

1988

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al.,)	
)	APPENDIX TO THE BRIEF OF
Plaintiff/Appellant,	)	RESPONDENTS
)	
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

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FILED
JAN 10 1989
Mary T. Hooper
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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)	APPENDIX TO THE BRIEF OF
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APPENDIX

- A. Second Amended Complaint
- B. Defendant's Memorandum in Support of Motion for Summary Judgment
- C. MacKay Affidavit
- D. Hughes Affidavit
- E. Christensen Affidavit
- F. Schoney Affidavit
- G. Minute Entry on January 15 ruling on Defendants' Motion for Summary Judgment
- H. Fifth Amended Complaint
- I. Order, Summary Judgment and Judgment by Default
- J. Rule 25(a), Utah Rules of Civil Procedure
- K. Rule 37(d), Utah Rules of Civil Procedure
- L. Rule 56(c), Utah Rules of Civil Procedure
- M. Section 22-4-1, Utah Code Annotated, 1953
- N. Section 22-4-1, Utah Code Annotated, 1983
- O. Section 78-12-25, Utah Code Annotated, 1953
- P. Section 78-12-25.5, Utah Code Annotated, 1953

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 1989, I caused four true and correct copies of the foregoing Appendix to the Brief of Respondents 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



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APPENDIX

Second Amended Complaint	A
Defendant's Memorandum in Support of Motion for Summary Judgment	B
MacKay Affidavit	C
Hughes Affidavit	D
Christensen Affidavit	E
Schoney Affidavit.	F
Minute Entry on January 15 ruling on Defendants' Motion for Summary Judgment.	G
Fifth Amended Complaint	H
Order, Summary Judgment and Judgment by Default	I
Rule 25(a), Utah Rules of Civil Procedure	J
Rule 37(d), Utah Rules of Civil Procedure	K
Rule 56(c), Utah Rules of Civil Procedure	L
Section 22-4-1, Utah Code Annotated, 1953	M
Section 22-4-1, Utah Code Annotated, 1983	N
Section 78-12-25, Utah Code Annotated, 1953	O
Section 78-12-25.5, Utah Code Annotated, 1953	P

Tab A

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H. DIXON, JR. CLERK

[Signature]
DEPUTY CLERK

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Salt Lake City, Utah, 84117
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GEORGE K. SCHONEY, and)	
IRMA J. SCHONEY, for)	
themselves and all others)	
similarly situated,)	
)	
Plaintiffs,	)	SECOND AMENDED COMPLAINT
)	
vs.)	
)	
MEMORIAL ESTATES, INC., and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENT CORP., corpora-)	
tions, and JOHN DOES 1 through)	
10, individuals,)	
)	
Defendants.	)	Civil No. C 82-4983
)	
)	

The plaintiffs George K. Schoney and Irma J. Schoney complain for themselves and all others similarly situated as follows:

DESCRIPTION OF PARTIES

1. Defendant Memorial Estates, Inc. is a corporation organized pursuant to the laws of the State of Utah, which has its principle place of business at 6500 South Redwood Road in Murray, Utah.

2. Defendant Memorial Estates Cemetery Development Corp. is a corporation organized pursuant to the laws of the State of

Utah, which has its principle place of business at 6500 South Redwood Road in Murray, Utah.

3. The Defendants John Doe 1 through 10, are individuals residing in Salt Lake County, as yet unknown to the plaintiffs.

4. The corporate defendants are and were at all times relevant, interrelated corporations operating under a common scheme to sell pre-need funeral contracts for burial lots, mausoleum crypts, burial services and other funeral merchandise such as grave markers and vaults. The defendant corporations are controlled through common management. Plaintiff alleges on information and belief that at all times relevant to this action the defendants co-mingled corporate funds and in other ways were and are so closely related that the corporateness of one corporate defendant is not distinguishable from the other corporate defendant.

COUNT I

TORTIOUS BAD FAITH

5. Defendants are generally engaged in the cemetery business. As a part of that business, defendants have, at all times relevant hereto maintained an aggressive "pre-need" sales program. Through this sales program, defendants sell real and personal property and cemetery services to purchasers prior to the purchaser's death and burial.

6. In 1973 and years surrounding that time, as part of the defendants' sales program, defendant approached plaintiffs, and others, representing that the defendant was prepared to build a mausoleum for interment of the plaintiffs and others.

Defendants represented that they lacked sufficient capital to complete the construction of the mausoleum and that if plaintiffs would purchase mausoleum space in advance of completion, defendants would use the money received for the construction of the mausoleum.

7. On or about January 23, 1973, as a result of the defendants' aggressive sales program, plaintiffs entered into a written contract with defendants for the purchase of two interment spaces in the mausoleum. The contract is attached hereto as Exhibit A.

8. Between January 23, 1973 and January 20, 1977, plaintiffs duly performed all of their duties and obligations under the contract at issue in this action. On or about January 20, 1977, defendants delivered to plaintiffs a "Deed for Interment Rights", attached hereto as Exhibit B.

9. Defendants have not yet begun construction of the mausoleum sold and promised to the plaintiffs.

10. Plaintiffs are presently in their late fifties. Plaintiff George K. Schoney is suffering from cancer. Over the years, plaintiffs have made frequent inquiries concerning the defendants' plan for completion of the mausoleum promised them. On each occasion defendants lulled plaintiffs with assurances that the work would soon be completed.

11. On or about March 29, 1981, plaintiffs formulated a belief that it was likely that they would die before the completion of the mausoleum promised them by the defendants.

In accord with this belief plaintiffs purchased interment space in another mausoleum not connected with the defendants.

12. Plaintiffs allege on information and belief that defendants do not intend to build the mausoleum space they sold to plaintiffs. Plaintiffs allege further on information and belief that the money paid by them for the construction of mausoleum space has been diverted by defendants for business purposes other than the building of a mausoleum, including the payment of commissions and dividends. Defendants acted with malice in diverting to other uses the money received for construction of the mausoleum.

13. Plaintiffs allege on information and belief that as early as January of 1976, the management and agents of the corporate defendants, herein referred to as John Does 1 through 10, had concluded that they would never build the mausoleum promised the plaintiffs. Despite this change of intent, defendants continued to accept plaintiffs' installment payments until January 20, 1977 when the last payment was made. Defendants acted with malice and in bad faith in not informing plaintiffs of their changed intention and in continuing to accept plaintiffs' money.

14. Plaintiffs allege on information and belief that as early as January of 1976 the defendants formed a scheme to bury deceased purchasers of mausoleum space in cheaper ordinary burial plots. Defendants acted with malice in forming the scheme described in this paragraph 14.

15. As a part of the scheme described in paragraph 14 above, defendants relied on the fact that interested persons would not be aware of the failure to construct mausoleum space until the time of death and bereavement. Defendants further relied on the fact that persons suffering under the stress created by the loss of a loved one would not be willing or able to complain about defendants' failure to construct the mausoleum. The formation and implementation of this scheme to defraud plaintiffs constitutes malice and bad faith on the part of the defendants.

16. Defendants have not made any good faith attempt to complete the mausoleum space promised the plaintiffs and have thereby breached their contractual duty of good faith.

17. As a result of defendants' bad faith, plaintiffs have lost \$1,390.00 plus interest and attorney's fees. As a further result of defendants' bad faith, defendants have been unjustly enriched in the amount of \$1,390.00 plus interest.

COUNT II

BREACH OF CONTRACT

18. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 17 above.

19. More than nine years have elapsed since defendants contracted with plaintiffs for the construction of the mausoleum at issue. Defendants' failure to perform their obligations within a reasonable time is a breach of their contract with plaintiffs.

20. The time transpired since the making of the contract is sufficiently great to warrant a conclusion that defendants do not intend to build the mausoleum promised.

21. By reason of defendants' breach of contract, plaintiffs have lost \$1,390.00 plus interest. Defendants have been unjustly enriched in the amount of \$1,390.00 plus interest.

COUNT III

FRAUDULENT CONVEYENCE

22. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 21 above.

23. In 1975, defendants issued a "Deed for Interment Rights" to plaintiffs. (The deed is attached as Exhibit B.)

24. That deed purports to grant and convey, for interment purposes only, specific property.

25. In fact, the property conveyed by the deed does not exist. Defendants issued these deeds knowing that the property conveyed did not exist. This was done fraudulently for the purpose of misleading plaintiffs.

26. By reason of defendants' fraudulent conduct, defendants have become liable to plaintiffs in the sum of \$1390.00 plus interest.

COUNT IV

VIOLATION OF UTAH CONSUMER SALES PRACTICES ACT

27. The sale by defendants of mausoleum space is a consumer transaction within the meaning of Section 13-11-3(2) Utah Code Annotated.

28. Defendants' failure to provide mausoleum space is a deceptive practice within the meaning of Section 13-11-4(b) and (d).

29. Defendants have continually represented to plaintiffs that the mausoleum would be built despite their knowledge or belief to the contrary. This and other practices described above are unconscienable practices within the meaning of Section 13-11-5 Utah Code Annotated.

30. Defendant has issued deeds to class members. These deeds purport to convey interment rights in an existing mausoleum. In fact, only 128 mausoleum spaces have been constructed. All other class members have received deeds and property rights to non-existent mausoleums. Said conduct by defendant is a deceptive act within the meaning of §13-11-4(e), Utah Code Annotated, 1953.

31. Plaintiffs have suffered an actual loss within the meaning of Section 13-11-19(4) Utah Code Annotated. The amount of that loss is \$1,390.00 plus interest and attorney's fees.

COUNT V

BREACH OF CONTRACT TO PROVIDE CHAPEL

32. The Mausoleum Estate Agreement provides, in part, that, ". . . The Company agrees to extend to the Purchaser and his immediate family. . . the use of a full service chapel . . ."

33. The promise of a chapel was an essential term of the contract in that such a chapel provides convenience, comfort, and peace at a time of bereavement.

34. The defendants have converted the existing chapel at 3115 East 7800 South, Salt Lake City, Utah into office space.

35. By reason of this unlawful conversion, plaintiffs have suffered the loss of use of the chapel, and defendant has been unjustly enriched by keeping the rental proceeds.

COUNT VI

BREACH OF TRUST

36. As early as 1972, defendants were actively selling mausoleum space on a pre-need basis under a so called public relations development program. Under this program, plaintiffs were sold space in a mausoleum that was yet to be constructed. Defendants represented to plaintiffs that the proceeds collected from these pre-need mausoleum sales would be used to construct a mausoleum unit once enough funds were received to begin construction. Completion of the program as to a mausoleum unit was promised to occur after about 50% of the mausoleum spaces in that unit had been sold.

37. Plaintiffs allege on information and belief that money collected from mausoleum sales was put into the general operating fund of the defendants' corporation and used for general business purposes. Defendants failed to reserve and save the money collected from mausoleum sales for mausoleum construction as indicated in the public relations development program.

38. As a result of defendant's failure to reserve and save the money collected from mausoleum sales for mausoleum construction, plaintiffs have been damaged in their not having

mausoleum space available. They are without guarantee that the necessary money will be available to construct the necessary mausoleum spaces.

COUNT VII

BREACH OF STATUTORY TRUST

39. Pursuant to Sections 8-4-82 and 8-4-83, U.C.A., defendants are required to deposit \$30.00 in an irrevocable endowment care trust fund for each mausoleum space sold. The required sum is payable to the trust upon full payment of the contract price. The funds in this trust are to be collected for the purpose of maintenance and care of the cemetery property. These trust funds are to be invested in accordance with Section 10-2-1, Utah Code Annotated, which requires the standard of care that men of prudence, discretion and intelligence exercise in the management of their own affairs.

40. Contrary to the requirements of Section 33-2-1, Utah Code Annotated, defendants have substituted and maintain over 40% of the trust corpus with accounts receivable. This is money owing to defendants on sales contracts and is by its very nature noninvestable.

41. As a result of this ongoing practice, the endowment care trust fund remains over 40% uninvested and thus is not capable of the proper generation of funds for endowment care cemetery maintenance as required by law. As a result, plaintiffs and their families who are effectively the beneficiaries of this endowment care trust fund, are damaged by the loss of available trust funds for cemetery maintenance at Memorial

Estates Cemeteries; and further, plaintiffs are deprived of the peace, comfort and solitude of having an adequate endowment care trust as promised by the contract.

COUNT VIII

INVASION OF TRUST CORPUS

42. Plaintiffs Mausoleum Estate Agreement provides that defendant shall contribute \$20.00 to "Trust A" and \$20.00 to "Trust B" (See Exhibit "A".) However, defendant has not maintained two separate trust accounts. Plaintiff alleges on information and belief that defendant has invaded the assets of trust B and used those assets for the general operating expenses of defendant including salaries and advertising. Wherefore plaintiffs have been deprived of the assets of trust B; and further, plaintiffs have been deprived of the peace, comfort and solitude of having an adequate endowment care trust as provided by the contract.

COUNT IX

FRAUD

43. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 43, above.

44. Plaintiffs allege on information and belief that at the time Defendants induced plaintiffs to purchase space in the non-existent mausoleum, defendants knew that there was a substantial probability that the mausoleum would never be built. Defendants' representations to plaintiffs that the mausoleum would be built were made in reckless disregard for the truth or untruth of those representations.

