

1990

# George K. Schoney and Erma J. Schoney v. Memorial Estates, Inc. : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

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

Earl J. Peck; Nielson and Senior; Stephen L. Henroid; Henroid and Henroid; Attorneys for Defendants.

Robert J. Debry; Robert J. Debry and Associates; Attorneys for Petitioners.

---

## Recommended Citation

Petition for Certiorari, *Schoney v. Memorial Estates, Inc.*, No. 900274.00 (Utah Supreme Court, 1990).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/3073](https://digitalcommons.law.byu.edu/byu_sc1/3073)

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

UTAH  
SUPREME COURT  
BRIEF  
45.9  
.59  
DOCKET NO. 900274

IN THE UTAH SUPREME COURT

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

Plaintiffs/Appellants,

vs.

MEMORIAL ESTATES, INC.,  
et al.,

Defendants/Respondents.

Case No. 900274

**MEMORIAL ESTATES, INC.** PETITION FOR WRIT OF CERTIORARI

ROBERT J. DEBRY  
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Petitioners  
4252 South 700 East  
Salt Lake City, UT 84107  
Telephone: (801) 262-8915

EARL J. PECK  
NIELSON & SENIOR  
Attorneys for Defendants/Respondents  
36 South State Street, #1100  
P. O. Box 11808  
Salt Lake City, UT 84111

STEPHEN L. HENROID  
HENROID & HENROID  
Attorneys for Defendants/Respondents  
700-38 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111

**FILED**

JUN 4 1990

Clerk, Supreme Court, Utah

GEORGE K. SCHONEY and	)	
ERMA J. SCHONEY, et al.	)	
	)	
Plaintiffs/Appellants,	)	
	)	
vs.	)	Case No. 900274
	)	
MEMORIAL ESTATES, INC.,	)	
et al.,	)	
	)	
Defendants/Respondents.	)	
	)	

STEPHEN L. HENROID  
HENROID & HENROID  
Attorneys for Defendants/Respondents  
700-38 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111

I.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court whose judgment is sought to be reviewed are as follows:

George K. Schoney (deceased)	Plaintiff/Petitioner
Erma K. Schoney	Plaintiff/Petitioner
Memorial Estates, Inc.	Defendant/Respondent
Memorial Estates Cemetery Development Corporation	Defendant/Respondent

II.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>PARTIES TO THE PROCEEDINGS</u> . . . . .	ii
II. <u>TABLE OF CONTENTS</u> . . . . .	iii
III. <u>TABLE OF AUTHORITIES</u> . . . . .	v
IV. <u>QUESTIONS PRESENTED FOR REVIEW</u> . . . . .	1
V. <u>REFERENCE TO THE OFFICIAL REPORT OF THE OPINION ISSUED BY THE COURT OF APPEALS</u> . . . . .	1
VI. <u>STATEMENT OF JURISDICTION</u> . . . . .	2
VII. <u>CONTROLLING PROVISIONS OF THE CONSTITUTION, STATUTES, ORDINANCES AND REGULATIONS</u> . . . . .	2
VIII. <u>STATEMENT OF THE CASE</u> . . . . .	2
IX. <u>STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW</u> . . . . .	3
X. <u>ARGUMENT</u> . . . . .	7

POINT I

<u>CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS CHANGED THE STANDARD FROM "WILLFUL FAILURE TO ANSWER DISCOVERY" TO "EXCUSABLE NEGLIGENCE" FOR IMPOSING DEFAULT JUDGMENT</u> . . . . .	7
A. <u>Introduction</u> . . . . .	7
B. <u>Legal Analysis</u> . . . . .	7
C. <u>Factual Background</u> . . . . .	9

POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS USED IMMATERIAL AND HERETOFORE NEVER RECOGNIZED FACTORS IN UPHOLDING THE SANCTIONS OF A DEFAULT JUDGMENT FOR ANSWERING INTERROGATORIES 13 DAYS LATE . . . . . 11

POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS MANUFACTURED, OUT OF THIN AIR, FACTORS FOR SUPPORTING THE SANCTION OF A DEFAULT JUDGMENT FOR ANSWERING INTERROGATORIES 13 DAYS LATE . . . . . 12

POINT IV

CERTIORARI IS APPROPRIATE BECAUSE THE COURT OF APPEALS HAS USURPED THE POWER OF THE TRIAL COURT 15

POINT V

CERTIORARI SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS HAVE DEPARTED FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS. . . . . 16

