a first place trial setting on February 9, 1987. (R. 1069). However, Judge Dee suddenly retired effective January 31, 1987. Plaintiff requested a special pro tempore judge to prevent delay of a trial. (R. 1085). This was denied. By scheduling order of May 14, 1987, the case was given a trial date of August 24, 1987. (R. 1096). Upon defendant's request for a continuance, the trial date was changed to December 7, 1987. (R. 1136). This was again changed to February 1, 1988 upon defendant's request. (R. 1139). Upon the court's own motion, the trial was continued. (R. 1301). Upon plaintiff's request (R. 1336 and 1338), the case was reset for trial on July 6, 1988. (R. 1360).

Summary Judgment:

On February 10, 1984, defendant moved for summary judgment as to all causes of action in plaintiffs' Second Amended Complaint. (R. 494). On June 24, 1985, Judge Dee entered an order denying defendant's motion. (R. 693). Defendant filed a second motion for summary judgment as to all causes in this complaint on December 29, 1987. (R. 1200). This motion was in all material respects the same as the February 10, 1987 motion. This second motion was denied by Judge Moffat on January, 1988. (R. 1301). Defendant filed a third motion for summary judgment on June 14, 1988. (R. 1363). This motion was granted by Judge Moffat as to all causes in plaintiffs' complaint on June 27, 1988. (R. 1377).

POINT

DEFENDANT SHOULD HAVE BEEN REQUIRED TO PLACE
75% OF THE SCHONEY'S PAYMENTS IN TRUST UNDER
U.C.A. 22-4-1

A. Claim for Breach of Trust - 22-4-1.

Utah Code Ann. §22-4-1 required defendant to maintain 75% of the money paid by pre-need plaintiffs in a trust. The statute at the time of plaintiffs' purchase applied when "money is paid for a purpose of finishing or performing funeral services or the furnishing or delivery of any personal property, merchandise, or services of any nature to be conveyed or delivered at any time. . . for future use at a time determinable by the death of the person ...". §22-4-1. The act excludes "cemetery lots, vaults, mausoleum crypts, niches, cemetery burial privileges, and cemetery space..." (Emphasis added). Plaintiff claimed that the exclusion for "mausoleum crypts" did not extend to unconstructed mausoleum crypts.

The legislature amended §22-4-1 in 1983 to include:

personal property, merchandise, or services
of any nature to be conveyed or delivered at
any time ... including ...unconstructed
mausoleum crypts..."

B. §22-4-1 (1971) Required a 75% Trust.

Pre-need sales have been so flagrantly abused in the cemetery business, that over half the states have enacted pre-need laws. These laws require that money paid under a pre-need cemetery contract be held in trust. The case of Utah Funeral Directors v. Memorial Gardens of the Valley, 408 P.2d 190, 17 Utah 2d 227 (1965), explains the purpose of these statutes:

One of the main purposes of the pre-need laws is to make sure that after the solicitations of such contracts, the embalming and funeral services will be furnished as contracted to the extent that the trust funds and earnings can accomplish this. 17 Utah 2d at 232.

State v. Anderson, 408 P.2d 864 (Kan. 1965) added:

[Because of] a great time lag between the time of beginning and performance . . . there is a public interest in the protection of funds intended for a particular purpose, from whatever hazard, whether the normal vicissitudes of business, or plain fraud and deceit.

The statute as originally written in 1971 shows from its face that it meant to cover pre-need arrangements. The title refers to trusts for "pre-arranged funeral plans," and indicated a broad reading of that phrase to include "any agreement" to provide property and services in the future at the time of death. The sale of pre-need mausoleum space fits this intention. The exceptions list what are normally understood to be existing property and services. This would not include pre-need mausoleum spaces. The purpose of protecting pre-need consumers would be frustrated by a reading excluding pre-need mausoleum sales from the trust protection.

Defendant's claim was that it was selling "mausoleum crypts." However, defendant did not sell a mausoleum crypt. It sold the right to the use of a non-existent piece of personal property at a time determined by the plaintiff's death. Defendant sold a promise to build a crypt (services) to be performed in the future. Thus, the 75% trust exemption for "mausoleum crypts" should not apply.