45. On frequent occasions between January 23, 1973 (the date of contract) and January 20, 1977 (the date of Plaintiffs' last payment on the contract) Plaintiffs asked defendants about their intentions to commence construction of the promised mausoleum.

46. Each time plaintiffs inquired of defendants concerning defendants' intentions, defendants assured plaintiffs that the mausoleum would be completed. On some or all of these occasions, defendants knew that there was no plan to complete the promised mausoleum.

47. Defendants represented to plaintiffs that they would complete the promised mausoleum with the intent to deceive plaintiffs, defendants intended to persuade plaintiffs to continue to make monthly payments on the purchase of the non-existent mausoleum.

48. Plaintiffs reasonably relied on defendants' assurances that the mausoleum would be constructed. On at least one occasion defendants' salesman showed plaintiffs or plaintiffs' children the place where the mausoleum was to stand and described the preliminary construction work necessary for work to begin on the structure itself.

49. Plaintiffs have been damaged by defendants' fraudulent representations in the sum of \$1,390.00 together with costs and attorney's fees.

COUNT X

FAILURE TO ESTABLISH A STATUTORY
TRUST

50. The sale of unconstructed mausoleum space with chapel privileges is a prearranged funeral plan within the meaning of §22-4-1, U.C.A.

51. Defendants have failed to establish the 75% trust required by §22-4-1, U.C.A.

52. Plaintiff has been damaged because the trust funds have been diverted to general operating expenses, and plaintiffs have not been given the option of withdrawing their funds pursuant to §22-4-4, U.C.A.

COUNT XI
OUTRAGE AND INTENTIONAL INFLICTION
OF EMOTIONAL DISTRESS

53. Defendants' 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. Plaintiff has paid money in good faith. However, defendant has failed to provide peace, comfort, and security. Rather, defendant has pursued a course of tortious conduct as more fully alleged above. Defendants' conduct has caused great turmoil and emotional distress. Defendants' conduct was done willfully and in reckless disregard for plaintiff's rights.

CLASS ALLEGATIONS

54. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 53 above.

55. Plaintiffs are members of a class composed of persons who have entered into pre-need contracts with defendants.

56. Plaintiff allege on information and belief that the class is composed of more than 500 persons making joinder of all class member impracticable.

57. There are questions of law and fact common to all class members. Those common questions include: whether defendants have fraudulently and deceptively received money for the construction of a mausoleum, whether the defendants have acted in bad faith in the performance of their contractual obligations, whether defendants have breached their contract by not constructing the promised mausoleum within a reasonable time, whether defendants have breached the express trust, whether plaintiffs have been deprived of the chapel, and whether defendants have committed deceptive acts by conveying interment rights in a non-existent mausoleum.

58. Plaintiffs' claims are typical of the claims of other class members in that defendants sold mausoleum space through a standardized marketing scheme. All class members have purchased mausoleum space pursuant to standardized form contracts all class members have also received the same standard form of deed.

59. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. Such adjudications would establish incompatible standards of conduct for the party opposing the class in that defendants must either build a mausoleum for all class members or refund the money received for construction of

the mausoleum to all class members. Also, defendant must establish a chapel for all class members.

60. The questions of law and fact common to the class members predominate over any questions affecting only individual members. The class action device is superior to other available methods for the fair and efficient adjudication of this controversy.

PRAYER

WHEREFORE, plaintiffs pray for judgment for themselves and for all others similarly situated as follows:

1. That defendants Memorial Estates, Inc. and Memorial Estates Cemetery Development Corp. and John Does 1 through 10 be required, jointly and severally, to plaintiffs George K. Schoney and Irma J. Schoney and all others similarly situated as follows:

(A) To refund all money paid to defendants for the right of interment in the promised mausoleum.

(B) For interest on the money defendants received from plaintiffs, calculated at an annual rate of 12% from the date defendants received the money.

(C) For punitive damages in the amount of \$1,000,000.00.

(D) For a reasonable rental for loss of use of the chapel and to restore the office building to its original status as a chapel, or in the alternative, that defendants disgorge the rental income by which they have been unjustly enriched.

(E) For an accounting of all trust funds.

(F) For an order that plaintiff class members be given the option of withdrawing their payments pursuant to §22-4-4 U.C.A.

2. That the plaintiffs and all others similarly situated be awarded reasonable costs and attorney's fees in connection with the prosecution of this action.

3. For such other and further relief as the court deems just and proper under the circumstances.

DATED this 6 day of June, 1983.

ROBERT J. DEBRY & ASSOCIATES

BY: Robert J. DeBry
Robert J. DeBry

MEMORIAL ESTATES

Mausoleum Crypts

MAUSOLEUM ESTATE AGREEMENT

Upon payment of this agreement, the Purchaser will receive a deed to the exclusive right of interment in a Mausoleum Estate containing 2 spaces, described as Mausoleum Crypts to be used subject to the Rules and Regulations of the Company now or hereafter made and promulgated for the operation, care, use, control, and preservation of the mausoleum units and the improvements thereof.

The purchase price, including the total amount of the Endowment Care Trust Funds at Forty (\$40.00) Dollars per space, is the Cash price of \$ 1,390.00. The Down Payment of \$ 300.28 leaves an unpaid cash balance of \$ 1,090.00. The Finance Charge is \$ None, at the annual percentage rate of 0%. The Total Deferred payment price is \$ 1,090.00.

The Purchaser agrees to pay the total of payments in 36 equal consecutive monthly installments \$ 30.27 each, the first installment to be due and payable on the 1st day of February, 1974 and the remaining installments to be paid on the same day of each succeeding month.

In addition, the Company agrees to extend to the Purchaser and his immediate family the following benefits:

Chapel & Improvement Use: To provide the use of the full service chapel, the entrance area, the parking facilities, and all other convenience improvements as completed, without additional charges.

Care & Maintenance: To provide the care and maintenance required, in addition to that which is provided by current trust fund income, in order to maintain the entire developed section of the cemetery until such time as the trust fund income is adequate.

Transfer to Developed Property: To transfer the mausoleum estate, which has hereby been purchased in a semi-developed mausoleum, to a comparable developed mausoleum space without any additional cost, should a space in the mausoleum estate be needed for interment prior to development.

Transfer to Other Memorial Estate Properties: To allow the Purchaser any time to present his request for transfer of the mausoleum estate to another mausoleum unit that has the same Public Relations and wherein not more than one half ($\frac{1}{2}$) of the spaces have been previously allocated.

Transfer to Other Persons: To honor the request of the Purchaser to transfer his estate or any space thereof to anyone whom he may desire upon prior written approval of the Company.

Transfer to Other Communities: To permit the Purchaser, if he moves to another community more than fifty miles distance from metropolitan Salt Lake City, to transfer full dollar equity into the new community, subject to the Rules and Regulations governing such transfer at the time of the transfer request.

Purchaser's Right to Cancel: This agreement can be cancelled by the Purchaser upon notification in writing, mailed to the Company at 55 East Stratford Avenue, Salt Lake City, before midnight on the third business day after the Purchaser has signed the agreement.

Endowment Care Trust Funds: To cause to be transferred, when the total amount has been received from the purchaser, (\$20.00) per space to Trust "A" and to transfer Twenty Dollars (\$20.00) per space to Trust "B". Both Trust "A" and Trust "B" have been established by the Company to provide income to be applied to endowment care. The Purchaser authorizes and directs that the contributions to Trust "B" be invested in corporate bonds of Memorial Estate Investment, Inc., a corporation created to maximize the income to be realized from this trust for endowment care, or to such other investments as are authorized in that trust.

Design and Construction: To complete the mausoleum unit construction proposed by the mausoleum designers, for the mausoleum unit in which the Mausoleum Estate is located, within one year from the date that the Public Relations Development Program on that unit is completed.

The agreement shall be deemed to be accepted by the Purchaser and receipt acknowledged of a legible completed copy of the agreement, which includes the disclosure statement, at the time the Purchaser signs the agreement and by the Company at the time it mails to the Purchaser its letter of acknowledgement.

Dated this 29th day of January, 1973

Deed For Interment Rights

Know all men by these presents:

That Memorial Estates - Redwood, Inc. the Grantor, a corporation organized under the laws of the State of Utah, in consideration of the purchase price to it in hand paid, the receipt of which is hereby acknowledged, does hereby grant and convey to GEORGE A. & IRMA J. SCHONLY the grantee, for interment purposes only, subject to the conditions, reservations and rules and regulations set forth and referred to herein, the following (property) situated in MEMORIAL ESTATES - REDWOOD, INC., an endowment care cemetery in the county of Salt Lake, State of Utah, to wit

Estate No. C 1 Space No. 11 Maus. front & rear

In the MAUSOLIUM

According to the maps and plats of said cemetery, on file in the office of the under signed corporation and the office of the Recorder of Deeds for said Salt Lake County, Utah

That this conveyance, and all the right, title and interest hereby conveyed in and to the property above described, is subject to all laws and ordinances, and to the following conditions, reservations, restrictions and rules and regulations, and the Grantee covenants and agrees that

(a) No transfer, conveyance or assignment of any interest or rights acquired by Grantee shall be valid without the written consent of Grantor and being thereafter recorded on its books

(b) No monument or other memorial, tree, plants, objects or embellishments of any kind shall be placed upon, altered or removed from the above described property by the Grantee without the written consent of Grantor. All grading, landscape work and improvements of any kind, and all care on the above-described property, shall be done, and all trees and plants of any kind shall be planted, trimmed or removed, and all interments, disinterments and removals, including all openings and closings of graves, shall be made only by Grantor with its equipment. All interments shall be made subject to the use of the type of an outer container and the type of marker as shall be designated by Grantor in its rules and regulations.

(c) Grantor, at the expense of Grantee and as a charge against the above described property, may repair or remove any monument or other memorial which is improper or offensive or which has become dangerous or dilapidated, and may remove any tree, flower or plant, or other object or embellishment that becomes unsightly or dangerous.

(d) Grantor shall not be liable for loss or damage caused by an act of God, common enemy, thieves, vandals, strikers, malicious mischief makers, unavoidable accidents, riot or order of any military or civil authority

(e) The enumeration herein of certain conditions, reservations, restrictions and rules and regulations shall not be considered as the only limitations, but the Grantee shall always hold all his interest and rights limited by and subject to the rules and regulations and by laws of Grantor now existing or which may be by it hereafter adopted either by amendment alteration or the adoption of new ones. These rules and regulations are on file for inspection in Grantor's office and are specifically referred to and herein inserted as if set forth in full

All the above conditions, reservations, restrictions and rules and regulations are binding upon Grantee, his heirs, devisees, executors, administrators and assigns and are enforceable only by Grantor or its successors in interest. Nothing herein contained shall be deemed to restrict the use of any other portion of the cemetery than that herein conveyed to Grantee

IN WITNESS WHEREOF, the said Memorial Estates - Redwood, Inc., has caused this instrument to be executed in its corporate name by its duly authorized officers, and its corporate seal affixed this

24 day of January 19 77

MEMORIAL ESTATES REDWOOD, INC.

By [Signature]

Tab B

FILED

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Earl Jay Peck, #A2562
Stephen L. Henriod, #1469
NIELSEN & SENIOR
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DEC 29 4 17 PM '87

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Vicki J. Perkins

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.)	
SCHONEY for themselves and	)	MOTION FOR SUMMARY JUDGMENT
all others similarly situated,)	
)	
Plaintiffs,)	
)	
vs.	)	Civil No. 82-4983
)	
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge Richard H. Moffat
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

Defendant Memorial Estates, Inc. moves this court for an Order Granting Summary Judgment in Defendants favor and denying the claims for relief filed on behalf of George K. and Irma Schoney, on the basis that there are no genuine issues as to any material facts and that Defendant is entitled to judgment as a matter of law. This motion is further supported by a Memorandum of Points and Authorities filed herewith and the Memorandum in Support of Summary Judgment filed by defendant on February 10, 1984.

DATED this 29 day of December, 1987.

NIELSEN & SENIOR

By 

CERTIFICATE OF DELIVERY

I hereby certify that on the 29 day of December, 1987, I caused a true and correct copy of the foregoing Motion for Summary Judgment to be hand delivered to the following:

Daniel F. Bertch
Robert J. DeBry
Robert J. DeBry & Associates
Attorneys for Plaintiffs
4001 South 700 East, 5th Floor
Salt Lake City, Utah 84107



Joseph L. Henriod, #1468
Earl Jay Peck, #A2562
Stephen L. Henriod, #1469
NIELSEN & SENIOR
Attorneys for Defendants
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

DEC 29 4 16 PM '87

H. DIXON HINDLEY CLERK
3rd DIST. COURT

BY *Vicki [Signature]*
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.	)	DEFENDANTS MEMORANDUM IN
SCHONEY for themselves and	)	SUPPORT OF ITS MOTION FOR
all others similarly situated,	)	SUMMARY JUDGMENT
)	
Plaintiffs,)	
)	
vs.	)	Civil No. 82-4983
)	
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge Richard H. Moffat
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

Defendant Memorial Estates, Inc. (hereinafter "Defendant")
submits to the court its Memorandum in Support of its Motion for
Summary Judgment as follows:

I.