XI. CONCLUSION . . . . . 19

### III.

#### TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Amica Mutual Insurance Co. v. Schettler,</u> 768 P.2d 950 (Utah 1989) . . . . .	8
<u>Carman v. Salvens,</u> 546 P.2d 601 (Utah 1976) . . . . .	8
<u>Cousins v. City Council of Chicago,</u> 361 F.Supp. 530 (N.D. Ill. 1973) . . . . .	14
<u>Davis Stock Co. v. Hill,</u> 2 Utah 2d 20, 268 P.2d 988 (Utah 1954) . . . . .	12
<u>Edgar v. Slaughter,</u> 548 F.2d 770 (8th Cir. 1977) . . . . .	8
<u>First Federal Savings &amp; Loan Association of Salt Lake City v. Schamack,</u> 684 P.2d 1257, 1266 (Utah 1984) . . . . .	8
<u>Keiser v. Coliseum Properties, Inc.,</u> 614 F.2d 406 (5th Cir. 1980) . . . . .	17
<u>Letizia v. Prudential Bache Securities, Inc.,</u> 802 F.2d 1185 (9th Cir. 1986) . . . . .	12
<u>Local Union No. 251 v. Town Line Sand and Gravel, Inc.,</u> 511 F.2d 1198 (1st Cir. 1975) . . . . .	8
<u>Lopez v. Schwendiman,</u> 720 P.2d 778, 80 (Utah 1986) . . . . .	9
<u>Merican, Inc. v. Caterpillar Tractor Co.,</u> 596 F.Supp. 691 (E.D.P.A. 1984) . . . . .	11
<u>Ohio v. Crafters, Inc.,</u> 75 F.R.D. 12 (D. Colo. 1977) . . . . .	8
<u>Re Attorney General of United States,</u> 596 F.2d 58 (2d Cir. 1979) . . . . .	8
<u>Rich v. McGovern,</u> 551 P.2d 1266 (Utah 1976) . . . . .	16

<u>Schoney v. Memorial Estates, Inc.,</u>	
132 Utah Adv. Rep. 22 (Ct. App. April 24, 1990)	1, 7
<u>Stepanischen v. Merchants Despatch Transp. Corp.,</u>	
722 F.2d 922 (1st Cir. 1983)	17
<u>Tucker Realty, Inc. v. Nunley,</u>	
396 P.2d 410 (Utah 1964)	8
<u>W.W. &amp; W.B. Gardner, Inc. v. Park West Village, Inc.,</u>	
568 P.2d 734 (Utah 1977)	9, 10, 13, 15, 17, 19
<u>Western Capitol &amp; Securities, Inc. v. Knudson,</u>	
779 P.2d 688 (Utah 1989)	14

#### OTHER AUTHORITIES

<u>Utah Code Ann. § 78-2-2(3)(a)</u>	2
<u>Utah Rules of Appellate Procedure, Rule 30</u>	14
<u>Utah Rules of Appellate Procedure, Rule 46(c)</u>	16
<u>Utah Rules of Civil Procedure, Rule 37(b)(2)(c)</u>	2, 8
<u>Utah Rules of Civil Procedure, Rule 37(d)</u>	2
<u>Utah Rules of the Appellate Procedure, Rules 45-51</u>	1, 2



The plaintiffs ("Schoneys"), pursuant to Rules 45-51 of the Utah Rules of the Appellate Procedure, submit this Petition for Writ of Certiorari.

#### IV.

##### QUESTIONS PRESENTED FOR REVIEW

1. May the trial courts impose a default judgment when a party answers interrogatories 13 days late and the delay is excusable?

2. Should certiorari be granted when the Court of Appeals uses immaterial and, heretofore, unrecognized factors in upholding the sanction of a default judgment for answering interrogatories 13 days late?

3. Should certiorari be granted when the court of Appeals invents factors that do not factually exist in upholding a default judgment sanctions?

#### V.

##### REFERENCE TO THE OFFICIAL REPORT OF THE OPINION ISSUED BY THE COURT OF APPEALS

The opinion of the Utah Court of Appeals is reported at Schoney v. Memorial Estates, Inc., 132 Utah Adv. Rep. 22 (Ct. App. April 24, 1990). Hereinafter ("Schoney at \_\_\_\_.") (A copy of the opinion is attached as Exhibit 1 to the Appendix of this Petition.)

VI.

STATEMENT OF JURISDICTION

The decision sought to be reviewed was entered on April 6, 1990. In subsequent orders dated May 3, 1990 and May 16, 1990, this Court granted petitioners up through June 4, 1990 in which to file a Petition for Writ of Certiorari. Jurisdiction is invoked pursuant to Utah Code Ann. § 78-2-2(3)(a) and Rules 45-51 of the Utah Rules of the Appellate Procedure.

VII.

CONTROLLING PROVISIONS OF THE CONSTITUTION, STATUTES,  
ORDINANCES AND REGULATIONS

The controlling provisions of the Utah Rules of Civil Procedure are 37(d) and 37(b)(2)(c). The text of the rules is set forth in Appendix, Exhibit 2.

VIII.

STATEMENT OF THE CASE

The Schoneys brought this class action alleging breach of contract, fraud, breach of trust and intentional infliction of emotional distress arising out of Memorial Estates' sale of mausoleum crypt space. The class was certified by Judge Fishler. Later, Judge Dee decertified the class. On the eve of a jury trial, Judge Moffat dismissed the

entire Complaint on summary judgment, and entered a default judgment as a sanction for answering interrogatories 13 days late. (Transcript of Proceedings, June 21, 1988 pp. 51, 52, hereinafter "Tr. p. \_\_\_\_.")