C. If 22-4-1 (1971) Was Unclear, Then The 1983 Revision Should Apply Retroactively.

The 1983 legislature made explicit that the 75% trust applied to unconstructed mausoleum crypts. The Utah Supreme Court has held "when the purpose of an amendment is to clarify the meaning of an earlier enactment, the amendment may be applied retroactively in pending actions." State, Dept. of Soc. Services v. Higgs, 656 P.2d 998, 1001 (Utah 1982) ... " Shelter America Corp. v. Ohio Cas. & Ins. Co., 745 P.2d 843, 845 (Utah App. 1987). The 1971 version was at least unclear whether the 75% trust applied to pre-need unconstructed mausoleum crypts. The 1983 amendments made clear the intent of the prior enactment, and the amendment should apply in pending actions such as this one.

Further, since the operation of a cemetery is impressed with a public purpose, any contract implicitly includes a clause rendering the contract subject to any changes made in the laws. Diamant v. Mnt. Pleasant Westchester Cemetery Corp., 201 N.Y.S. 2d 861 (Sup. 1960); Grove Hill Realty Co. v. Fercliff Ass'n., 198 N.Y.S. 2d 287 (A.D. 1960). Silver Mtn. Cem. Ass'n v. Simon, 231 N.Y.S. 2d 909 (Sup. Ct. 1962). Similarly, each contract has an implied term that the performance of the contract will comply with any applicable law. Hall v. Warren, 632 P.2d 848 (Utah 1980). Thus, the Schoneys are entitled, at a minimum, to interest on 75% of her contract payments from 1983 to the present.

POINT

THERE WAS AMPLE EVIDENCE THAT DEFENDANT HAD
BREACHED THE SCHONEYS' CONTRACT BY DELAYING
CONSTRUCTION OF THE MOUNTAIN VIEW MAUSOLEUM

A. Claim for Delay in Construction.

Plaintiffs claimed defendant was obligated to build a mausoleum at Mountain View "within one year from the date that the Public Relations Development Program on that unit is completed." (Mausoleum Sales Agreement, para. headed "Design and Construction;" Fifth Amended Complaint, para. 2.) It was conceded by defendants that the Public Relation Development Program is completed upon sale of 1/2 of the spaces in the mausoleum. (Tr. at p. 22-24). Plaintiff claimed that defendants delayed the actual completion of the Public Relations Development Program by voluntarily abandoning sales of the mausoleum spaces. (Fifth Amended Complaint, para. 3-5).

B. Defendant's Obligation to Build a Mausoleum Began one Year After it Stopped Selling Mausoleum Spaces at Mountain View.

The completion of the Public Relations Development Program was a condition precedent to defendant's performance. Kimball v. Campbell, 699 P.2d 714 (Utah 1985). Because the fulfillment of the conditions was dependent on defendant's acts (i.e. sales of mausoleum spaces), it was required to make a good-faith effort to complete the conditions. Connor v. Stevens School of Business, 560 P.2d 1383 (Utah 1977). When a good faith effort is not made, the condition is deemed fulfilled. Connor, supra. Thus, defendant's obligation to build began one year from the time it failed to make a good-faith effort to fulfill the conditions by selling 1/2 of the spaces.

As early as 1975, defendants had abandoned its active efforts to fulfill the conditions by selling pre-need mausoleum spaces. (Keith Hughes depo., p. 35). A jury could have reasonably found that a good-faith effort to fulfill the condition would require at the least an active continuing effort to sell 1/2 of the spaces. Defendants put no evidence in the record that their abandonment was beyond their control. A jury could have concluded that defendant's obligation to build was triggered when efforts to sell 1/2 the spaces were stopped.

Defendant also contended that plaintiff bought space at Redwood Road and that because a mausoleum was built in 1976, there was no breach. (Tr. at p. 13). However, the Schoneys alleged that they bought mausoleum space at Mountain View. This was supported by the affidavit of Erma Schoney and deposition testimony of both Erma and George Schoney. Because the evidence was conflicting as to whether plaintiffs bought at Mountain View or Redwood, the trial court erred by granting summary judgment on the basis that a mausoleum was timely built at Redwood Road.