FACTS

1. On June 17, 1982, this action with George K. Schoney and
Irma J. Schoney (hereinafter "Plaintiffs") as named Plaintiffs was
filed. The complaint was amended on October 29, 1982 with a
second amendment on June 27, 1983. Plaintiffs have attempted two

subsequent amendments which have been denied by this court and, therefore, the allegations raised in Plaintiffs' June 27, 1983 complaint are at issue.

2. Clinton and Anna Wheeler, Mrs. Schoney's parents, owned ground burial lots located at Memorial Estates Redwood Road Cemetery. On December 29, 1973, they transferred two of their ground burial lots to Plaintiffs. (See K. Hughes Affidavit, ¶3, attached hereto as Exhibit "A".)

3. The Wheelers and Schoneys subsequently traded in their ground burial lots to purchase pre-need mausoleum spaces. Plaintiffs entered into the "Mausoleum Estate Agreement" on January 29, 1974, and made their first payment under the agreement on February, 1974 and continued making monthly payments for 36 months until the contract price was paid in full in January of 1977 (Exhibit "A").

4. Clinton Wheeler died August 13, 1974 and his funeral services were held at the Memorial Estates' Chapel, located at 5858 South 900 East. He was then interred at the Mountain View location in a ground burial plot.

5. Mrs. Wheeler passed away on May 22, 1982, and was interred at the mausoleum at Sunset Lawn and Mr. Wheeler was subsequently disinterred from the Mountain View location and interred at the mausoleum at Sunset Lawn.

6. Plaintiffs' subsequently purchased mausoleum space at Sunset Lawn. George K. Schoney died February 19, 1986, and was interred at this mausoleum space at Sunset Lawn. (See Plaintiff's

Answers to Interrogatories ¶¶1-4, attached hereto as Exhibit "B".) Mrs. Schoney has made it clear that she does not intend to utilize the mausoleum space available at either Memorial Estates or Redwood Road, nor does she intend to use Defendant's chapels. (See Plaintiff's Answers to Interrogatories ¶¶14 and 15, attached hereto as Exhibit "C".) Following Mr. Schoney's death, demand was never made upon Defendants for the use of any of their chapels or other facilities. (See Plaintiff's Answers to Interrogatories, ¶¶8-10, attached hereto as Exhibit "D".)

7. A 128 space partially filled mausoleum is in existence at the Memorial Estates' Redwood Cemetery which was constructed in 1976.

8. A 276 space partially filled mausoleum is in existence at the Memorial Estates' Mountain View Cemetery which was built and finished in April, 1985 (Exhibit "A").

9. Defendant has held separate and reserved a mausoleum space at their Redwood Road Cemetery for Mr. and Mrs. Schoney since at least January, 1977.

10. Plaintiffs have never requested that Defendants provide them use of a chapel for their own personal needs, nor have they requested use of mausoleum or other space for interment purposes (Exhibit "A").

11. Plaintiffs did not contend, nor can they, that there are not sufficient endowment funds for the cemetery at the present time.

12. On or about June 24, 1985, an order was signed decertifying the class in this action and leaving George K. Schoney and Irma J. Schoney as the only Plaintiffs in this action.

13. Defendant Memorial Estates, Inc. has always been ready, willing and able to provide Plaintiffs with two interment spaces in any of its completed mausoleums. Further, Defendant has always been ready, willing and able to provide Plaintiffs with use of a chapel upon request (Exhibit "A").

II.

ARGUMENT

A. PLAINTIFFS' CLAIM FOR TORTIOUS BAD FAITH MUST FAIL.

Under Count I of Plaintiffs' Second Amended Complaint, Plaintiffs alleged that Defendant Memorial Estates, Inc. is liable under a tortious bad faith theory. The sole basis for Plaintiffs' claim seems to be that Defendant would never complete the mausoleum promised to Plaintiffs, and that Defendant acted in bad faith by accepting Plaintiffs' payments knowing this. Defendant has constructed mausoleums at both of its cemeteries. Neither mausoleum is full, and in fact, Defendant has reserved mausoleum space for both Plaintiffs. Plaintiffs cannot reasonably contend Defendant acted in bad faith under these facts.

Further, a claim for bad faith as raised by Plaintiffs requires not simply negligence or bad judgment, but rather implies the conscious doing of a wrong with dishonest purposes or intent to cause harm. The facts, even as urged by Plaintiffs, do not approach this standard. As a matter of law, Plaintiffs' claim for tortious bad faith cannot stand.

The Plaintiffs' claim under Count I is also barred by the Statute of Limitations. This cause of action is controlled

either by the one-year limitation period pursuant to U.C.A. §78-12-29, (intentional tort) or the four-year period pursuant to U.C.A. §78-12-25(2). Since Plaintiff's own pleadings allege that the cause of action arose in January, 1976, and since the complaint was not filed until August, 1982, both the one-year and four-year statute of limitations has run. Further, even if the limitations period was tolled for a time, it was not tolled for a period sufficient to overcome this fatal flaw.

B. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT MUST FAIL.

In Count II of Plaintiff's Second Amended Complaint, Plaintiffs claim that Defendant has failed to perform its contractual obligations. The facts outlined above, and those more fully outlined in the affidavits attached hereto, reveal that Defendant has fully completed its contractual obligations. Defendants were always ready, willing and able to perform as required by the contracts entered into with Plaintiffs. Therefore, Plaintiffs' claim for breach of contract cannot stand.

C. PLAINTIFFS' FRAUDULENT CONVEYANCE CLAIM CANNOT STAND.

Count III of Plaintiffs' Second Amended Complaint claims that Defendant fraudulently conveyed property to Plaintiffs that they knew did not exist. This claim, as a matter of law, simply cannot stand. A fraudulent conveyance, as recognized by Utah law, requires that a conveyance be made with an intent to avoid a debt or defraud a creditor. As revealed by the above facts, and more fully supported by the affidavits attached hereto, Defendant neither conducted itself fraudulently nor intended to defraud or

mislead Plaintiffs. As stated above, Defendant has been, ready, willing and able to inter Plaintiffs in its Redwood Road Mausoleum, or since its completion in the Mountain View Mausoleum. Furthermore, before the Mountain View Mausoleum was completed, Defendant informed Plaintiffs that it would inter Plaintiffs in another location and then transfer them at its expense to the Mountain View mausoleum upon its completion.

Plaintiffs cannot claim anything for the fact that the Mountain View mausoleum did not exist at the date the deed for interment rights was issued. Plaintiffs were aware at the time of the Deed of Interment Rights was entered into that the Mountain View mausoleum did not exist, and they were fully aware that that facility was to be constructed in the future. Plaintiffs cannot be heard now to argue that Defendant's conduct was fraudulent.

D. THERE IS NO VIOLATION OF THE UTAH CONSUMER'S SALES PRACTICES ACT.

Count IV of Plaintiffs' Complaint alleges violation of the Utah Consumer's Sales Practices Act. Even assuming the Utah Consumer's Sales Practice Act is applicable to this transaction, this Count is inapplicable as a matter of law. A review of the facts reveal that Defendant's conduct was not unconscionable. Unconscionability is the basis for such a claim. Plaintiffs' claim that Defendant's conduct is unconscionable in that they represented that the mausoleum would be built despite their contrary knowledge. The mausoleum has now been built.

Further, pursuant to §13-11-19(a) U.C.A., 1953 as amended, an action must be brought within two years after the occurrence of a violation. Since Plaintiffs' allege that the cause of action as to the deceptive practices arose at least in January, 1976, Plaintiffs' action is barred by the applicable two year statute of limitations.

E. THERE IS NO BREACH OF CONTRACT TO PROVIDE A CHAPEL.

Count V of Plaintiffs' Second Amended Complaint alleges that Defendant breached his contract to provide a chapel. As identified in the facts above, Defendants have always been ready, willing and able to provide a chapel for Plaintiffs' use. Plaintiffs have never made such request or demand. In their Responses to Defendant's First Request for Admissions, Plaintiffs admitted:

Request No. 9:

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

Answer:

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

(See also Plaintiff's Answers to Interrogatories, dated August 13, 1987, ¶¶8 and 14, Exhibits "C" and "D" attached hereto.)

Plaintiffs have not at any time requested use of a chapel.

F. DEFENDANT HAS COMMITTED NO BREACH OF TRUST.

Count VI of Plaintiffs' Second Amended Complaint alleges breach of trust. As revealed by the affidavits of John Mackay,

Warren Christensen and Kenith Hughes attached hereto as Exhibits "E", "F", and "A" respectively, Defendant has complied with all the conditions required of it by state statute regarding the maintenance of any endowment trust funds. Defendant is audited on a yearly basis and these audits have revealed that Defendant maintains the necessary money available for mausoleum and cemetery construction.

G. PLAINTIFFS' CANNOT MAINTAIN A CAUSE OF ACTION FOR BREACH OF STATUTORY TRUST.

Count VII of Plaintiffs' Seconded Amended Complaint alleges that Defendant is in violation of §8-4-2 and §8-4-3 U.C.A., 1953 as amended, which require Defendants to maintain a trust fund for endowment care. Plaintiffs do not have a right to maintain a private cause of action under this action. Pursuant to §8-4-5, the Cemetery Board shall examine persons relative to the administration and enforcement of the act and shall examine the endowment care fund of a cemetery authority. Section 8-4-5(c) which was applicable at the time this action was commenced, provides that an examination shall occur: "Whenever it is requested by a verified petition signed by 25 lot owners alleging that the endowment care funds are not in compliance with this act, in which case, the examination shall be at the expense of the petitioners." No such request ever occurred. Annual examinations by the Cemetery Board now occur pursuant to the present statute. Nothing in this act provides for a private cause of action or remedy. This cause of action, as a matter of law, cannot stand.

H. PLAINTIFFS' ARE NOT ENTITLED TO RELIEF UNDER COUNT VIII OF THEIR COMPLAINT.

Count VIII of Plaintiffs' Second Amended Complaint alleges that Defendant has invaded the assets of Trust B and used those assets for the general operating expenses. As fully outlined in the facts above, Defendant has at all times been ready, willing and able to perform its full obligations and its endowment care fund is fully funded. As set forth in the preceding section, the cemetery board has the power to review and does review the endowment funds of Defendant. Since Defendant has continually ready, willing and able to perform its full obligation upon request, and no request having been made, Plaintiffs has not been, nor can they maintain that they have been damaged.

I. DEFENDANT HAS NOT COMMITTED FRAUD.

Count IX of Plaintiffs' Second Amended Complaint alleges Defendant has committed fraud. In order to recover for fraud, Plaintiffs have the burden of proving 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 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. See Pace v. Parrish, 122 Utah 141, 144-145, 247 P.2d 273, 274-75 (1952).

Additionally, the circumstances constituting fraud must be pled "with particularity," [Utah Rules of Civil Procedure, Rule 9(b)], and the evidence of fraud must be "clear and convincing."

Berkeley Banks v. Meibos, 607 P.2d 798, 801 (1980). If the representation relates a future performance (as Plaintiff claim does here), the Plaintiff must show that Defendant 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 (1982). A subsequent change of mind or nonperformance does not prove fraud. Id.

The testimony of Mr. Schoney shows that there were pictures shown at the meeting with the salesman, Mr. Nordan, and that ". . . my wife and I just talked it over quietly and decided to buy it, and there wasn't a whole lot said other than we just agreed between ourselves to buy it and that was it." (See George Schoney Deposition p. 8, lines 24-25, and p. 9, lines 1-3.) Mr. Schoney further stated that he did not know if he was ever given a specific date as to when the mausoleum would be completed (See G. Schoney Deposition, p. 10, lines 4-6), nor does Mr. Schoney recall ever discussing the provision regarding the public relations program development being completed. (See G. Schoney deposition, p. 27, lines 6-13.)

The facts reveal that Defendant did not act in any way fraudulently. Plaintiffs cannot show that any of the representations made by Mr. Nordan were false when made or were made recklessly knowing that he had insufficient knowledge to base

the representations. In fact, it is difficult to see how Plaintiffs can argue that Defendants did not intend to perform at the time the representations were made, given the fact that they have subsequently performed in full.

J. COUNT X OF PLAINTIFFS' SECOND AMENDED COMPLAINT CANNOT STAND.

Plaintiffs, in Count X of their Second Amended Complaint contend that Defendant has failed to establish a 75% trust fund pursuant to U.C.A. §22-4-1. However, that section provides that there is an exclusion to that 75% trust for cemetery lots, vaults, mausoleum crypts, niches, cemetery burial privileges and cemetery space. In 1983, the legislature amended that section to include mausoleum space, but that provision is not applicable to the cause of action at hand here. Therefore, there can be no violation of that section as alleged by Plaintiffs. Further, the facts reveal that Defendant is in full compliance with all statutory requirements and, therefore, Plaintiffs can not claim they have been damaged in any way.

K. THERE HAS BEEN NO INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Count XI of Plaintiffs' Second Amended Complaint alleges Defendants conduct was outrageous and that Defendants intentionally inflicted emotional distress upon Plaintiffs. In order to recover under an action for intentional infliction of emotional distress, Plaintiffs must show that Defendants 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. Therefore, as a matter of law, this claim of Plaintiffs cannot stand.