The Utah Court of Appeals affirmed the default judgment, as a discovery sanction, and ruled it had no need to consider the propriety of the summary judgment entered by the trial court.

#### IX.

##### STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

1. The Schoneys brought their claims individually and on behalf of the class of consumers of Memorial Estates Services. (R. 202, 294.)

2. The Schoneys served interrogatories on Memorial Estates on June 17, 1982. (R. 12.) Memorial Estates answered the interrogatories twenty eight (28) days late. (R. 50.)

3. The Schoneys submitted to Memorial Estates a request for documents on January 28, 1983. (R. 197.) Memorial Estates never responded to the request.

4. The Schoneys served another request for documents on March 1, 1983. Memorial Estates never responded to the request. (R. 225.)

5. Schoneys certified the case for trial in May of 1983 (R. 263.) Memorial Estates objected (R. 269.) The Schoneys again certified the case for trial on September 13, 1983. (R. 390.) Because of District Judge Leary's, poor health, and to avoid delay, the Schoneys moved and obtained a different trial Judge. (R. 522.) The Schoneys certified the case as ready for trial on April 22, 1986. (R. 1067.) The Court entered a scheduling order setting the case for trial, as a first place setting on February 9, 1987. However, Judge Dee suddenly retired effective January 31, 1987. The Schoneys requested a pro-tempore judge to prevent delay of the trial. The request was denied. (R. 1084, 1085.) The case was set for trial on August 24, 1987. Upon Memorial Estates' request for a continuance, the trial date was postponed to December 7, 1987 and a discovery cut-off date of December 1, 1987 was established by the trial court.

6. In June of 1987, Schoneys served another set of interrogatories and another request for documents. Memorial Estates sought and received a 62 day extension (until September 15, 1987) to respond to discovery. (R. 1121.) Memorial Estates did not answer by September 11, 1987. Memorial Estates partially answered Schoneys' discovery on November 24, 1987. (R. 1166.) The Schoneys were forced to

bring a motion to compel answers on December 8, 1987. (R. 1150.)

7. Schoneys' Motion to Compel was partially granted by an order entered December 23, 1987. (R. 1187.)

8. Upon Memorial Estates' request, the trial was postponed until February 1, 1988. (R. 1139.)

9. Upon the Court's own motion, the trial was again continued. (R. 1301.)

10. Upon Schoneys' request, the case was set for trial on July 6, 1988. (R. 1336, 1338, 1360.)

11. Memorial Estates claims to have mailed a final set of interrogatories and requests for documents to Schoneys' counsel on April 29, 1988 (R. 1363), forty days before the discovery cut-off date set forth in a scheduling order. (Tr. p. 3.) Schoneys' counsel said he did not receive the discovery until the first week of June. (Tr. p. 5.) The court blamed the mix-up on the mail. (Tr. p. 7.) Memorial Estates acknowledged receiving unsigned answers to its discovery on June 15. (Tr. p. 4, ln. 20, R. 1398.) Signed answers were served on June 20, 1988. (R. 1292.)

12. Two Memorial Estates substantively identical summary judgment motions were denied. (R. 693, 1301.) Memorial Estates filed a third Motion for Summary Judgment and

Motion for Default Judgment on June 14, 1988. (R. 1363.) The motions were heard on June 21, 1988. (Transcript of Proceedings, June 21, 1988.)

13. At the June 21 hearing, the Court admitted it had not read the file (Tr. p. 2.) Memorial Estates renewed its \$4,000 offer of judgment. The court gave Schoneys' counsel the Hobson's choice of accepting the \$4,000, or suffering the fate of a summary and default judgment. The \$4,000 was rejected and the court granted Memorial Estates' Motions for Summary and Default Judgment. (Tr. pp. 51, 52.)

14. The trial court: a) did not find that Schoneys' short delay in answering the interrogatories was willful; b) did not find when Schoneys' counsel received the interrogatories; c) did not examine the interrogatories to determine whether they were duplicitous of other discovery as alleged by Schoneys' counsel; and d) never entered an order compelling discovery.

15. At the conclusion of the June 21 hearing, the court said:

. . .I think that the rules require, and that the Gardner case would require that the motion to strike [as a default sanction] be granted.

(Tr. pp. 52, 53.)

16. On appeal, the Utah Court of Appeals affirmed the default judgment and ruled that accordingly it had no need to consider the propriety of the summary judgment. Schoney v. Memorial Estates, Inc., 132 Adv. Rep. 22 (Ct. App. April 24, 1990).