POINT

THE SCHONEYS CLAIM THAT DEFENDANT FAILED TO
BUILD THE MAUSOLEUM AS PROMISED SHOULD BE
SENT TO A JURY.

A. Claim for Breach of Warranty.

Plaintiff claimed she was shown a drawing of the mausoleum intended for Mountain View. (Fifth Amended Complaint, para 8.) She alleged that the mausoleum as built was different,

and of inferior quality. The Mountain View mausoleum was built in 1985. (Answer to Interrogatory 5, November 24, 1987).

B. The Statute of Limitations Began to Run When the Mountain View Mausoleum Was Built in 1985.

Defendant contended that plaintiff had bought space at Redwood and, therefore, the wrong, if any, began upon completion of the 1976 Redwood mausoleum. (Tr. at p. 18). Of course, the Schoneys' testimony was always that they bought at Mountain View. Thus, the statute of limitations began to run in 1985 when the Mountain View mausoleum was constructed. Defendant made no claim that plaintiff's claim for breach of warranty was untimely if it related to the Mountain View mausoleum.

C. There was No Evidence in the Record that the Mountain View Mausoleum (As Built) was the Same as the Mausoleum Shown to Plaintiffs.

There was no evidence in the record that the Mountain View mausoleum looked like the drawing shown to the plaintiffs in 1973. Defendant's counsel opined that "the two mausoleums are substantially the same." (Tr. p. 17). However, Moore stated at his deposition that the mausoleum as shown, and the mausoleum as built, were "absolutely" not the same. (Moore depo. p. 24). Moore stated the constructed one was "inferior" and an "eyesore." (Id. at 24-25). A jury might or might not share that opinion. Because the trial court had no basis to decide whether the mausoleum was built as represented, summary judgment was inappropriate.

POINT

WHETHER THE CHAPEL WAS AVAILABLE FOR THE
SCHONEYS TO USE WAS AN ISSUE OF FACT
PRECLUDING SUMMARY JUDGMENT.

A. The Schoneys' Claim for Wrongful Rental of the Cemetery Chapel.

The Schoneys alleged that defendant rented out the cemetery chapel from 1977 to 1984 as office space. (Fifth Amended Complaint, para 31.) The Schoneys sought an order requiring a restitution of the chapel rental proceeds to the owners of cemetery plots and mausoleum spaces who were entitled to use of the chapel.. (Id. at p. 18).

B. There was no Factual Basis for This Court to Conclude that the Chapel was not Rented out and Unavailable for Funeral Services.

There was no evidence in the record that the chapel was not rented to Security National Life. Instead, the evidence in the record shows that salesmen for defendant were told "the area that will eventually house the pews and the whole operation is currently office space." (Holt depo. p. 42). Further, if the chapel was not being rented and was available, why would defendant substitute use of LDS chapels for funerals? (Id. at 44). The only basis the court had to support defendant's motion was defendant's counsel's statement that there was an uncontroverted affidavit that there was a chapel available at Mountain View. (Tr. at 19, 51). There is no such affidavit. The trial court was unaware of such a basis (Tr. at p. 48). The Schoney's counsel specifically represented to the trial court that the chapel was not available because there was an insurance company in there. (Tr. at p. 47).

The reason that there was next-to-nothing in the record as to whether the Mountain View chapel was available is because that claim was first made at oral argument. The Schoneys had, in fact, made a formal request for entry onto land for the express purpose of taking photographs of the chapel filled with desks, filing cabinets, and etc. Had either counsel or the court known of that basis for defendant's motion, an evidentiary record could have been made. As it was, all the trial court had was the assertion of defendant's counsel that a chapel was available, and the assertion of the Schoney's counsel that the chapel was not available. Such is not the stuff of which summary judgments can be made.