WHEREFORE, Defendant prays that summary judgment be granted in its favor and that Plaintiffs' Second Amended Complaint be dismissed with prejudice and that Defendant be entitled to his costs of court incurred herein, a reasonable attorney fee, and such other relief as the court may deem fair and equitable.

DATED this 29 date of December, 1987.

NIELSEN & SENIOR


By 

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

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of December, 1987 I caused a true and correct copy of the foregoing Defendants Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment to be hand delivered to the following:

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



Joseph L. Henriod, #1468
Earl Jay Peck, #A2562
Stephen L. Henriod, #1469
NIELSEN & SENIOR
Attorneys for Defendants
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.)	
SCHONEY for themselves and	)	AFFIDAVIT OF
all others similarly situated,	)	KENITH M. HUGHES
)	
Plaintiffs,)	
)	
vs.	)	Civil No. 82-4983
)	
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge Richard H. Moffat
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Kenith M. Hughes, being first duly sworn, deposes and states
as follows:

1. I am manager of Memorial Estates, Inc., and am
responsible for its day to day operations.
2. I have personal knowledge of the facts set forth in this
affidavit.
3. Clinton and Anna Wheeler, Mrs. Schoney's parents, owned
ground burial lots located at Memorial Estates Redwood Road

Cemetery. On December 29, 1973, they transferred two of their ground burial lots to the named plaintiffs.

4. The Wheelers and Schoneys subsequently traded in their ground burial lots to purchase pre-need mausoleum space. Plaintiffs entered into the "Mausoleum Estate Agreement" on January 29, 1974, and made their first payment under the agreement on February, 1974 and continued making monthly payments for 36 months until the contract price was paid in full in January of 1977.

5. Clinton Wheeler died August 13, 1974 and his funeral services were held at the Memorial Estates' Chapel, located at 5858 South 900 East. He was then interred at the Mountain View location in a ground burial plot.

6. Mrs. Wheeler passed away on May 22, 1982, and was interred at the mausoleum at Sunset Lawn and Mr. Wheeler was subsequently disinterred from the Mountain View location and interred at the mausoleum at Sunset Lawn.

7. Plaintiffs have never made demand on defendant for the use of any chapel nor have they made demand for use of burial plots or mausoleum crypts.

8. Defendant has reserved two mausoleum spaces for plaintiffs at the Redwood Mausoleum since prior to Mr. Schoney's death and there is presently space available at the Mountain View Mausoleum.

9. At the present time, defendant holds funds in its endowment care trust in a sum in excess of that required by the

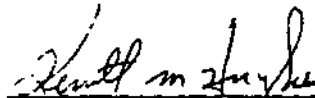
statutes of the State of Utah, specifically including the sum of \$60.00 which is attributable to the plaintiffs' two crypts.

10. Defendant Memorial Estates, Inc. has always been ready, willing and able to provide plaintiffs with two interment spaces in any of its completed mausoleums. It was, prior to completion of the Mountain View Mausoleum, ready, willing and able at its own expense to inter plaintiffs in a crypt at the Redwood Mausoleum or in a burial plot at the Mountain View Cemetery and then move plaintiffs to a crypt at the Mountain View Mausoleum upon its completion.

11. Plaintiffs refused defendant's offer of interment and then removal to a Mountain View crypt.

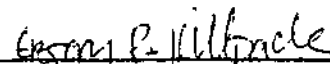
12. At the time of Schoney's purchase of the Redwood crypt, there was a surfeit of mausoleum space in Salt Lake County.

13. Of the 276 full crypts and 80 niches at the Mountain View Mausoleum, less than 50% had been sold at the time of completion of construction.



Kenneth M. Hughes

On this 24 day of December, 1987, personally appeared before me, the signer of the foregoing instrument, who, being duly sworn, acknowledged to me that he executed the same.



NOTARY PUBLIC

My Commission Expires:

8-9-90

Residing at:

S.L. County

DANIEL F. BERTCH - A4728
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.)	
SCHONEY. for themselves and	)	PLAINTIFF'S ANSWERS
all others similarly situated,	)	TO INTERROGATORIES
)	
Plaintiffs,)	
)	
v.)	
	)	Civil No. C82-4983
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge David B. Dee
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

The following Answers to Interrogatories are
submitted by plaintiff pursuant to the provisions of Utah
Rules of Civil Procedure:

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1. State:

a. Is the plaintiff George K. Schoney deceased?

ANSWER: Yes

INTERROGATORY NO. 2: If the answer to the preced-
ing interrogatory is in the affirmative, state the date of
his death.

ANSWER: February 19, 1986

INTERROGATORY NO. 3: State the location where George Schoney was interred.

ANSWER: Sunset Lawn Mausoleum at about 1300 South 200 East, Salt Lake City, Utah.

INTERROGATORY NO. 4: State whether George Schoney is interred in a mausoleum crypt and, if so, state the location of the mausoleum.

ANSWER: Yes; section 100 Row C Crypt 15.

INTERROGATORY NO. 5: State whether funeral services were conducted on behalf of George Schoney.

ANSWER: Yes.

INTERROGATORY NO. 6: Identify the individual (s) who conducted and spoke at George Schoney's funeral services.

ANSWER: Reverend Peter Brenner of the Congregational Church. He was the only one who spoke.

INTERROGATORY NO 7: Was any individual conducting the funeral services for George Schoney a clergyman or an official representing any organized religion? If the answer is yes, then state the following:

- a. Identify the individual.
- b. What faith or religion does the individual belong to?

ANSWER: See answer to #6 above.

tion, plaintiff responds as follows: I cannot recall how many times. He went as often as he could. He worked Sundays frequently for many years at Geneva Steel Works. He attended whenever he was not working but he loved to go to hear Reverend Peter Brenner speak. He occasionally went to the Mormon church whenever we were invited or on special occasions.

INTERROGATORY NO. 12: For the period of February 1, 1984 up to the date that Mr. Schoney passed away, on how many occasions did Mr. Schoney go to a chapel or other place of worship or meditation?

ANSWER: See answer to No. 11 above.

INTERROGATORY NO. 13: State each and every location where you claim Mr. Schoney attended religious services and/or places of meditation.

ANSWER: Plaintiff objects on the ground that the information sought is irrelevant. Furthermore, the phrase "place of meditation" is so vague that a meaningful response is impossible. Subject to that objection, plaintiff responds as follows: 1937 the Mormon Church at about 2000 East and 3200 South. The Congregational Church at about 2000 South Foothill Drive.

INTERROGATORY NO. 14: Does Irma Schoney intend to use any chapel located at Memorial Estates cemetery?

ANSWER: Plaintiff objects on the ground that the information sought is irrelevant. Subject to that objection, plaintiff responds as follows: No.

INTERROGATORY NO. 15: Does Irma J. Schoney intend to be interred at any Memorial Estates Mountain View Cemetery?

ANSWER: Plaintiff objects on the ground that the information sought is irrelevant. Subject to that objection, plaintiff responds as follows: No.

INTERROGATORY NO. 16: Have either of the plaintiffs visited the mausoleum located at the Memorial Estates Mountain View Cemetery?

ANSWER: Plaintiff objects on the ground that the information sought is irrelevant. Subject to that objection, plaintiff responds as follows: No.

INTERROGATORY NO. 17: If the answer to the preceding interrogatory is in the affirmative, state the following:

- a. The date (s) either of the plaintiffs visited a mausoleum.
- b. The purpose for each visit.
- c. Who was with them each time they visited the mausoleum site.
- d. Each and every reason why they visited the mausoleum.

ANSWER: N/A.

INTERROGATORY NO. 18: Identify each and every expert witness which plaintiffs or their counsel have

INTERROGATORY NO. 8: Did Irma J. Schoney ever request of Memorial Estates the use of a chapel for any of the services that were conducted on behalf of George K. Schoney?

ANSWER: No. Plaintiff also denies that such a demand was necessary as the chapel was rented out to plaintiff's knowledge.

INTERROGATORY NO. 9: Did Irma J. Schoney ever make a request or demand of Memorial Estates that George K. Schoney be interred at any Memorial Estates cemetery?

ANSWER: No. Neither myself or my husband ever wished to be interred. We always wanted to be in a mausoleum.

INTERROGATORY NO. 10: Did Irma J. Schoney make any request of Memorial Estates that George K. Schoney be interred in any mausoleum located any any Memorial Estates cemetery?

ANSWER: No. Plaintiff also denies that such a request was necessary as no mausoleum had been built to plaintiff's knowledge.

INTERROGATORY NO. 11: During the period of February 1, 1974 up to the date that Mr. Schoney passed away, state on how many occasions Mr. Schoney attended religious services of any kind.

ANSWER: Plaintiff objects on the ground that the information sought is irrelevant. Subject to that objec-

Joseph L. Henriod, #1468
Earl Jay Peck, #A2562
Stephen L. Henriod, #1469
NIELSEN & SENIOR
Attorneys for Defendants
1100 Beneficial Life Tower
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Telephone: (801) 532-1900

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.)	
SCHONEY for themselves and	)	AFFIDAVIT OF JOHN Mc KAY
all others similarly situated,)	
)	
Plaintiffs,)	
)	
vs.	)	Civil No. 82-4983
)	
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge Richard H. Moffat
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

John ^{As}McKay, being first duly sworn, deposes and states as follows:

1. I am the Chairman of the Utah State Cemetery Board, which under statute is authorized to supervise and regulate endowment care cemeteries in the State of Utah.

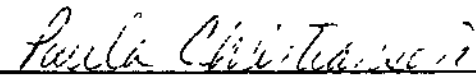
EXHIBIT "E"

2. I am familiar with Memorial Estates, Inc., and have participated in the Board's annual review of its audited financial statements.

3. Memorial Estates, Inc. is in compliance with the statutes and regulations of the State of Utah in all respects.


John Makay

On this 27th day of December, 1987, personally appeared before me the signer of the foregoing instrument, who, being duly sworn, acknowledged to me that he executed the same.


NOTARY PUBLIC

My Commission Expires:

6-25-91

Residing at:

Salt Lake County

0080n

Joseph L. Henriod, #1468
Earl Jay Peck, #A2562
Stephen L. Henriod, #1469
NIELSEN & SENIOR
Attorneys for Defendants
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.)	
SCHONEY for themselves and	)	AFFIDAVIT OF
all others similarly situated,	)	WARREN J. CHRISTENSEN
)	
Plaintiffs,)	
)	
vs.	)	Civil No. 82-4983
)	
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge Richard H. Moffat
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Warren J. Christensen, being first duly sworn, deposes and states as follows:

1. I am a Certified Public Accountant and president of the C.P.A. firm of Christensen, Gyllenskog and Co., P.C.
2. I have performed accounting and auditing services for Memorial Estates, Inc. since approximately 1978 and have personal knowledge of the facts set forth in this affidavit.


3. On an annual basis, Memorial Estates, Inc. submits audited financial statements to the Department of Business Regulation of the State of Utah for compliance review by the Utah State Cemetery Board.

4. The most recent completed audit was dated December 31, 1986, with the December 31, 1987 audit currently in progress.

5. I am familiar with the requirements of the State of Utah regarding Endowment Care cemeteries.

6. The endowment care fund of Memorial Estates, Inc. contains sufficient funds to meet the requirement of §8-4-2 of the Utah Code Annotated for graves, crypts and niches.

7. Memorial Estates, Inc. has further maintained sufficient funds and assets to meet all costs associated with its construction of mausoleum and cemetery facilities.


Warren J. Christensen

On this 27th day of December, 1987, personally appeared before me, the signer of the foregoing instrument, who, being duly sworn, acknowledged to me that he executed the same.


NOTARY PUBLIC

My Commission Expires:

3-20-88

Residing at:

Salt Lake City, Utah

Tab C

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY UTAH

DEC 29 4 17 PM '87

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

BY Vicki Perkins

AFFIDAVIT OF JOHN MCKAY

Civil No. 82-4983

Judge Richard H. Moffat

1. I am the Chairman of the Utah State Cemetery Board, which under statute is authorized to supervise and regulate endowment care cemeteries in the State of Utah.

2. I am familiar with Memorial Estates, Inc., and have participated in the Board's annual review of its audited financial statements.

3. Memorial Estates, Inc. is in compliance with the statutes and regulations of the State of Utah in all respects.


John McKay

On this 27th day of December, 1987, personally appeared before me the signer of the foregoing instrument, who, being duly sworn, acknowledged to me that he executed the same.


NOTARY PUBLIC

My Commission Expires:

6-25-91

Residing at:

Salt Lake County

0080n

Tab D

Joseph L. Henriod, #1468
Earl Jay Peck, #A2562
Stephen L. Henriod, #1469
NIELSEN & SENIOR
Attorneys for Defendants
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

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SALT LAKE COUNTY, UTAH

DEC 29 4 17 PM '87

H. DION HINDLEY CLERK
3rd DIST. COURT
Kenith M. Hughes
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.)	
SCHONEY for themselves and	)	AFFIDAVIT OF
all others similarly situated,	)	KENITH M. HUGHES
)	
Plaintiffs,)	
)	
vs.	)	Civil No. 82-4983
)	
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge Richard H. Moffat
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Kenith M. Hughes, being first duly sworn, deposes and states
as follows:

1. I am manager of Memorial Estates, Inc., and am responsible for its day to day operations.
2. I have personal knowledge of the facts set forth in this affidavit.
3. Clinton and Anna Wheeler, Mrs. Schoney's parents, owned ground burial lots located at Memorial Estates Redwood Road

Cemetery. On December 29, 1973, they transferred two of their ground burial lots to the named plaintiffs.