X.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS CHANGED THE STANDARD FROM "WILLFUL FAILURE TO ANSWER DISCOVERY" TO "EXCUSABLE NEGLIGENCE" FOR IMPOSING DEFAULT JUDGMENT AS A DISCOVERY SANCTION

A. Introduction.

As set forth in Section IX, paragraphs 2-4 of this Petition, Memorial Estates repeatedly failed to timely respond to Schoney's discovery requests. Some of the requests have never been responded to by Memorial Estates. Other Memorial Estates' delays range from 28 to 132 days. However, when Schoneys answered Memorial Estates' last set of interrogatories (most of which were cumulative) 13 days late, the court entered a default judgment as a sanction against the Schoneys.

B. Legal Analysis.

The default judgment sanction was imposed even though there was not a finding of a willful refusal to answer. The

legal standard for striking a pleading as a discovery sanction is "a showing of willfulness, bad faith, or fault on the part of non-complying party. U.R.C.P. 37(b)(2)(c); First Federal Savings & Loan Association of Salt Lake City v. Schamack, 684 P.2d 1257, 1266 (Utah 1984). In every appellate Utah Case that has considered the issue, the Utah Courts have unanimously and unequivocally required some showing of a willful failure to respond. Tucker Realty, Inc. v. Nunley, 396 P.2d 410 (Utah 1964); Carman v. Salvens, 546 P.2d 601 (Utah 1976); Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950 (Utah 1989).

A review of federal decisions construing identical discovery rules shows that a default judgment is never entered as a sanction unless: a) there is bad faith; or b) a willful failure to respond to the request; or c) a failure to respond to a court order to produce discovery. e.g., Local Union No. 251 v. Town Line Sand and Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975); Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977); Ohio v. Crofters, Inc., 75 F.R.D. 12 (D. Colo. 1977). Re Attorney General of United States, 596 F.2d 58 (2d Cir. 1979).

In summary, Schoneys cannot find a case where a Utah or federal court has upheld a default judgment as a discovery sanction without a finding of bad faith or willful conduct. Neither could the Court of Appeals.



In this case, the trial court ruled that W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977) required the entry of a default judgment.

\* \* \*

I think that the Gardner case would require that the motion to strike be granted. (Tr. 51, 52.)

The trial court's error is clear and complete. Gardner upheld a default judgment against a party whose defense was without merit and whose "persistent dilatory tactics frustrated the judicial process." Gardner, at 737. Gardner did not require a default judgment when there was no persistent dilatory conduct. Of course, no judicial deference is given the lower court when the lower court misapplies the law. e.g., Lopez v. Schwendiman, 720 P.2d 778, 780 (Utah 1986).

C. Factual Background.

In this case, the trial court did not make a finding of wilful failure to answer because there was none. The relevant transcript shows:

- a) Memorial Estates claims to have served interrogatories on April 29th, 40 days before the discovery cut-off date. (Tr. p. 3.)
- b) Schoneys' counsel did not receive the interrogatories. (Tr. p. 5.)

- c) Schoneys' counsel was on vacation from June 3 to June 12. During the vacation, Memorial Estates' counsel called the office of Schoneys' counsel to see if there was a mix-up. Upon learning that Schoneys' counsel had not received the interrogatories, he sent over another copy. (Tr. p. 5, 6.)
- d) Schoneys' counsel returned from vacation on June 12 and within 3 days submitted unsigned answers to Memorial Estates. Signed answers were sent one week later. (Tr. p. 6, 3.)
- e) The court blamed the mix-up on the mail:  
It's a constant darn problem about mailing and at times, I, with lesser counsel, have some problems about veracity. It is really a problem with mailing. I don't know what we're going to do about it. . . . (Tr. p. 7.)

Based on the foregoing, the court entered the default judgment of Schoneys as a sanction for answering interrogatories 13 days late. No comparable sanction was ever imposed on Memorial Estates for its much longer delays in responding to discovery. The decision was upheld by the Court of Appeals without citing a single case except for W.W. & W.B. Gardner. No other reported case on the planet has upheld a default judgment on comparable facts.

## POINT II

### CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS USED IMMATERIAL AND HERETOFORE NEVER RECOGNIZED FACTORS IN UPHOLDING THE SANCTIONS OF A DEFAULT JUDGMENT FOR ANSWERING INTERROGATORIES 13 DAYS LATE

The Court of Appeals listed several factors in upholding the trial court's default judgment sanction. A major factor in the Court's reasoning was that Schoneys had amended their complaint 5 times. (Slip opinion at p. 2.)

Because of the complicated procedural history, the operative complaint was titled "Fifth Amended Complaint." However, the Court of Appeals was wrong to infer that plaintiffs had amended the complaint five times. In fact, the court had granted three motions to amend.

Furthermore, the court was wrong to infer that there was something improper about multiple amendments. (Especially in a complex case.) One of the amendments was simply to clarify issues. (See Exhibit 3.) In at least one instance, plaintiff was required to amend simply because there had been a change in circumstances during the lengthy litigation. (See Exhibit 4.)