C. The Schoneys Could Sue to Redress a Past Use of the Cemetery Chapel for Non-Cemetery Purposes.

A cemetery may not be put to any use inconsistent with repose of the dead. Vidrine v. Vidrine, 225 So. 2d 6691 (La. App. 969); Michels v. Crouch, 122 S.W.2d 211 (Tex. Civ. App. 1938); Wing v. Forest Lawn Cemetery Assn, 101 P.2d 1099 (Cal. 1940); Benson v. Lakewood Cemetery, 267 N.W. 510 (Minn. 1936); Moore v. U.S. Cremation Co., 9 N.E.2d 795 (N.Y.); Hertle v. Riddell, 106 S.W. 282 (Ken. 1907); Frank v. Cloverleaf Park Assn, 148 A.2d 488 (N.J. 1959); Connolly v. Frobeniurs, 574 P.2d 971 (Kan. App. 1978); Arlington Cem. Co. v. Hoffman, 119 S.E. 696 (Ga. 1961). This prohibition is grounded in the idea that cemetery management are trustees. See e.g. Dennis v. Glenwood Cemetery, 130 A. 373 (N.J. 1924); Braun v. Maplewood Cemetery Ass'n, 89 N.W. 872 (Minn. 1902); Hines v. State, 149 S.W. 1058

(Tenn. 1911); Cave Hill Cemetery v. Gosnell, 161 S.W. 980 (Ky. App. 1913).

Use of the cemetery chapel for insurance offices is a flagrant abuse of the interests and rights of the consumers who have purchased cemetery lots and mausoleum spaces. A court of equity should be available to redress such an abuse.

POINT

THE TRIAL COURT COULD NOT CONCLUDE AS A
MATTER OF LAW THAT NO FRAUD HAD BEEN
PRACTICED ON THE SCHONEYS.

A. The Schoneys' Claim for Fraud:

The Schoneys alleged that defendant had represented that the Schoneys had purchased specific mausoleum spaces. (Fifth Amended Complaint, para 18). This allegation was supported by the deposition testimony of the Schoneys' that they selected specific mausoleum spaces when Nordin made the sale to them. (George Schoney depo. p. 10-11). Moore's testimony also confirmed that specific spaces were sold.

The reality is that defendant sold many more mausoleum spaces than it actually had. (Fifth Amended Complaint, para. 17, 19). This fact was not explained to the Schoneys. (Id. at para. 19). Actually, defendant stopped assigning specific crypt spaces in 1973 or 1974 (Smith depo. p. 37). This was about the time the Schoneys purchased. Thus, the specific mausoleum spaces people (like the Schoneys) thought they were buying were non-existent.

Defendant's argument to the trial court was that the Schoneys had "not alleged" there was never a crypt available to them. (Tr. at p. 31). Defendant's intent was to substitute a crypt space at Redwood Road. Of course, the Schoneys did not want "any" crypt; they had purchased a specific crypt space at a specific location (Mountain View). The fact that defendant could have substituted a different crypt in a different location merely points up the fraud. The tactic is a kind of bait and switch; consumers think they're getting one thing, but another is substituted. The trial court erred by concluding as a matter of law that the Schoneys could not prove fraud.

POINT

THE SCHONEYS' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS NOT TIME-BARRED.

A. The Schoneys' Claim for Intentional Infliction of Emotional Distress.

The Schoneys pleaded a claim for intentional infliction of emotional distress in their Second Amended Complaint filed June 6, 1983 (Count 10). They repleaded this theory in their Fifth Amended Complaint of January 26, 1988.

B. The Statute of Limitations.

Defendants' ground for dismissing the count for intentional infliction of emotional distress was "the statute of limitations on that claim has run." (Tr. at p. 25). No claim was made that facts alleged did not state a cause of action. Defendant claimed that the relation back provision of Rule 15(a)

did not apply because the wrong or liability alleged in the Fifth Amended complaint was different from that in the second Amended Complaint, and it required different proof. Defendant calculated the four-year limitation period from May 22, 1982. (Tr. at p. 49).

C. Legal Standard and Standard of Appellate Review.

If the intentional infliction count alleged in the Fifth Amended Complaint "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the [Second Amended Complaint], the amendment relates back . . . ". Rule 15(c). Since the question is answered solely by comparing the two pleadings, the appellate court simply reviews for error.