4. The Wheelers and Schoneys subsequently traded in their ground burial lots to purchase pre-need mausoleum space. Plaintiffs entered into the "Mausoleum Estate Agreement" on January 29, 1974, and made their first payment under the agreement on February, 1974 and continued making monthly payments for 36 months until the contract price was paid in full in January of 1977.

5. Clinton Wheeler died August 13, 1974 and his funeral services were held at the Memorial Estates' Chapel, located at 5858 South 900 East. He was then interred at the Mountain View location in a ground burial plot.

6. Mrs. Wheeler passed away on May 22, 1982, and was interred at the mausoleum at Sunset Lawn and Mr. Wheeler was subsequently disinterred from the Mountain View location and interred at the mausoleum at Sunset Lawn.

7. Plaintiffs have never made demand on defendant for the use of any chapel nor have they made demand for use of burial plots or mausoleum crypts.

8. Defendant has reserved two mausoleum spaces for plaintiffs at the Redwood Mausoleum since prior to Mr. Schoney's death and there is presently space available at the Mountain View Mausoleum.

9. At the present time, defendant holds funds in its endowment care trust in a sum in excess of that required by the

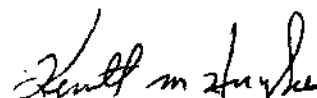
statutes of the State of Utah, specifically including the sum of \$60.00 which is attributable to the plaintiffs' two crypts.

10. Defendant Memorial Estates, Inc. has always been ready, willing and able to provide plaintiffs with two interment spaces in any of its completed mausoleums. It was, prior to completion of the Mountain View Mausoleum, ready, willing and able at its own expense to inter plaintiffs in a crypt at the Redwood Mausoleum or in a burial plot at the Mountain View Cemetery and then move plaintiffs to a crypt at the Mountain View Mausoleum upon its completion.

11. Plaintiffs refused defendant's offer of interment and then removal to a Mountain View crypt.

12. At the time of Schoney's purchase of the Redwood crypt, there was a surfeit of mausoleum space in Salt Lake County.

13. Of the 276 full crypts and 80 niches at the Mountain View Mausoleum, less than 50% had been sold at the time of completion of construction.



Kenneth M. Hughes

On this 29 day of December, 1987, personally appeared before me, the signer of the foregoing instrument, who, being duly sworn, acknowledged to me that he executed the same.



NOTARY PUBLIC

My Commission Expires:

5-9-90

Residing at:

S.L. County

Tab E

Joseph L. Henriod, #1468
Earl Jay Peck, #A2562
Stephen L. Henriod, #1469
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FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

DEC 29 4 17 PM '87

DEPUTY CLERK
3rd DIST. COURT
Vicki Quirk
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

GEORGE K. SCHONEY AND IRMA J.)	
SCHONEY for themselves and	)	AFFIDAVIT OF
all others similarly situated,	)	WARREN J. CHRISTENSEN
)	
Plaintiffs,)	
)	
vs.	)	Civil No. 82-4983
)	
MEMORIAL ESTATES, INC. and)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENTS CORP., a	)	Judge Richard H. Moffat
corporation, and JOHN DOES I)	
through 10, individuals,)	
)	
Defendants.)	

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Warren J. Christensen, being first duly sworn, deposes and states as follows:

1. I am a Certified Public Accountant and president of the C.P.A. firm of Christensen, Gullenskog and Co., P.C.
2. I have performed accounting and auditing services for Memorial Estates, Inc. since approximately 1978 and have personal knowledge of the facts set forth in this affidavit.

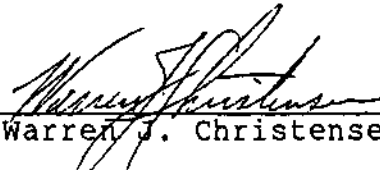
3. On an annual basis, Memorial Estates, Inc. submits audited financial statements to the Department of Business Regulation of the State of Utah for compliance review by the Utah State Cemetery Board.

4. The most recent completed audit was dated December 31, 1986, with the December 31, 1987 audit currently in progress.

5. I am familiar with the requirements of the State of Utah regarding Endowment Care cemeteries.

6. The endowment care fund of Memorial Estates, Inc. contains sufficient funds to meet the requirement of §8-4-2 of the Utah Code Annotated for graves, crypts and niches.

7. Memorial Estates, Inc. has further maintained sufficient funds and assets to meet all costs associated with its construction of mausoleum and cemetery facilities.


Warren J. Christensen

On this 29th day of December, 1987, personally appeared before me, the signer of the foregoing instrument, who, being duly sworn, acknowledged to me that he executed the same.


NOTARY PUBLIC

My Commission Expires:

3-20-88

Residing at:

Salt Lake City, Utah

Tab F

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

JAN 4 4 36 PM '88

H. DIXON HINDLEY CLERK
3rd DIST. JUDGE

By [Signature]

DANIEL F. BERTCH - A4728
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and IRMA
J. SCHONEY for themselves and
all others similarly situated,

Plaintiffs,

vs.

MEMORIAL ESTATES, INC. and
MEMORIAL ESTATES CEMETERY
DEVELOPMENT CORP. a corpora-
tion, and JOHN DOES I through
10, individuals,

Defendants

AFFIDAVIT OF
ERMA SCHONEY

Civil No. C82-4983

Judge Richard H. Moffat

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Erma Schoney, being first duly sworn, deposes and
states as follows:

1. It was always the intent of my mother and
father, my husband and myself, to be interred together.
This was very important to us.

2. We purchased mausoleum space at the Mountain
View location. At the time of our initial purchase, we
selected specific crypt locations.

3. It was our understanding that the money from the pre-construction sales (including ours) would be saved and used to build the mausoleum.

4. We would never have purchased pre-need services from Memorial Estates if we had known that they were insolvent.

5. We agreed to the ground burial of my father at Mountain View because we were assured he would be there temporarily, not more than six months. We all strongly were opposed to ground burial; the long delay in construction of the mausoleum was very upsetting to us because it extended the time my father was buried in the ground. Also, because we were assured that construction of the mausoleum was soon, we did not place a marker on his grave. The long delay caused my father to lie in an unmarked grave for years.

6. When we purchased mausoleum space from Memorial Estates, we wanted to have peace of mind that our final arrangements were taken care of. As we got older, and the health of my husband and parents got worse, the delay in constructing the mausoleum became more and more upsetting.

7. Memorial Estates failed to keep track of the location of my father's ground burial. Mr. Holt of

Memorial Estates had to use a long metal probe to physically locate the casket. To disturb his grave in this manner was very distressful to us.

8. 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.

DATED this _____ day of _____,
1988.

ERMA SCHONEY

SUBSCRIBED AND SWORN to before me this _____ day
of _____, 1987.

NOTARY PUBLIC
Residing at:

My commission expires:

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT OF ERMA SCHONEY, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 4th day of January, 1988, to the following:

Joseph L. Henriod
Earl Jay Peck
Stephen L. Henriod
NEILSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Laurie Fabiano

Tab G

THIRD JUDICIAL DISTRICT **County of Salt Lake - State of Utah**

George K. Schoney
Plaintiff

Memorial Estates Inc. et al
Defendant

CASE NO: C-82-4983

Type of hearing: Div. _____ Annul. _____ Supp. Order _____ OSC. _____ Other ☒
 Present: Pltf. _____ Deft. _____
 P. Atty: D. F. Bertch ☒
 D. Atty: J. L. Henroid N/P E. Peck ☒
 Sworn & Examined: _____
 Pltf: _____ Deft: _____
 Others: _____
 Summons _____ Stipulation _____
 Waiver _____ Publication _____
☐ Default of Pltf/Deft Entered
 Date: January 15, 1988
 Judge: Richard H. Moffat
 Clerk: K. Krotepas
 Reporter: H. Walton ☒
 Bailiff: _____

ORDERS:

- ☐ Custody Evaluation Ordered ☐ Custody Awarded To _____
☐ Visitation Rights _____
☐ Pltf/Deft Awarded Support \$ _____ x _____ = _____ Per Month
☐ Pltf/Deft Awarded Alimony \$ _____ Per Month/Year ☐ Alimony Waived
☐ Payments to be made through the Clerk's Office: _____
☐ Atty. fees to the _____ in the amount of _____ ☐ Deferred
☐ Home To: _____
☐ Furnishings To: _____ Automobile To: _____
☐ Each Party Awarded their Personal Property
☐ Pltf/Deft. to Maintain Debts and Obligations
☐ Pltf/Deft. to Maintain Insurance on Minor Children
☐ Restraining Order Entered Against _____
☐ Pltf/Deft. Granted Judgment for Arrearage in the Sum of \$ _____
☐ 90-Day Waiting Period is Waived
☐ Divorce Granted To _____ As _____
☐ Decree To Become Final: ☐ Upon Entry ☐ 3-Month Interlocutory
☐ Former Name of _____ Is Restored
☐ Based on the failure of Deft to appear in response to an order of the court and on motion of Pltfs counsel, court orders _____ / _____ shall issue for Deft. _____ Returnable _____ Bail _____
☐ Based on written stipulation of respective counsel/motion of Plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.
☒ Based on ^{arguments} ~~written stipulation~~ of respective counsel/motion of Plaintiff's counsel, court orders _____
deft's motion for summary judgment is denied
without prejudice. The trial of Feb 1, 1988 and
pre-trial of Jan 26, 1988 are stricken. Plaintiff
has 10 days to amend complaint + defendant
has 10 days to respond. Counsel to contact the

Tab H

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SALT LAKE COUNTY, UTAH

JAN 26 3 54 PM '88

H. DAVID HUNTLEY, CLERK
3rd DIST. COURT

BY

Lawrence P. Schoney

DANIEL F. BERTCH - A4728
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and ERMA
J. SCHONEY for themselves and
all others similarly situated,

Plaintiffs,

vs.

MEMORIAL ESTATES, INC. and
MEMORIAL ESTATES CEMETERY
DEVELOPMENT CORP. a corpora-
tion, and JOHN DOES I through
10, individuals,

Defendants

PLAINTIFFS' FIFTH
AMENDED COMPLAINT

Civil No. C82-4983

Judge Richard H. Moffat

The plaintiffs, George K. Schoney and Erma J. Schoney, complain for themselves and all others similarly situated as follows:

DESCRIPTION OF PARTIES

1. Defendant Memorial Estates, Inc. is a corporation organized pursuant to the laws of the State of Utah, which has its principal place of business at 6500 South Redwood Road, in Murray, Utah.

2. Defendant Memorial Estates Cemetery Development Corp. is a corporation organized pursuant to the laws of the State of Utah.

3. The defendants, John Does 1 through 10, are individuals residing in Salt Lake County, as yet unknown to the plaintiffs.

4. The corporate defendants are and were at all times relevant, interrelated corporations operating under a common scheme to sell pre-need funeral contracts for burial lots, mausoleum crypts, burial services and other funeral merchandise such as grave markers and vaults. The defendant corporations are controlled through common management. Plaintiffs allege on information and belief that at all times relevant to this action, the defendants commingled corporate funds and in other ways were and are so closely related that the corporateness of one corporate defendant is not distinguishable from the other corporate defendant.

FIRST CAUSE OF ACTION

BREACH OF CONTRACT FOR DELAYED PERFORMANCE

1. In 1973, plaintiffs purchased, from defendant, a crypt for an unconstructed mausoleum.

2. Pursuant to the said purchase agreement, defendants had an obligation to construct the mausoleum one year from the completion or termination of the "Public

Relations Development Program." Alternatively, defendants had an obligation to build the mausoleum within a reasonable time.

3. Defendants did not construct any new mausoleum as required. Defendants did not construct the new mausoleum which relates to plaintiffs until after this lawsuit was filed. Had it not been for this lawsuit, defendant would not have constructed the new mausoleum.

4. Plaintiffs allege on information and belief that defendants' motive in delaying performance was to preserve capital and to save on interest costs. Plaintiffs further allege on information and belief that defendants did not begin construction at an earlier time because defendants did not segregate or preserve the deposits from plaintiffs and other class members; and that said deposits were dissipated in defendants' daily operations.

5. From time to time, plaintiffs made inquiries to determine when the mausoleum would be completed. On each occasion, defendants lulled plaintiffs by stating that the mausoleum would be completed shortly. Therefore, plaintiffs did not discover and could not reasonably have discovered the breach of contract until 1981. Furthermore, plaintiffs had no way of knowing until discovery was completed in this case, that the public relations program was terminated and that defendants' duty to perform was complete.

6. By reason of the delay in performance, plaintiffs and other class members have been damaged by the loss of interest on their deposits from the time performance was required to the date on which the new mausoleums are completed. In addition, the named plaintiffs have been forced by defendant's breach to purchase substitute mausoleum space for themselves, and their parents. Further, the named plaintiffs have suffered emotional distress and mental anxiety.