It's true that the number of amended complaints may be a factor in deciding whether (1) allow a party to amend again. see generally, Merican, Inc. v. Caterpillar Tractor

Co., 596 F.Supp. 697 (E.D.P.A. 1984); or (2) to dismiss a complaint for failure to state a claim. Davis Stock Co. v. Hill, 2 Utah 2d 20, 268 P.2d 988 (Utah 1954); Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185 (9th Cir. 1986). However, no court has ever used the number of amended complaints to decide whether a sanction of default judgment should be imposed for answering interrogatories 13 days late.

### POINT III

#### CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS MANUFACTURED, OUT OF THIN AIR, FACTORS FOR SUPPORTING THE SANCTION OF A DEFAULT JUDGMENT FOR ANSWERING INTERROGATORIES 13 DAYS LATE

One of the factors listed by the Court of Appeals were dealt with in Point II of this Argument. The remaining factors listed by the Court of Appeals were:

- a) That plaintiffs had "narrowly" escaped summary judgment.
- b) That plaintiffs were "in effect, living on borrowed time."
- c) That the court was "growing short on patience and determined to keep plaintiffs on a short tether."
- d) Schoneys were, ". . . somewhat uneven in discharging their burden of prosecuting the case."

- e) 'Schoneys' untimely compliance with the discovery requests necessarily compromised defendants' ability to have the information necessary to go to trial.
- f) Schoneys made it impossible for Memorial Estates to conduct follow-up discovery.
- g) Schoneys missed the discovery cut-off date by 4 days.

The first four reasons (a-d) are completely contrary to the Record. The trial judge acknowledged that Schoneys had vigorously prosecuted the case (see page 7 of this Petition). Further, of the six trial continuances granted, only one was made at the request of the Schoneys. See Point IV of this Argument. The musing of the Court of Appeals about "living on borrowed time," and "a short tether," and "narrowly escaping summary judgment" were spun out of thin air with absolutely no basis in the Record. Indeed, the Record is to the contrary. (See fact section above.) It was the defendants who were dragging their feet.

Further, there is nothing in the Record that shows Memorial Estates did not have the information it needed to go to trial. In fact, Memorial Estates never made that claim. They only said that Gardner, supra required a default

judgment. (Tr. p. 5.) Schoneys, on the other hand, claimed that the interrogatories were, for the most part, duplicitious of previous discovery. (Tr. p. 6.)

Finally, the earliest possible due date for the interrogatory answers was June 2. Schoneys answered on June 14. Even if Schoneys had answered on June 2, Memorial Estates still could not have conducted further discovery because the discovery cut-off date was June 10. The rules allow a party 30 days to respond to discovery. There were only 8 days between June 2 and June 10.

It is axiomatic that the factual findings of a trial court must be supported by some evidence. e.g., Western Capitol & Securities, Inc. v. Knudvig, 768 P.2d 989 (Utah 1989). The factual findings in an appellate opinion also must be supported by some evidence. c.f., Rule 30 of the Utah Rules of Appellate Procedure. This is because a factual ruling by an appellate court is binding on the lower courts. e.g., Cousins v. City Council of Chicago, 361 F.Supp. 530 (N.D. Ill. 1973). In this case, there is nothing to support the factors listed above.

It's true that Schoneys missed by 4 days the discovery cut-off date set forth in the scheduling order. But the court and Memorial Estates also violated the scheduling

order by hearing dispositive motions less than 30 days before trial. (Tr. p. 7.)

In summary, all of the factors listed by the Court of Appeals in upholding the discovery sanction of a default judgment are:

- a) immaterial and unrecognized by other courts;
- b) made up; or
- c) at best, inconsequential.

#### POINT IV

#### CERTIORARI IS APPROPRIATE BECAUSE THE COURT OF APPEALS HAS USURPED THE POWER OF THE TRIAL COURT

It is axiomatic that the trial court has broad discretion in discovery matters. However, that discretion lies in the trial court - - not the Court of Appeals! It is the job of the trial court to exercise discretion. It is the job of the appellate court to review for abuse of discretion.

This case turns that orderly judicial process on its head. The trial court judge exercised no discretion. The trial court judge merely concluded that: ". . .the Gardner case would require that the motion to strike be granted." (Tr. 52-53.) The Court of Appeals then invented reasons to support the conclusion of the trial court.

The Opinion of the Court of Appeals would be appropriate if it had been a memorandum decision of a trial court judge. If Judge Moffat (the trial court judge) had entered such a detailed memorandum decision, an appellate court could review. Here the trial court judge gave a bare conclusion. It was the Court of Appeals -- and not the trial court -- who exercised discretion.

#### POINT V

#### CERTIORARI SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS HAVE DEPARTED FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The ruling of the trial court and the opinion of the Court of Appeals have clearly and completely departed from the acceptable and usual course of judicial proceedings. (See Rule 46(c) of the Utah Rules of Appellate Procedure.)

In particular, Judge Moffat didn't even read the file:

. . . We have a Motion for Summary Judgment. Haven't had a chance to look at the file. . . .

(June 21, 1988 Transcript at p. 2, Lines 4-5.)