D. The Schoneys' Claim for Intentional Infliction of Emotional Distress in the Fifth Amended Complaint Relates Back Under Rule 15(c) to the Claim for Intentional Infliction in the Second Amended Complaint.

Defendant's counsel represented that the Schoneys' claim for intentional infliction of emotional distress in the Fifth Amended Complaint was a new cause of action brought up for the first time. (Tr. p. 25). Actually, the Schoneys pleaded a separate claim for intentional infliction of emotional distress in the Second Amended Complaint of June 6, 1983, just over one year from the culmination of the entire transaction between the named parties. (Second Amended Complaint, para. 53). Under Rule 15(c), the claim for intentional infliction in the Fifth Amended Complaint related back to at least the Second Amended Complaint.

The following allegations in the Fifth Amended Complaint show substantial similarity with those in the Second

Amended Complaint. Included are citations to the April 1, 1983 depositions of the Schoneys for the facts more specifically alleged in the Fifth Amended Complaint. Defendant was on notice of these facts since at least that time. The allegations which are bracketed were taken from the Second Amended Complaint:

[Defendant's advertising program is designed to promise customers a sense of peace, comfort and security through the purchase of "pre-need" mausoleum space and related services. Plaintiffs have paid money in good faith. However, defendants have failed to provide peace, comfort, and security.] (Verbatim, Second Amended Complaint, para. 53.)

Defendant's knew, or should have known, that named plaintiffs were opposed to ground burial for philosophical and personal reasons. (Erma Schoney depo. p. 18, April , 1983).

[Plaintiffs agreed to a ground burial for Clinton Wheeler in 1974 in reliance on defendant's express promise that he would not be there more than several (less than six) months.] (George Schoney depo. p. 16). (cf. Second Amended Complaint, para. 14, regarding defendant's scheme to substitute cheaper ground plots.)

Further, because of the temporary nature of the interment, his grave was not marked. (Erma Schoney depo. p.16)

[However, defendants intentionally or recklessly delayed building the mausoleum for years.] (cf 2d. Complaint, para. 12, 13, 20, 43-48.)

Moreover, with the passage of time, defendants lost track of the location. (Erma Schoney depo. p. 16). Ultimately, defendants were forced to use a long metal probe to locate the grave. (Id. at 11.)

[Due to the long delay, and defendants' stated intention not to build the mausoleum, plaintiffs' purchased other mausoleum space

at Sunset Lawn.] (Id. at 11-12) (Second Amended Complaint, para 11).

When plaintiff Erma Schoney's mother died, she was interred at the Sunset Lawn. Defendants intentionally refused to allow the father of plaintiff Erma Schoney to be disinterred, and reinterred at Sunset Lawn with his wife. (George Schoney depo. p. 45-46.) Finally on the morning of the funeral, defendants relented and allowed plaintiff Erma Schoney's father to be transferred. (Id. at 47-48).

[Defendants' conduct, together with the acts alleged above, has caused great turmoil and severe emotional distress to the named plaintiffs. Defendants' conduct was done wilfully and in reckless disregard for their rights and sensibilities.] (Second Amended Complaint, para. 53.)

A reasonable person should have known that defendants' conduct would cause such severe emotional distress. (New allegations).

Thus, the allegations in the Fifth Amended Complaint are nothing more than a compilation of allegations from the Second Amended Complaint, as more particularly set forth in the Schoneys' depositions of April 1, 1983.

POINT

BECAUSE DEFENDANT FAILED TO PROPERLY SERVE A FORMAL SUGGESTION OF DEATH, THE ACTION WAS IMPROPERLY DISMISSED AS TO GEORGE SCHONEY'S ESTATE.

A. Defendant's Motion to Dismiss.

Defendant made an oral motion to dismiss the action as to George Schoney, pursuant to U.R.C.P. 25. (Tr. at p. 8). Defendant represented that a suggestion of death upon the record had been made more than 90 days before the hearing. (Tr. at 0.11). Defendant was referring to a statement in its motion for

summary judgment filed on December 29, 1987. (Id.). That motion, however, did not mention Rule 25, nor argue George Schoney's death as a basis for dismissal.