SECOND CAUSE OF ACTION

BREACH OF WARRANTY

7. Defendants sold crypt space in a mausoleum to plaintiffs and other class members prior to the time that such mausoleums were constructed:

8. In order to induce plaintiff and other class members to purchase mausoleum space, defendants showed plaintiffs and other class members an artist's rendering of the mausoleum which was to be constructed. That artist's rendering is attached as Exhibit A.

9. After 12 years, defendants have finally built the promised mausoleums. However, the new mausoleums are of different design and of lesser quality than the mausoleum promised in the artist's sketch attached as Exhibit A.

10. Plaintiff alleges on information and belief that the breaches of warranty alleged above were done with malice and with reckless disregard for the rights of the members of the plaintiff class in that defendants rely on the fact that class members will not normally learn of the breach of warranty until the time of death and bereavement when they are not emotionally able to complain.

11. The new mausoleums have only recently been completed or are still under construction. Therefore, plaintiffs could not reasonably have discovered the breach of warranty until 1985.

12. By reason of the breaches of warranty alleged above, plaintiffs and other class members have been damaged in that their mausoleum spaces are worth less than if the mausoleum had been built as warranted.

THIRD CAUSE OF ACTION

COMMON LAW FRAUD

13. Defendants began their campaign of selling mausoleums at a time when no mausoleum had been constructed. During that time period, defendants used a form of contract which states in haec verba:

. . . The company agrees . . . to complete the mausoleum unit . . . within one year after the Public Relations Development Program on that unit is completed.

14. Thereafter, defendants constructed their first mausoleum unit at the Redwood location. The said unit has space for 128 crypts.

15. At approximately the time that defendants completed construction of the above-described mausoleum, defendants changed the form of their sales presentation and their standard contract to read in haec verba:

The undersigned seller hereby sells and the undersigned buyer buys, subject to the terms and conditions hereinafter set forth, the following described property, the delivery and condition of which are hereby acknowledged and accepted.
[Mausoleum crypt.]

16. Defendants thereupon began assigning space in the then existing 128 crypt mausoleum to customers, and delivering to said customers deeds which state in haec verba:

Deed for Interment Rights
. . . Memorial Estates . . . does hereby grant and convey to [name of class members] the following property . . . Estate No. * Space No. *.

In the mausoleum according to the maps and plats of said cemetery, on file in the . . . office of the recorder of deeds in Salt Lake County.

17. After defendant had made and assigned 128 crypts to customers, the entire, then existing, mausoleum was filled.

* These spaces are filled in by defendants' staff for each contract.

However, defendants did not change their sales presentation, nor their sales contract, nor their deed. Rather, defendants began to oversell the existing mausoleum until approximately 600 crypts had been sold, assigned, and deeds issued in the 128 crypt mausoleum.

18. By reason of the foregoing representation, plaintiffs and other class members were led to believe, and did in fact believe that they owned a specific crypt in a specific existing mausoleum.

19. The customers of defendants were not aware of the true facts that the then existing 128 crypt mausoleum had been oversubscribed and over sold. If the customers had known the true facts, they would not have entered into the contracts or purchased a crypt.

20. Defendants' actions alleged above were done with malice and with reckless disregard for the rights of plaintiffs in that defendants perpetrated their fraud upon the belief that plaintiffs would not discover the fraud until the time of death and bereavement when they would not be emotionally able to complain. Defendants further calculated that their fraud would not be discovered because all customers would not die at the same time.

21. Plaintiffs did not discover and could not reasonably have discovered defendants' fraudulent conduct

until 1984. Furthermore, plaintiffs allege on information and belief that other class members are not aware of the fraud because they would not learn that the mausoleum is oversubscribed until a time of death and bereavement.

22. By reason of the foregoing acts of fraud, plaintiffs and other class members have been deprived of their purchase price, plus interest, costs, and attorney fees.

FOURTH CAUSE OF ACTION

VIOLATION OF UTAH CONSUMER SALES PRACTICES ACT

23. The sale by defendants of mausoleum space is a consumer transaction within the meaning of §13-11-3(2), Utah Code Ann.

24. Within the meaning of §13-11-4(2)(b), Utah Code Ann., defendants represented that the mausoleums to be constructed were of a particular standard, grade, style and model when they were not.

25. Within the meaning of §13-11-4(e), Utah Code Ann., the mausoleum was not supplied in accordance with the previous representations of defendant.

26. The foregoing conduct together with the other acts of defendant's alleged in other counts of this complaint, constitute deceptive practices within the meaning of §13-11-5, Utah Code Ann.

27. Plaintiffs have suffered actual loss within the meaning of §13-11-19(4), Utah Code Ann. Additionally, named plaintiffs have suffered emotional distress and mental anxiety.

28. Plaintiffs are further entitled to a reasonable attorneys fee as provided by §13-11-19(5), Utah Code Ann.

FIFTH CAUSE OF ACTION

BREACH OF CONTRACT, UNJUST ENRICHMENT, INTERFERENCE WITH EASEMENT

29. The Mausoleum Estate Agreement provides, in part, that, " . . . The Company agrees to extend to the Purchaser and his immediate family . . . the use of a full service chapel" Additionally, this agreement creates an easement or other property interest in the chapel.

30. The promise of a chapel was an essential term of the contract in that such a chapel provides convenience, comfort, and peace prior to and at a time of bereavement.

31. The defendants converted the existing chapel at 3115 East 7800 South (Mountain View), Salt Lake City, Utah, into office space, and rented this space for that purpose from about 1977 to 1984. This chapel was built through sales proceeds from, and for the benefit of, cemetery plot and mausoleum crypt purchasers. The existence of

the chapel was to be of benefit to the entire class of plaintiffs at Mountain View Cemetery. However, by defendants' acts, it was totally unavailable for the use of plaintiffs and their families.

32. By reason of the conversion of the chapel into offices, the collection of rent therefrom, and the retention of rent proceeds, defendants have been unjustly benefited and unjustly enriched at the expense and loss of the plaintiffs.

SIXTH CAUSE OF ACTION

BREACH OF COMMON LAW TRUST

33. As early as 1972, defendants were actively selling mausoleum space on a pre-need basis under a so-called public relations development program. Under this program, plaintiffs were sold space in a mausoleum that was yet to be constructed. Defendants expressly promised to plaintiffs that the proceeds collected from these pre-need mausoleum sales would be used to construct a mausoleum unit once enough funds were received to begin construction. Completion of the program as to a mausoleum unit was promised to occur after about 50 percent of the mausoleum spaces in that unit had been sold, or after the program was abandoned.

34. Plaintiffs allege, in the alternative, that if there was no express promise to hold the funds in trust, defendants nonetheless had a common law duty to hold the said funds in trust and that the said duty was an implied term of the contract between the parties.

35. Plaintiffs allege on information and belief that money collected from mausoleum sales was put into the general operating fund of the defendants' corporation and used for general business purposes. Defendants failed to preserve the money collected from mausoleum sales for mausoleum construction.

36. As a result of defendants' failure to preserve the money collected from mausoleum sales for mausoleum construction, defendants, as trustees, have been unjustly enriched by receiving interest on the trust funds during the period of the delay in construction.

SEVENTH CAUSE OF ACTION

BREACH OF STATUTORY TRUST

37. Pursuant to Sections 8-4-12 and 8-4-13, Utah Code Ann., defendants are required to deposit \$30.00 in an irrevocable endowment care trust fund for each mausoleum space sold. The required sum is payable to the trust upon full payment of the contract price. Compliance with this statute is an implied term of the contract. The funds in

this trust are to be collected for the purpose of maintenance and care of the cemetery property. These trust funds are to be invested in accordance with Section 33-2-1, Utah Code Ann., which requires the standard of care that men of prudence, discretion and intelligence exercise in the management of their own affairs.

38. Contrary to the requirements of Section 33-2-1, Utah Code Ann., defendants have substituted and maintain over 40% of the trust corpus with accounts receivable. This is money owing to defendants on sales contracts and is by its very nature noninvestable.

39. As a result of this ongoing practice, the endowment care trust fund remains over 40% uninvested and thus is not capable of the proper generation of funds for endowment care cemetery maintenance as required by law. As a result, plaintiffs and their families, who are effectively the beneficiaries of this endowment care trust fund, are damaged by the loss of available trust funds for cemetery maintenance at Memorial Estates Cemeteries; and further, plaintiffs are deprived of the peace, comfort and solitude of having an adequate endowment care trust as promised by the contract. Defendants are unjustly enriched by diverting trust funds to their own benefit.

EIGHTH CAUSE OF ACTION

INVASION OF TRUST CORPUS

40. Plaintiffs Mausoleum Estate Agreement provides that defendant shall contribute \$20.00 to "Trust A" and \$20.00 to "Trust B" (See Exhibit "B".) However, defendant has not maintained two separate trust accounts. Plaintiff alleges on information and belief that defendant has invaded the assets of Trust B and used those assets for the general operating expenses of defendant including salaries and advertising. Therefore plaintiffs have been deprived of the assets of Trust B; and further, plaintiffs have been deprived of the peace, comfort and solitude of having an adequate endowment care trust as provided by the contract, and defendant has been thereby unjustly enriched.

NINTH CAUSE OF ACTION

FAILURE TO ESTABLISH A STATUTORY TRUST

41. The sale of unconstructed mausoleum space with chapel privileges is a prearranged funeral plan within the meaning of §22-4-1, Utah Code Ann. Further, compliance with the statute is an implied term of the contract.

42. Defendants have failed to establish the 75% trust required by §22-4-1, Utah Code Ann.

43. Plaintiffs and other class members have been damaged because the trust funds have been diverted to general operating expenses, and plaintiffs have not been given the option of withdrawing their funds pursuant to §22-4-4, Utah Code Ann.

TENTH CAUSE OF ACTION

OUTRAGE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

44. Defendants' 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. Defendant's knew, or should have known, that named plaintiffs were opposed to ground burial for philosophical and personal reasons. 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. Further, because of the temporary nature of the interment, his grave was not marked. However, defendants intentionally or recklessly delayed building the mausoleum for years. Moreover, with the passage of time, defendants lost track of the location. Ultimately, defendants were forced to use a long metal probe to locate the

grave. Due to the long delay, and defendants' stated intention not to build the mausoleum, plaintiffs' purchased other mausoleum space at Sunset Lawn. 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. Finally, on the morning of the funeral, defendants relented and allowed plaintiff Erma Schoney's father to be transferred. Defendants' conduct, together with the acts alleged above, has caused great turmoil and severe emotional distress to the named plaintiffs. Defendants' conduct was done willfully and in reckless disregard for their rights and sensibilities. A reasonable person should have known that defendants' conduct would cause such severe emotional distress.

ELEVENTH CAUSE OF ACTION

CLASS ALLEGATIONS*

45. Plaintiffs are members of a class composed of persons who have entered into pre-need contracts with defendants, and have received deeds to mausoleum space.

*The named plaintiffs have repleaded the class allegations to preserve their objection to Judge Dee's decertification order.

Plaintiffs allege on information and belief that the class is composed of more than 1000 persons making joinder of all class members impracticable.

46. Alternatively, plaintiffs are members of a class of persons who have purchased pre-need mausoleum space at Mountain View. This class is composed of more than 120 members making joinder of all class members practicable.

47. There are questions of law and fact common to all class members. Those common questions include: whether defendants have fraudulently and deceptively received money for the construction of a mausoleum, whether the defendants have breached their warranty of quality, whether defendants have breached their contract by not constructing the promised mausoleum within the required time, whether defendants have breached an express trust, whether plaintiffs have been deprived of the chapel, and whether defendants have committed deceptive acts by conveying interment rights in a non-existent mausoleum.

48. Plaintiffs' claims are typical of the claims of other class members in that defendants sold mausoleum space through a standardized marketing scheme. All class members have purchased mausoleum space pursuant to standardized form contracts; all class members have also received the

same standard form of deed. Further, defendants have violated statutory trust obligations owed to all members of the class.

49. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. Such adjudications would establish incompatible standards of conduct for the party opposing the class in that defendants must either maintain trusts for all class members or refund the money received for construction of the mausoleum to all class members. Also, defendants have acted or refused to act on grounds applicable to the whole class in renting the chapel, breaching trust obligations, delaying construction of the mausoleum and building an inferior mausoleum.

50. The questions of law and fact common to the class members predominate over any questions affecting only the named plaintiffs. Specifically, the claims of the named plaintiffs for breach of trust (Counts 6, 7, 8 and 9); rental of the chapel (Count 5); breach of warranty (Count 2); deceptive consumer sales (Count 4); fraud (Count 3) and breach of contract (Count 1) are identical in substance to that of the class members. Only the claim for intentional

infliction of emotional distress (Count 10) is unique to the named plaintiffs.

51. Because of the common marketing scheme of defendants and their failure to keep trust obligations to the class as a whole, and due to the relatively small amounts involved, a class action is superior to other available methods for a fair and efficient adjudication of the controversy.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

1. For named plaintiffs and all others similarly situated:

- (A) For interest on their purchase price from the time when defendants should have built the mausoleum, until it was built;
- (B) For the difference in value between mausoleum space as warranted, and as built;
- (C) For the reasonable or actual rental value of the chapel during the time it was rented; in the alternative, that defendants be required to disgorge the rental income by which they have been unjustly enriched;
- (D) For an accounting of all trust funds;

(E) For an order granting all plaintiff class members the option of withdrawing their payments pursuant to U.C.A. §22-4-4/

(F) For punitive damages in an amount to be assessed at trial;

(G) For costs, interest and attorney fees.

