

1990

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

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF
900274
DOCKET NO. _____

IN THE UTAH SUPREME COURT

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

REPLY BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

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Clerk, Supreme Court, Utah

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Pursuant to Rule 50(e) of the Utah Rules of Appellate Procedure, appellants submit this Reply Brief in Support of their Petition for Writ of Certiorari.

ARGUMENT

POINT I

THE ISSUE OF RULE 37 SANCTIONS IS OF
CONSTITUTIONAL PROPORTIONS

Respondent argues that attorney fees should be granted because appellant's claims are frivolous.

In order to demonstrate good faith, appellant respectfully suggests that this is an issue of constitutional dimensions. The United States Supreme Court has held that:

The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. . . . These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of these constitutional considerations.

Societe Internationale Pour Participations Industrielles Et Commerciales A.A. v. Rogers, Attorney General, 357 U.S. 197, 209 (1958). See also, Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983); Patton v. Aerojet Ordinance Co., 765 F.2d 604 (6th Cir. 1985). c.f., Harwood v. Great American Management & Investment, 298 S.E.2d 263 (Ga. App. 1982).

It is true that the trial court held a hearing -- of sorts. However, the trial court did not read the file; did not read the case upon which its ruling was based; did not examine the content of the interrogatories to determine if defendants were prejudiced by the 13 day delay; did not make any findings on plaintiff's claim that documents were lost in the mail; supposed that it was "required" to dismiss the case. Thus, there was no meaningful hearing. See, Patton v. Aerojet Ordinance Co., supra. (A dismissal of a complaint with prejudice as a sanction for failure to cooperate in discovery must be "accompanied by some articulation on the record of the court's resolution of the factual, legal, and discretionary issues presented.")

Appellants cannot be said to be acting in bad faith because they rely on constitutional safeguards.

POINT II

THE ISSUE OF DEFAULT JUDGMENT WAS SQUARELY PRESERVED

Respondent argues that the issue of Rule 37 sanctions was not preserved for appeal and that it is being presented for the first time in the Petition for Writ of Certiorari. That argument is not made in good faith.

To begin with, the Court of Appeals must have thought that the issue was preserved because they wrote an opinion on the issue.

Further, the Notice of Appeal was taken from an Order, Summary Judgment and Judgment by Default. (See Exhibit A to Brief of Respondent.) That Order states: "Judgment should be entered upon the additional ground that plaintiff has failed to respond to Defendant's Fourth Set of Interrogatories." Because plaintiff appealed from that order, ipso facto, appellant did appeal the ruling on Rule 37 sanctions.

Finally, the issue of Rule 37 sanctions was argued at some length at oral argument.¹

POINT III

THIS APPEAL IS NOT FILED TO AVOID THE CONSEQUENCES OF A SUMMARY JUDGMENT MOTION

Respondent's brief states that "this appeal . . . [has] been filed solely to avoid the consequences of a failure to respond to defendant's motion for summary judgment. . . ." (Respondent's Brief p. 4). That theory is nonsense. Appellant's strenuously and factually contested all three of respondent's summary judgment motions. (Exhibit B pp. 1-21 to Respondent's Appendix).

The Court of Appeals must have concluded that appellants adequately contested the summary judgment motion because it declined to base its decision on the merits of any

¹Appellant will supply a written transcript as soon as it can be prepared.

summary judgment motion. Instead, the Court of Appeals upheld the trial court's entry of a default judgment for answering interrogatories 13 days late.

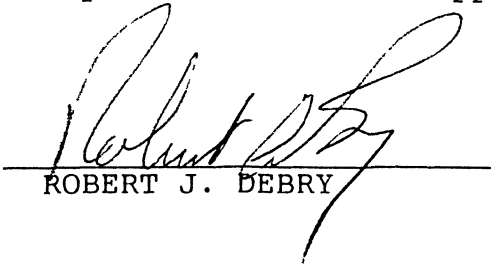
We affirm as to the default judgment and accordingly have no need to consider the propriety of the summary judgment.

Schoney v. Memorial Estates, (Slip Opinion dated April 6, 1990.)

DATED this 11 day of July, 1990.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs/Appellants

By:

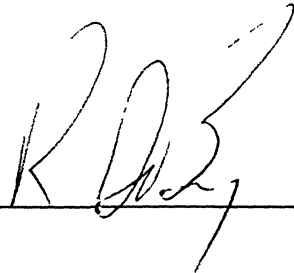

ROBERT J. DEBRY

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI (George K. Schoney, et al. v. Memorial Estates, et al.), was mailed, postage prepaid, on the 11 day of July, 1990, to the following:

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