Thus, Judge Moffat could not follow his duty to, ". . . carefully scrutinize the submissions and contentions..." Rich v. McGovern, 551 P.2d 1266 (Utah 1976). Under lesser circumstances, federal courts have reversed summary judgments.



Keiser v. Coliseum Properties, Inc., 614 F.2d 406 (5th Cir. 1980); Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922 (1st Cir. 1983).

In the end, the trial court judge based his ruling on the case of W.W. & W.B. Gardner v. Park West Village, Inc., supra. However, since the trial judge had not read the file, he could not have read the case either. No copy of the case was handed to the judge at the hearing. Rather, the trial judge simply accepted the defendants' interpretation of the case. Thus, without even reading the case, the trial judge concluded: "I think that the Gardner case would require that the motion to strike be granted." (Tr. 51-52.)

During the course of the hearing, numerous fact issues were examined: viz. whether defendant's interrogatories were lost or delayed in the mail (June 21, 1988 Tr. p. 5, Lines 18-25); whether Memorial Estates ever made a suggestion of death on the Record (June 21 Tr. at p. 11, Lines 17-20; p. 12, Lines 10-13); whether a \$4,000 offer of judgment would satisfy all of Schoney's claims (June 21 Tr. at p. 14, Lines 7-11); whether Schoneys were shown a picture of the mausoleum before it was constructed (June 21 Tr. at p. 15, Lines 2-13); whether the Schoneys were shown a rendering of a mausoleum (June 21 Tr. at p. 16, Lines 20-25); whether the mausoleums at Mountain View

and Redwood Road were the same (June 21 Tr. at p. 17, Lines 11-15); whether the construction of a mausoleum at Redwood Road put the Schoneys on notice that a later mausoleum at Mountain View would be of the same quality (June 21 Tr. at p. 18, Lines 6-10); whether a chapel has always been available at Mountain View (June 21 Tr. at p. 18, Line 22, p. 19, Line 5); whether it was reasonable for Schoneys to purchase alternate mausoleum space (at Sunset Lawn) (June 21 Tr. at p. 27); whether Memorial Estates sold more crypts than had been constructed (June 21 Tr. at p. 31, Lines 1-4); whether the Schoneys purchased a mausoleum at Redwood Road or Mountain View (June 21 Tr. at p. 36 and 37); whether Memorial Estates properly accounted for trust funds (June 21 Tr. at p. 43, Lines 8-22); whether Memorial Estates held a dead corpse as a hostage (June 21 Tr. at p. 46, Lines 1-9); whether Memorial Estates told Schoneys that their money would be held in trust (June 21 Tr. at p. 46, Lines 10-19); whether Memorial Estates represented that a mausoleum would be built when there were no plans to do so (June 21 Tr. at p. 47, Lines 1-7); whether it was reasonable for Memorial Estates to substitute an LDS chapel for the Schoneys, who were a non-LDS family (June 21 Tr. at p. 48, Lines 12-22); whether a chapel was available at both Mountain View and Redwood Road (June 21 Tr. at p. 51, Lines 1-3);

whether Memorial Estates was prejudiced because Schoney answered interrogatories approximately 13 days late. (June 21 Tr. at p. 5, Lines 1-15.)

In summary, it was clear error for Judge Moffat to grant summary judgment and a default judgment in such a complicated case, without even reading the file, the interrogatories, or the Gardner case.

## XI.

### CONCLUSION

Certiorari should be granted when:

a) The Court of Appeals decides a question in conflict with a decision of this Court; or

b) The Court of Appeals decides an important question of law which should be settled by the Utah Supreme Court; or

c) The Court of Appeals renders a decision which calls of this Court's power of supervision.

The Court of Appeals, in this case, changed the standard for imposing a default judgment as a discovery sanction from willfulness to excusable neglect. The decision conflicts with prior decisions of this Court. Further, if the change in standard is going to be made, this Court should make it.

Finally, the Court of Appeals' use of immaterial or invented factors in upholding the default judgment.

DATED this 4 day of June, 1990.

ROBERT J. DEBRY & ASSOCIATES  
Attorney for Plaintiffs/Appellants

By: \_\_\_\_\_

ROBERT J. DEBRY

CERTIFICATE OF MAILING

I certify that on the 4 day of June, 1990, a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI (George K. Schoney v. Memorial Estates, et al.), was mailed, postage prepaid, to the following:

Earl J. Peck  
NIELSON & SENIOR  
36 South State Street, #1100  
P. O. Box 11808  
Salt Lake City, Utah 84111

Stephen L. Henroid  
Henroid & Henroid  
700-38 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111



SP8-051\jn

## APPENDIX

**EXHIBIT 1**

FILED

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

APR 6 1990  
*Gary Noonen*  
Gary Noonen  
Clerk of the Court  
Utah Court of Appeals

George K. Schoney and Erma J.	)	
Schoney, et al.,	)	
	)	
Plaintiffs and Appellants,	)	OPINION
	)	(For Publication)
v.	)	
	)	
Memorial Estates, Inc., et al.,	)	Case No. 880630-CA
	)	
Defendants and Respondents.	)	

-----

Third District, Salt Lake County  
The Honorable Richard H. Moffat

Attorneys: Daniel F. Bertch and Robert J. DeBry, Salt Lake City,  
for Appellants  
Earl Jay Peck and Stephen L. Henriod, Salt Lake City,  
for Respondents

-----

Before Judges Billings, Garff, and Orme.