B. No Proper Suggestion of Death Was Ever Made.

A suggestion of death upon the record is a formal pleading. See e.g. Fed. R. Civ. P. Form 30. A passing reference somewhere in the record to death of a party is insufficient. In Blair v. Beech Aircraft Corp., 104 F.R.D. 21 (W.D. Pa. 984) a reference to death of a party was made in a pleading. The court stated:

This Court does not agree that the reference to plaintiff's death in the November 4, 1983 pleading triggered the running of the 90 day time limit. Under Rule 25(a), the time for filing a motion for substitution commences only after the death of the party is formally suggested on the record by the filing and service of a written statement of the fact of death as provided in Rule 5 of the Federal Rules of Civil Procedure and Form 30. United States v. Miller Bros. Constr. Co., 505 F.2d 1031, 1034 (10th Cir. 1974); Mobil Oil Corp. v. Lefkowitz, 454 F. Supp. 59, 70 (S.D.N.Y. 1977). No such formal writing was filed in the instant case. The reference to the death of the plaintiff in the pleadings is not sufficient to trigger the running of the 90 day time period.

Likewise, in Dolgow v. Anderson, 45 F.R.D. 470 (E.D.N.Y. 1968), the court held:

A statement made in passing during a deposition is not "a statement of the fact of death: within the meaning of Rule 25. See Official Form 30 Federal Rules of Civil Procedure. Substitution may be made prior to service of the statement. 4 Moore's Federal Practice 25.-02, p. 62 (1967 Supp.).

Attorneys are sometimes so harassed during the course of a litigation that they may well overlook an informal suggestion of death. When the consequences to the client of a slightly delayed reaction may be severe and the burden of providing formal notice is slight, insistence on the observance of procedural ritual is justified.

Similarly, an answer to interrogatory is not a proper suggestion of death:

The incidental mention of the deaths in answers to interrogatories does not appear to this Court to have started the 90-day period running. Federal Form 30 provides an example of the proper suggestion; the answers to interrogatories cited by defendants do not rise to the required level of formality.

Acri v. Int. Ass'n of Mach. & Aero. Wkrs., 595 F.Supp 326, 330 (N.D. Cal. 1983).

No proper suggestion of death was ever made. A passing reference to death in an unrelated motion is insufficient. An answer to interrogatory is insufficient. The rules contemplate a formal pleading specifically referring to the provisions of Rule 25. See Connelly v. Rathjen, 547 P.2d 1336 (Utah 1976) where dismissal was proper because "notice of death was duly made of record pursuant to Rule 25(a), U.R.C.P."; Nat. Equip. Rental Ltd. v. Whitecraft Unl. Inc., 75 F.R.D. 507 (E.D.N.Y.1977)(service of notice to file claim against estate is not proper suggestion of death).

C. No Personal Service Was Made Pursuant to Rule 25.

Rule 25(a)(1) requires service of the suggestion of death to be made "upon persons not parties in the manner provided in Rule 4 for the service of a summons." Rule 4, in turn,

requires personal service upon the executor or personal representative of the estate of George Schoney. Rule 4(e)(1). "The non-parties for whom Rules 25(a)(1) and 4(d)(1) mandate personal service are evidently the 'successors or representatives of the deceased party'." Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 (4 Cir. 1985). Defendant offered no evidence that it had served the non-party, i.e. the estate of George Schoney. Defendant offered no evidence that an executor or personal representative had ever been appointed for George Schoney's estate.

Service upon George Schoney's counsel was not sufficient.

Service on decedent's attorney above was inadequate. The attorney's agency to act ceases with the death of his client, see Restatement (Second) of Agency __120(1)(1958) and he has no power to continue or terminate an action on his own initiative. Because the attorney is neither a party nor a legal successor or representative of the estate, he has no authority to move for substitution under Rule 25(a)(1), as the courts have repeatedly recognized." Fariss v. Lunchburg Foundry, supra, 769 F.2d at 962.