2. For named plaintiffs, the cost of substitute space at Sunset Lawn in the approximate amount of \$13,500, damages for mental anxiety and emotional distress, and for punitive damages in an amount to be determined at trial. Also, for costs, interest and attorney fees.

3. For such other relief as is necessary to do justice and equity between the parties.

DATED this 26 day of Jan, 1988.

ROBERT J. DEBBY & ASSOCIATES
Attorneys for Plaintiffs

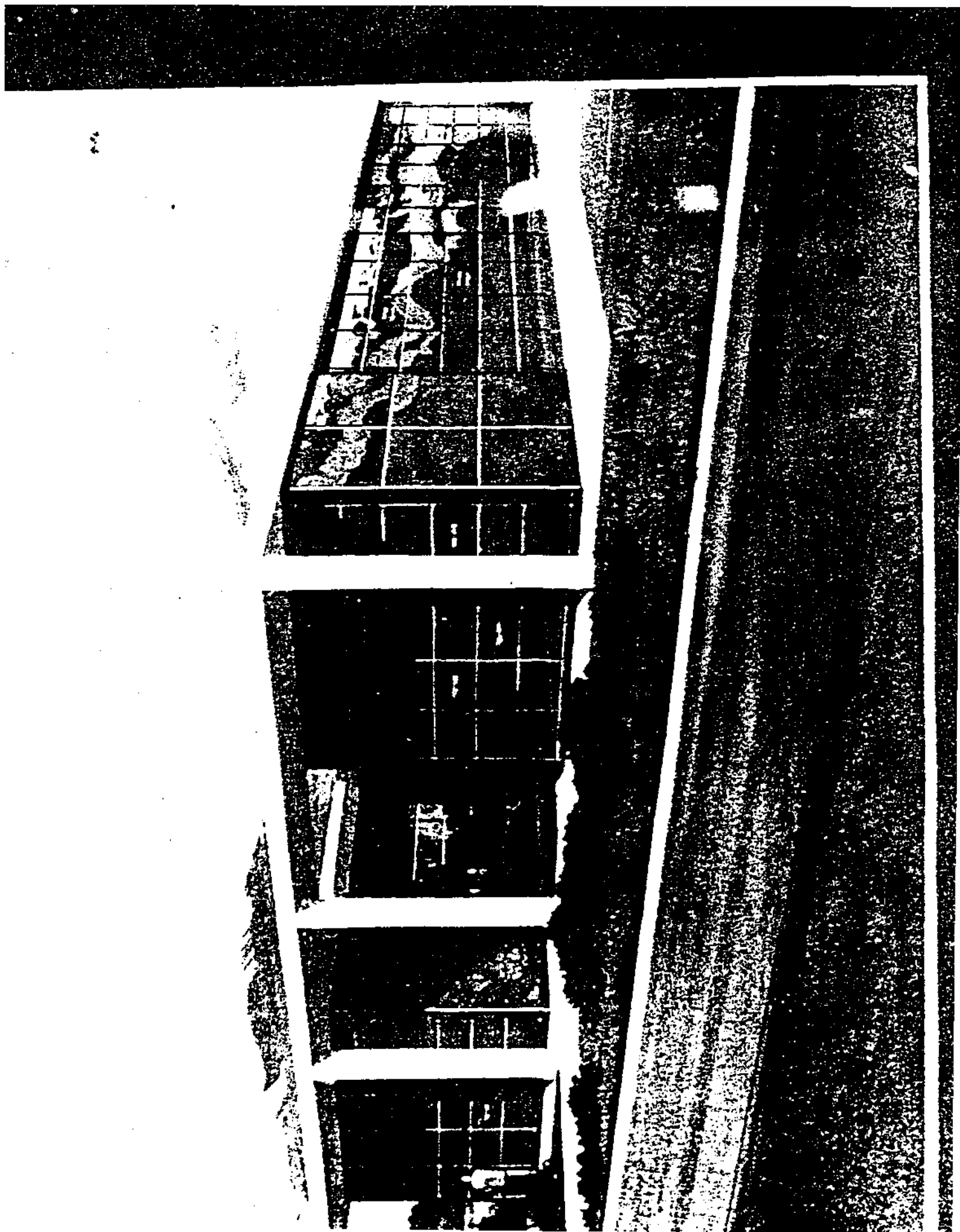
By: 
DANIEL F. BERTCH

CERTIFICATE OF ~~MAILING~~ HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing FIFTH AMENDED COMPLAINT, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 26 day of Jan, 1988, to the following:

Joseph L. Henriod
Earl Jay Peck
Stephen L. Henriod
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Anita M. Corbett



FILED

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

JAN 27 1989

H. Dixon Hindley, Clerk of District Court
By R. G. Golepar
Deputy Clerk

DANIEL F. BERTCH - A4728
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and IRMA
J. SCHONEY for themselves and
all others similarly situated,

Plaintiffs,

vs.

MEMORIAL ESTATES, INC. and
MEMORIAL ESTATES CEMETERY
DEVELOPMENT CORP. a corpora-
tion, and JOHN DOES I through
10, individuals,

Defendants

ORDER

Civil No. C82-4983

Judge Richard H. Moffat

This matter came before the court on defendant's motion to dismiss. At the hearing, plaintiff moved orally for leave to amend the complaint. The court having heard argument of counsel, and considered the written materials submitted, hereby ORDERS:

1. Defendants' motion to dismiss and for summary judgment is denied without prejudice.

2. Plaintiff's motion to amend is granted. For clarity, plaintiff is ordered to style the amended

complaint as the "Fifth Amended Complaint."

3. Plaintiff is given ten days to file and serve the Fifth Amended Complaint.

4. Defendants are given ten days to answer the complaint.


DATED this 26 day of January, 1988.

BY THE COURT:


HONORABLE RICHARD H. MOFFAT

Approved as to form:

By: 
NEILSEN & SENIOR

ATTEST
H. DIXON HINDLEY
CLERK
By 
Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 19th day of January, 1988, to the following:

Joseph L. Henriod
Earl Jay Peck
Stephen L. Henriod
NEILSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Laurie Fabiano

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SALT LAKE COUNTY, UTAH

FEB 4 3 05 PM '88

H. B. JONES, JR.
CLERK

By *James P. Peterson*

DANIEL F. BERTCH - A4728
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and ERMA
J. SCHONEY for themselves and
all others similarly situated,

Plaintiffs,

vs.

MEMORIAL ESTATES, INC. and
MEMORIAL ESTATES CEMETERY
DEVELOPMENT CORP. a corpora-
tion, and JOHN DOES I through
10, individuals,

Defendants

REQUEST FOR PRE-TRIAL
SCHEDULING CONFERENCE

Civil No. C82-4983

Judge Richard H. Moffat

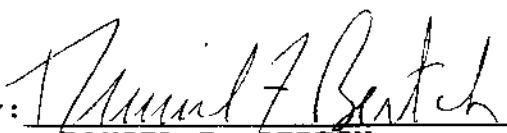
Plaintiff moves this Court, under Utah Rule of Civil Procedure 16, for a pre-trial scheduling conference to set a trial date, discuss additional discovery, if any, and to consider any other matter helpful to resolution of the case.

001326

Plaintiff suggests that the conference could possibly be held by telephone, to avoid unnecessary hearings.

DATED this 4th day of February, 1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs

By: 
DANIEL F. BERTCH

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REQUEST FOR PRE-TRIAL SCHEDULING CONFERENCE, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 4th day of February, 1988, to the following:

Joseph L. Henriod
Earl Jay Peck
Stephen L. Henriod
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111



FILMED

Robert J. DeBry & Associates
Attorneys at Law

The Woodlands — Suite 500

4001 South 700 East

Salt Lake City, Utah 84107

801 262-8915

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

FEB 6 1988

H. Dixon Hindley, Clerk 3rd Dist. Court
By R. Cytopas
Deputy Clerk

February 4, 1988

Honorable Richard H. Moffat
THIRD JUDICIAL DISTRICT COURT JUDGE
240 East 400 South
Salt Lake City, Utah 84111

C82-4983

Dear Judge Moffat:

RE: Schoney v. Memorial Estate

As you know, this case was continued due to your handling of Judge Daniels' calendar on the week of February 1, 1988. You then gave me the opportunity to amend the Complaint, and defendant will shortly answer it. Yesterday, Kathy, your clerk, kindly put myself and counsel for defendant on conference call to schedule a new trial date. It appears that defendant will need to request more discovery as a result of the amendment to the complaint. Also, the next "first-place" setting on your calendar is not until August 23, 1988.

It seems difficult to know when to set a new trial until the court indicates how much discovery by defendant, if any, will be permitted. Further, this case has had three previous first-place settings in the last 12 months cancelled. I would ask the court, if necessary, to "bump" someone else's first-place setting to a second-place setting so that we do not have to wait until late August for a trial. This is an unusual request and I do not make it lightly. However, due to the unusual delays that have plagued this case, it seems that extraordinary circumstances are present.

Another possibility would be to make an exception to allow us two or three settings, i.e. a second-place setting in April and May, and a first-place setting in August. In all probability, we would have a trial in April or May without taking the chance of a delay until the fall if we don't have a trial.

Page two

I suggest having a pre-trial scheduling conference with the court so that we can set a trial date in coordination with addressing further discovery. I enclose a formal request for that purpose. However, I think we could easily do it by telephone rather than require a formal hearing.

Respectfully,

ROBERT J. DEBRY & ASSOCIATES



DANIEL F. BERTCH

DFB/sd

cc: Jay Peck
Stephen Henroid

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FILED

FILED IN CLERK'S OFFICE
Salt Lake County Utah

FEB 5 1988

H. Dixon Hindley, Clerk, 3rd Dist. Court
By [Signature]
Deputy Clerk

DANIEL F. BERTCH - A4728
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and ERMA J. SCHONEY for themselves and all others similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
MEMORIAL ESTATES, INC. and MEMORIAL ESTATES CEMETERY DEVELOPMENT CORP. a corpora- tion, and JOHN DOES I through 10, individuals,)	
)	
Defendants)	

REQUEST FOR PRE-TRIAL
SCHEDULING CONFERENCE

Civil No. C82-4983

Judge Richard H. Moffat

Plaintiff moves this Court, under Utah Rule of Civil
Procedure 16, for a pre-trial scheduling conference to set a
trial date, discuss additional discovery, if any, and to
consider any other matter helpful to resolution of the case.

Plaintiff suggests that the conference could possibly be held by telephone, to avoid unnecessary hearings.

DATED this 4th day of February, 1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs

By: Daniel F. Bertch
DANIEL F. BERTCH

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REQUEST FOR PRE-TRIAL SCHEDULING CONFERENCE, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 4th day of February, 1988, to the following:

Joseph L. Henriod
Earl Jay Peck
Stephen L. Henriod
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Linda Korb

FILED IN CLERK'S OFFICE
Salt Lake County Utah

FEB 8 1988

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

H. Dixon Hindley, Clerk 3rd Dist. Court
By K. Grotepas
Deputy Clerk

George K. Schoney
Plaintiff(s),

vs.

Memorial Estates
Defendant(s).

ORDER FOR SCHEDULING
CONFERENCE

CASE NO. C82-4983

This case has been assigned to Judge Richard H. Moffat.

The Court, on its own motion, hereby orders that an in-Court scheduling conference be held in the above-entitled case as follows:

Date: February 17, 1988 Time: 9:25 a.m.
Place: Third Floor #330 Address: 451 South 200 East
Salt Lake City, Utah 84111

The following matters will be discussed:

- | | |
|----------------------------------|----------------------------------|
| 1. Trial dates | 6. Nature and complexity of case |
| 2. Discovery completion date | 7. Final pre-trial date |
| 3. Jury or non-jury | 8. Special matters |
| 4. Trial length | 9. Settlement status |
| 5. Dates for dispositive motions | |

If the above-referenced time and date are not possible, counsel are to contact the Court's clerk, Kathy Grotepas, at 535-5453 to arrange another date. Unavailability or non-appearance of counsel will result in pleadings being stricken and a default entered or dates being set without counsel's input.

Dated this 8th day of February 1988.


RICHARD H. MOFFAT
DISTRICT COURT JUDGE

Copies mailed to parties at the addresses indicated:

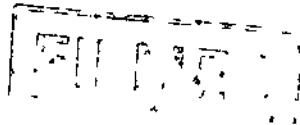
Daniel Bertsch 4001 So. 700 East Fifth Floor
SLC, Utah 84107
Stephen Hennrich 1100 Beneficial Life Towers
36 So. State Street SLC, Utah 84111

Date: 2/8/88

Kathy Grotepas
Court Clerk

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Tab I



FILED IN CLERK'S OFFICE
Salt Lake County Utah

JUL 18 1988

H Dixon Hindley, Clerk S. d. Dis. Court
By R. Cyndras
Clerk

Joseph L. Henriod (1468)
Earl Jay Peck (A2562)
Stephen L. Henriod (1469)
NIELSEN & SENIOR
Attorneys for Defendants
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GEORGE K. SCHONEY)	
IRMA J. SCHONEY, et al.,	)	ORDER, SUMMARY JUDGMENT
	)	AND JUDGMENT BY DEFAULT
Plaintiffs,)	
)	
vs.)	
	)	Civil No. C82-4983
MEMORIAL ESTATES, INC.)	
et al.,)	
	)	Judge Richard H. Moffat
Defendants.)	