ORME, Judge:

Plaintiffs, the Schoneys,<sup>1</sup> appeal from the trial court's judgment in favor of defendant Memorial Estates. The judgment was based on two independent grounds: 1) Summary judgment on the merits and 2) default judgment for failure to respond timely to a discovery request. We affirm as to the default judgment and accordingly have no need to consider the propriety of the summary judgment.

---

1. During the long course of this case, appellant George K. Schoney died. One issue on appeal is whether the trial court erred in dismissing the action as to him on the theory a suggestion of death was made on the record but no timely substitution of party was made. In view of our disposition of the case, we need not reach that issue. For convenience, in this opinion we will refer to plaintiffs in the plural.

FILED COPY



## AVAILABILITY OF SANCTION

The trial court entered default judgment against plaintiffs because they failed to comply with a discovery request within the time permitted by the rules and within the time provided by the court's order imposing a discovery cut-off. The entry of default judgment as a sanction based on failure to fulfill discovery obligations is within the discretion of the trial court. C. Wright and A. Miller, Federal Practice and Procedure § 2291, at 812-13, 817 (1970). Management of the actions pending before it is uniquely the business of the trial court and while an appellate court may, of course, intervene if discretion is abused, we accord trial courts considerable latitude in this regard and considerable deference to their determinations concerning discovery.

Rule 37(d) of the Utah Rules of Civil Procedure allows a court to impose sanctions against a party for disregarding discovery obligations even when that party has not directly violated a court order specifically compelling discovery.<sup>2</sup>

[Rule 37(d)] allows the court in which the action is pending, on motion, to impose a variety of sanctions on a party who . . . has failed to serve answers or objections to interrogatories submitted under Rule 33

. . . .  
No court order is required to bring Rule 37(d) into play. It is enough that . . . a set of interrogatories . . . has been properly served on the party.

C. Wright and A. Miller, Federal Practice and Procedure § 2291, at 807 (1970). The possible sanctions the court may impose include those listed in paragraphs (A), (B), and (C) of Utah R. Civ. P. 37(b)(2). Paragraph 37(b)(2) states: "[T]he court in which the action is pending may make such orders in regard to the failure [to fulfill discovery obligations] as are just, and among others the following: . . . (C) . . . rendering a judgment by default against the disobedient party."

---

2. By contrast, Utah R. Civ. P. 37(b) authorizes discovery sanctions only where particular kinds of court orders have been violated.

that everyone, including the court,<sup>3</sup> shares some blame for this delay. Nonetheless, there was no counterclaim in this case, and the primary responsibility for moving the case along rested with plaintiffs. Plaintiffs were, at best, somewhat uneven in discharging their burden of prosecuting the case in a timely fashion during its five-year life at the trial level.<sup>4</sup>

Third, the court itself had become involved in the discovery process, unqualifiedly indicating its desire to bring the lengthy proceedings to an end. The court had imposed an order fixing a cut-off date for discovery. While such an order is not on precisely the same footing as an order actually compelling discovery by a particular date, it is clearly analogous.

Finally, the trial date set by the court was only a few weeks beyond the discovery cut-off date. Plaintiffs' untimely compliance with the discovery request necessarily compromised defendant's ability to have the information necessary to go forward with trial on the date set by the court.<sup>5</sup> Moreover, the untimeliness of plaintiffs' answers effectively precluded

---

3. Various proceedings in this case were heard by five different trial judges. The retirement of one judge effectively cost plaintiffs a prior trial setting.

4. Cf. Maxfield v. Rushton, 779 P.2d 237, 241 (Utah Ct. App. 1989) (Orme, J., concurring specially) (when case had been pending for almost ten years, length of time the action had been pending was a relevant consideration in court's sua sponte decision that case should be dismissed).

5. Plaintiffs argue no prejudice actually resulted because the interrogatories sought information which was duplicative, extraneous, and unimportant. If this were true, a timely objection or motion for protective order would have been in order. Neither was made. We decline to consider this contention for the first time on appeal. See, e.g., Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 655 (Utah 1988). See also C. Wright & A. Miller, Federal Practice and Procedure § 2291, at 810-11 (1970) ("A party may not defend against sanctions under Rule 37(d) by contending that the request for discovery was improper or objectionable. If he takes this view, he is required to apply for a protective order under Rule 26(c).").

CASE TITLE:

George K. Schoney and Erma J. Schoney,  
et al.,

Plaintiffs and Appellants,

v.