Also holding that the deceased's attorney "is not a representative of the deceased party in the sense contemplated by Rule 25(a)(1)" is Rende v. Kay, 415 F.2d 983 (D.C. Cir. 1969). See also Brown v. Mustain, 30 Fed. Rules Serv. 2d 534 (4 Cir. 1980)(decedent's attorney not a party or successor to party who can file suggestion of death); Al-Jurdi v. Rochefelbs, 88 F.R.D. 244 (W.D.N.Y.1980)(service must be made on estate unless estate's attorney agrees and is authorized to accept service of process.) Because George Schoney's attorney does not automatically

represent his estate, defendant has never properly served George Schoney's estate.

POINT

DEFENDANT'S OFFER OF JUDGMENT DID NOT MOOT
THE SCHONEY'S CLAIMS

A. The Trial Court Dismissed All the Schoney's Claims Because Defendant Offered to Rescind the Contract and Pay Restitution in the Amount of the Purchase Price Plus Interest.

Defendant made an oral offer of judgment at the summary judgment hearing (Tr. at p. 13). The amount was \$4,000 and was calculated by returning the money paid by the Schoney's plus interest. (Tr. at p. 19). Defendant seemed to argue that return of the money the Schoneys paid, plus interest, would "moot" all their damage claims. (Id.). The trial court apparently agreed and held that the Schoneys could never recover more than the \$4,000 offered. (Tr. at p. 51).

B. The Schoneys Did Not Seek Rescission and Restitution; Instead They Sought to Affirm the Contract and Recover Damages.

The Schoney's Fifth Amended Complaint never sought rescission and a refund of the money they had paid. Instead, they sought interest on the money they paid (damages for delay in building the Mountain View Mausoleum); the difference in value between the mausoleum as shown and the mausoleum as built (damages) and their share of the money earned by defendant in renting the cemetery chapel (damages for loss of use). Additionally, the Schoney's sought an accounting of trust funds, which does not depend on a finding of breach of contract. The Schoneys also sought damages for buying substitute mausoleum spaces

("cover" damages) and damages for their mental and emotional distress. Every remedy sought (except the trust accounting) was based on damages for breach of contract or tort. The Schoneys made no request for rescission of the contract.

C. Election of Remedies Is Up to the Schoneys, Not Defendant and the Trial Court.

By offering rescission, defendant attempted to force an election of remedies on the Schoneys. Obviously, defendant feels it is cheaper to give the Schoneys their money back than to account for building an inferior mausoleum, renting out the cemetery chapel, abusing trust funds and obligations, and for mental distress caused by the lengthy delay in building the mausoleum. However, defendants are not allowed the option of choosing the least expensive remedy. If a plaintiff's damages exceed the purchase price, the plaintiff is free to seek damages.

A plaintiff is entitled to an election of remedies "free of fraud or imposition." Angelos v. First Interstate Bank of Utah, 571 P.2d 772, 778 (Utah 1983).

It is axiomatic that where a civil wrong gives rise to two or more causes of action, the choice of remedy is vested in the victim, not in the wrongdoer . . . It does not lie in the mouth of the wrongdoer to demand that his victim be limited to that cause of action which is most beneficial to the wrong-doer.

Gherman v. Colburn, 140 Cal. Rptr. 330, 343 (App. Ct. 1977)

(Emphasis in the original.)

The choice of remedies belongs to the one who has been defrauded and may not be forced upon him by the wrongdoer.

Moore & Co. v. Williams, 657 P.2d 984, 988 (Colo App. 1982). See also Mills v. Brown, 568 S.W.2d 100 (Tenn. 1978) (purchaser's choice whether to seek rescission or damages; not up to vendor); King v. Lindlay, 697 S.W. 2d 749 (Tex. App. 1985) ("Defendant may not dictate to a plaintiff which remedy he should pursue").

D. There was No Evidence that the Schoney's Damages Could Not Exceed \$4,000.

There was no basis for the trial court to conclude as a matter of law that the damages alleged would not exceed \$4,000. Damages such as mental and emotional distress are not capable of ascertainment on summary judgment anyway, and must be left to a jury. Thus, defendant's offer of settlement was no basis for dismissing the Schoney's complaint.