Defendant Memorial Estates, Inc.'s:

(i) Motion to Strike George K. Schoney as a party
plaintiff;

(ii) Motion to Strike Plaintiffs' Complaint and enter
default judgment for failure to answer Defendant's Fourth Set
of Interrogatories; and,

(iii) Motion for Summary Judgment came on for hearing
at the final pre-trial pursuant to the Scheduling Order, Notice

and Stipulation of the parties. Plaintiffs were represented by counsel, Daniel F. Bertch. Defendant was represented by Earl Jay Peck and Stephen L. Henriod.

Having considered the motions, affidavits and other submissions, and the arguments of counsel, the Court enters the following orders:

Plaintiff George K. Schoney is dismissed as a party, it appearing that he died February 19, 1986, his death was suggested on the record on or before December 29, 1987 and no motion for substitution has been made.

Defendant's Motion for Summary Judgment is granted for the reason that based upon the pleadings and the uncontroverted affidavits and depositions, there is no genuine issue as to any material fact in any cause of action and defendant is entitled to its judgment as a matter of law.

Judgment should be entered upon the additional ground that plaintiff has failed to respond to Defendant's Fourth Set of Interrogatories. Plaintiff failed: To answer the interrogatories within the time to answer; to answer prior to the Court's designated last date to respond to all outstanding discovery; or to answer prior to the filing of Defendant's motion for sanctions. Said failure to answer impedes trial on

the merits and prejudices defendant's ability to prepare for the early trial date, set for July 6, 1988, requested by plaintiffs.

A judgment of no cause of action is, therefore, hereby entered in favor of defendants and against plaintiff Irma Schoney; defendants are awarded their costs herein, and George K. Schoney is dismissed as a party with prejudice.

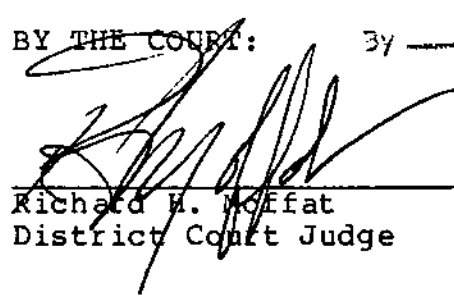
DATED this 13 day of July, 1988.

ATTEST
H. DIXON HINDLEY
CLERK

BY THE COURT:

By


K. G. Gotsopas
Deputy Clerk


Richard H. Moffat
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed a true copy of the foregoing Order, Summary Judgment and Judgment by Default, postage prepaid, this 27 day of ^{June}~~July~~, 1988, to:

Daniel F. Bertch
Robert J. DeBry
Robert J. DeBry & Associates
Attorneys for Plaintiffs
4001 South 700 East, 5th floor
Salt Lake City, Utah 84107



Tab J

and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rule 24. Intervention.

(a) **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Rule 25. Substitution of parties.

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in Subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

(d) **Public officers; death or separation from office.** When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office, it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

PART V.

DEPOSITIONS AND DISCOVERY.

Rule 26. General provisions governing discovery.

(a) **Discovery methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery scope and limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In general.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in Subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the

Tab K

opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any

other purpose nor may it be used against him in any other proceeding.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to comply with order.**

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after

proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, 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. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) **Failure to participate in the framing of a discovery plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

PART VI.

TRIALS.

Rule 38. Jury trial of right.

(a) **Right preserved.** The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) **Same: Specification of issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39. Trial by jury or by the court.

(a) **By jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or

Tab L

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

Rule 55. Default.

(a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a

declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of

Tab M

- 22-4-7. Violation as misdemeanor — Penalties.
- 22-4-8. Registration and monitoring of sales — Rules.
- 22-4-9. License required — Application — Renewal — Fees — Denial — Records — Reports — Examination — Cost.
- 22-4-10. Annual reports concerning trust funds.
- 22-4-11. Contract between contract seller and funeral director or cemetery authority.
- 22-4-12. Contract forms filed with division — Copy of contract delivered to buyer — Contents of contracts.

22-4-1. Payments for prearranged funeral plans to be held in trust — Trustee. At least 75% of any money paid to any person upon any agreement or contract, including 75% of money paid directly or indirectly and 75% of all securities delivered under any agreement or under any collateral agreement such as membership fees, dues, participation arrangements, and sales commissions, which has for a purpose the furnishing or performing of funeral services, under a prearranged funeral plan, or the furnishing or delivery of any personal property, merchandise, or services of any nature to be conveyed or delivered at any time, including vaults, unconstructed mausoleum crypts, unconstructed niches, and markers, but excluding cemetery lots and cemetery space, in connection with the final disposition of a human body, for future use at a time determinable by the death of the person or persons for whose benefit the contract or agreement has been made and whose body or bodies are to be disposed of, shall be held in trust. The trust may be revocable or irrevocable at the option of the beneficiary at the time the agreement or contract is made. The trust shall be maintained in this state. The trust shall be administered in accordance with Section 33-2-1 and Chapter 7, Title 75, and held intact until the contract for which it was paid is fulfilled according to its terms, and the person receiving the payments is declared to be a trustee of it. Any withdrawal of trust funds shall be determined by the agreement or contract and shall be released according to the provision of Section 22-4-4 of this act.

History: L. 1955, ch. 39, § 1; 1967, ch. 41, § 1; 1971, ch. 45, § 1; 1983, ch. 21, § 1.

Compiler's Notes.

Section 33-2-1, referred to in this section, was repealed by Laws 1983, ch. 63, § 2.

The 1967 amendment inserted "At least 75% of" at the beginning of the section; inserted "including 75% * * * and sales commissions" in the first sentence; inserted "mausoleum" in the exclusions in the first sentence; inserted the present third sentence; inserted "and held intact until the contract for which it was paid is fulfilled according to its terms" in the present fourth sentence; added the last sentence; and made a minor change in phraseology.

The 1971 amendment inserted "to be conveyed or delivered at any time" in the first sentence; and made minor changes in phraseology.

The 1983 amendment deleted "firm or corporation" after "person" in the first sentence; deleted "or any series or combination of agreements or contracts" after "agreement or contract" in the first sentence; inserted "including vaults, unconstructed mausoleum crypts, unconstructed niches, and markers" in the first sentence; deleted "vaults, mausoleum crypts, niches, cemetery burial privileges" from the exclusions in the first sentence; deleted "such deceased person to be known in this act as the decedent beneficiary" before "shall be held in trust" at the end of the first sentence; inserted the second sentence; inserted the provision for administration in accordance with 33-2-1 and Chapter 7, Title 75 in the fourth sentence; deleted "partnership, association or corporation" after "person" in the fourth sentence; and

Tab N

22-4-1. Payments for prearranged funeral plans to be held in trust — Trustee.

At least 75% of any money paid to any person upon any agreement or contract, including 75% of money paid directly or indirectly and 75% of all securities delivered under any agreement or under any collateral agreement such as membership fees, dues, participation arrangements, and sales commissions, which has for a purpose the furnishing or performing of funeral services, under a prearranged funeral plan, or the furnishing or delivery of any personal property, merchandise, or services of any nature to be conveyed or delivered at any time, including vaults, unconstructed mausoleum crypts, unconstructed niches, and markers, but excluding cemetery lots and cemetery space, in connection with the final disposition of a human body, for future use at a time determinable by the death of the person or persons for whose benefit the contract or agreement has been made and whose body or bodies are to be disposed of, shall be held in trust. The trust may be revocable or irrevocable at the option of the beneficiary at the time the agreement or contract is made. The trust shall be maintained in this state. The trust shall be administered in accordance with Chapter 7, Title 75, and held intact until the contract for which it was paid is fulfilled according to its terms, and the person receiving the payments is declared to be a trustee of it. Any withdrawal of trust funds shall be determined by the agreement or contract and shall be released according to the provision of Section 22-4-4.

History: L. 1955, ch. 39, § 1; 1967, ch. 41, § 1; 1971, ch. 45, § 1; 1983, ch. 21, § 1; 1988, ch. 169, § 10.

Compiler's Notes. — The 1988 amendment,

effective April 25, 1988, deleted "Section 33-2-1 and" following "in accordance with" in the fourth sentence and deleted "of this act" at the end of the last sentence.

22-4-3. Records and reports of trustee — Contents — Inspections — Audits.

(1) The trustee shall keep a record of all agreements. The record shall contain the name and address of the payor, the date and the amount of each payment made, the date and amount of each withdrawal and to whom paid, and the name of the bank or trust company depository.

(2) Within 30 days after the first transaction and deposit required to be made under this chapter the trustee shall make his first report to the director of the Division of Occupational and Professional Licensing, and shall make annual certified reports of all transactions to the director. All reports shall set forth in detail the information contained in the records required to be kept by the designated trustee, plus any other information required by the division. The division may audit these accounts or any part of them, and may inspect them at any time it deems advisable. The trustee shall make available to the division for examination, inspection, or auditing, all records pertaining to the accounts relating to services, merchandise, or property defined in § 22-4-1, and shall reimburse the division for all reasonable costs of the examination, inspection, or audit. The director of the division may employ experts from outside the division if special need exists to perform these examinations, inspections, and audits.

Tab O

78-12-24. Actions against public officers — Within six years.

An action by the state or any agency or public corporation thereof against any public officer for malfeasance, misfeasance, or nonfeasance in office or against any surety upon his official bond may be brought within six years after such officer ceases to hold his office, but not thereafter. 1983

78-12-25. Within four years.

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) A claim for relief or a cause of action under the following sections of Chapter 6, Title 25, the Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1).

(3) An action for relief not otherwise provided for by law. 1988

78-12-25.5. Injury due to defective design or construction of improvement to real property — Within seven years.

(1) (a) An action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, or any action for damages sustained on account of the injury, may not be brought against any person performing or furnishing the design, planning, surveying, supervising the construction of, or constructing the improvement to real property more than seven years after the completion of construction.

(b) In an action regarding property boundary surveys, the seven-year time period commences when the property survey is either recorded in the county recorder's office or filed in the county surveyor's office under Section 17-23-17.

(2) The time limitation imposed by this section does not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of the improvement constitutes the proximate cause of the injury for which an action is brought.

(3) This section does not extend or limit the periods otherwise prescribed by state law for the bringing of any action.

(4) As used in this section:

(a) "Person" means an individual, corporation, partnership, or other legal entity.

(b) "Completion of construction" means the date of issuance of a certificate of substantial completion by the owner, architect, engineer, or other agent, or the date of the owner's use or possession of the improvement on real property. 1988

78-12-26. Within three years.

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) An action to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered. 1988

78-12-27. Action against corporate stockholders or directors.

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory liability, such actions must be brought within three years after the levy of the assessment. 1953

78-12-28. Within two years.

Within two years, an action:

(1) against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this section does not apply to an action for an escape;

(2) for recovery damages for the death of one caused by the wrongful act or neglect of another; or

(3) for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983. 1987

78-12-29. Within one year.

Within one year:

(1) An action for liability created by the statutes of a foreign state.

(2) An action upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

Tab P

78-12-24. Actions against public officers — Within six years.

An action by the state or any agency or public corporation thereof against any public officer for malfeasance, misfeasance, or nonfeasance in office or against any surety upon his official bond may be brought within six years after such officer ceases to hold his office, but not thereafter. 1983

78-12-25. Within four years.

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) A claim for relief or a cause of action under the following sections of Chapter 6, Title 25, the Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1).

(3) An action for relief not otherwise provided for by law. 1988

78-12-25.5. Injury due to defective design or construction of improvement to real property — Within seven years.

(1) (a) An action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, or any action for damages sustained on account of the injury, may not be brought against any person performing or furnishing the design, planning, surveying, supervising the construction of, or constructing the improvement to real property more than seven years after the completion of construction.

(b) In an action regarding property boundary surveys, the seven-year time period commences when the property survey is either recorded in the county recorder's office or filed in the county surveyor's office under Section 17-23-17.

(2) The time limitation imposed by this section does not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of the improvement constitutes the proximate cause of the injury for which an action is brought.

(3) This section does not extend or limit the periods otherwise prescribed by state law for the bringing of any action.

(4) As used in this section:

(a) "Person" means an individual, corporation, partnership, or other legal entity.

(b) "Completion of construction" means the date of issuance of a certificate of substantial completion by the owner, architect, engineer, or other agent, or the date of the owner's use or possession of the improvement on real property. 1988

78-12-26. Within three years.

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) An action to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered. 1986

78-12-27. Action against corporate stockholders or directors.

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory liability, such actions must be brought within three years after the levy of the assessment. 1933

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Within two years, an action:

(1) against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this section does not apply to an action for an escape;

(2) for recovery damages for the death of one caused by the wrongful act or neglect of another; or

(3) for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983. 1987

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Within one year:

(1) An action for liability created by the statutes of a foreign state.

(2) An action upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.