Case No. 880630-CA

Memorial Estates, Inc., et al.,  
Defendants and Respondents.

PARTIES:

Daniel F. Bertch  
Robert J. Debry (Argued)  
Robert J. Debry & Associates  
Attorneys for Appellants  
4001 South 700 East, Suite 500  
Salt Lake City, UT 84107

Earl Jay Peck  
Stephen L. Henriod (Argued)  
Henriod & Henriod  
Attorneys for Respondent  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Ut 84111

TRIAL COURT:

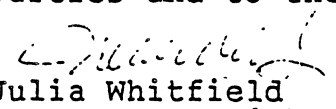
Hon. Richard H. Moffat.  
Salt Lake County  
Third District Court  
Case No. C82-4983.

April 6, 1990. - Opinion by Judge Gregory K. Orme  
Concurred: Judge Judith M. Billings  
Judge Regnal W. Garff

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the trial court herein be, and the same is, affirmed.

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of April, 1990, a true and correct copy of the attached opinion was mailed to each of the above parties and to the trial court.

  
Julia Whitfield  
Deputy Clerk

**EXHIBIT 2**

## **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

avail on the matter, or (4) there was other good reason for the failure to submit.

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 (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. (Amended effective Jan. 1, 1987.)

EXHIBIT 3



ALL COPY

ROBERT J. DEBRY  
ROBERT J. DEBRY & ASSOCIATES  
Attorney for Plaintiff  
965 East 4800 South, Suite 2  
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	)	
ERMA J. SCHONEY, for	)	
themselves and all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	MOTION TO
	)	AMEND COMPLAINT
vs.	)	
	)	
MEMORIAL ESTATES, INC. and,	)	
MEMORIAL ESTATES CEMETERY	)	(Judge David B. Dee)
DEVELOPMENT CORP., corpora-	)	
tion and JOHN DOES 1 through	)	
10, individuals,	)	
	)	
Defendants	)	Civil No. C'82-4983
	)	

---

COMES NOW the plaintiff, and moves pursuant to Rule 15 of the Utah Rules of Civil Procedure, that leave of court be granted to amend plaintiffs' Complaint as set forth in the attached, proposed Third Amended Complaint.

The grounds for this motion are that allowance of the amendment is in the interest of justice.

Specifically, plaintiffs seek to amend count five to more specifically plead unjust enrichment on the part of the defendants.

Allowance of the amendment will not prejudice the defendants, nor delay the upcoming trial.

DATED this 18 day of Jan,  
1985.

ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiffs

By: Robert J. Debry

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Motion to Amend Complaint, (George K. Schoney, et al vs. Memorial Estates, et al, Civil No. C-82-4983), was mailed this 18 day of June, 1984, by depositing same in the U.S. Mail, postage prepaid, to the following:

Arthur H. Nielsen  
Joseph L. Henriod  
David Swope  
NIELSON & SENIOR  
P.O. Box 11808  
36 South State Street  
Salt Lake City, Utah 84111

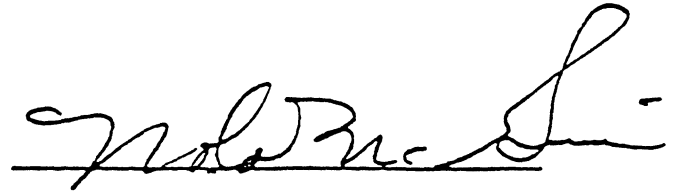
A handwritten signature in dark ink, appearing to read "Arthur H. Nielsen", written over a horizontal line.

EXHIBIT 4

ROBERT J. DEBRY - A0849  
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff  
965 East 4800 South, Suite 2  
Salt Lake City, Utah 84117  
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,	)	MOTION TO AMEND
	)	
vs.	)	
	)	
MEMORIAL ESTATES, INC. and	)	Civil No. C82-4983
MEMORIAL ESTATES CEMETERY	)	
DEVELOPMENT CORP., corpo-	)	(Judge David B. Dee)
ration and JOHN DOES 1	)	
through 10, individually,	)	
	)	
Defendants.	)	

Plaintiff respectfully moves to file the Fourth Amended Complaint (a copy of which is filed herewith).

The grounds for the motion are that defendants have only recently disclosed that the mausoleum space at issue in this case is finally (after 12 years) under construction. Furthermore, defendants have only recently completed another mausoleum at the Redwood location for other class members.

FILE COPY

This late construction substantially changes many of the theories of liability and damages in the case. Furthermore, defendants are not prejudiced because there has been no discovery cutoff and no trial date has been set.

DATED this 28th day of February, 1985.

ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff

By: \_\_\_\_\_

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing MOTION TO AMEND, was hand delivered this 28th day of February, 1985 to the following:

Arthur H. Nielsen  
Joseph L. Henriod  
David Swope  
NIELSON & SENIOR  
P.O. Box 11808  
36 South State Street  
Salt Lake City, Utah 84111

\_\_\_\_\_