A procedure similar to that of Judge Moffat's was found reversible error in Jarrett v. G.L. Harper & Sons, Inc., 235 S.E. 2d 362 (W. Va. 1977). After picking a jury, the defendant confessed judgment in the amount of the plaintiff's out-of-pocket expenses. After colloquy with plaintiff's counsel, the trial court dismissed the case. The appellate court reversed:

The record discloses no explanation about how the trial court arrived at his decision to force acceptance of this confession of judgment upon plaintiffs. . . [W]hen a defendant's offer of judgment only partially satisfies the plaintiff's claim for damages and plaintiff either rejects the tender or accepts it as part payment only, the court must consider the offer withdrawn and submit the case to the jury, whereas here one has been demanded.

Id. at 363, 364.

Because the offer of judgment was only a partial satisfaction and was rejected by the Schoneys, the trial court had no choice but to send the matter to a jury.

E. The Schoneys' Complaint Should Not Have Been Discussed Even if their Damages Could Not Exceed \$4,000.

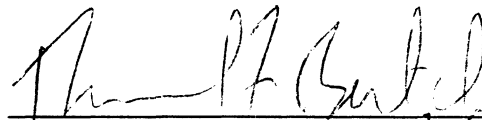
Assuming for sake of argument that the Schoneys' damages could not exceed \$4,000, defendant's offer of judgment could not form the basis for dismissing their complaint. The dismissal deprived the Schoneys of both their cause of action and the \$4,000 which defendant offered. An offer of judgment "is neither a defense to an action nor a bar to further prosecution of a suit." Katz Drug Co. v. Comm. Standard Ins., 647 S.W.2d 831, 840 (Mo. App. 1983). "Defendant's reliance upon its offer of judgment as constituting an acceptable basis for the grant of summary judgment is misplaced. [It] is not a defense to an action and does not bar the further prosecution of a suit. [Citation omitted]. Miller v United Security Ins. Co., 496 S.W. 2d 871, 876 (Mo. App. 1973). An offer of judgment is not a pleading, deposition, admission or affidavit which will support summary judgment. Id.

What Judge Moffat did must be distinguished from the procedure occasionally used in class actions of offering judgment in excess of the named plaintiff's damages. This is done after class certification is denied and is done to avoid a useless trial. In those cases, the named plaintiff gets a judgment in his favor for the full amount of his individual damages. Even then, "a court may not impose upon a plaintiff a settlement that

deprives him of relief to which he could be entitled after trial. [Citation omitted]." Kline v. Wolf, 702 F.2d 400, 405 (2d Cir. 1983). Part of the relief sought in a class action is class certification. Thus, a judgment in favor of an individual named plaintiff must allow for appeal of the denial of class certification. Roper v. Conserve, Inc., 578 F.2d 1106 (5th Cir. 1978) affirmed sub. nom. Deposit Guar. Nat. Bank v Roper, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed.2d 427 (1980). This prevents a large defendant from avoiding class-wide accountability by paying off the named plaintiff's claims through an unaccepted offer of judgment.

In this case, however, defendant used its unaccepted offer of judgment to avoid both class liability and liability to the Schoneys. This approach deprives the Schoneys of both the offered judgment and their causes of action. No plausible reasoning can support this result.

DATED this 10 day of March, 1989.


DANIEL F. BERTCH¹

¹This brief is submitted in its current form pursuant to the order of March 7, 1989. Appellant submits it under protest that the order is incorrect and that the hearing panel will be unfairly hampered by the abbreviated nature of the brief.

CERTIFICATE OF MAILING

I certify that on the 10th day of March, 1989, I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF, (Schoney v. Memorial Estates, et al.) postage prepaid, by depositing a copy of the same in the U.S. Mail to:

Arthur H. Nielsen
Joseph L. Henriod
David Swope
NIELSEN & SENIOR
36 South State, #1100
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Paul J. Butch", is written over a horizontal line.

/jc