

1992

George K. Schoney (deceased) and Erma J.
Schoney, et al. v. Memorial Estates, Inc., et al :
Petition for Rehearing

Utah Court of Appeals

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Clark Nielseon, Stephen L. Henroid; Henroid, Henroid & Nielson; counsel for respondents.

Robert J. Debry; counsel for appellants.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920704

IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY (deceased)
and ERMA J. SCHONEY, et al.,

Plaintiffs/Appellants,

vs.

MEMORIAL ESTATES, INC., et al,

Defendants/Respondents.

CASE NO. 920704-CA

Category No. 16

Priority No. 15

PETITION FOR REHEARING

APPEAL FROM A FINAL ORDER OF
THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, DISTRICT JUDGE

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

Clark Nielson
Stephen L. Henroid
HENROID, HENROID & NIELSON
Counsel for Respondents
185 S. State Street
Suite #500
Salt Lake City, UT 84111

FILED

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Clerk of Court

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Clark Nielson
Stephen L. Henroid
HENROID, HENROID & NIELSON
Counsel for Respondents
185 S. State Street
Suite #500
Salt Lake City, UT 84111

I.

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II.

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III.

PETITION

Pursuant to Rule 35, Utah Rules of Appellate Procedure, appellants petition this court to rehear and reconsider its Opinion in this case dated October 25, 1993.

In support of this petition, appellants rely on the argument below.

IV.

ARGUMENT

POINT I

REHEARING SHOULD BE GRANTED BECAUSE THIS
COURT'S OPINION HAS OVERLOOKED TWO LANDMARK
UNITED STATES SUPREME COURT CASES

This case involves multiple parties. Schoney is the named party. However, the unnamed class members are also parties with distinct rights. See American Pipe & Construction v. Utah, 414 U.S. 538 (1974).

This Court's Opinion begins with the proposition that Schoney's personal claim has been lost. Next, this Court reasons that, because Schoney's personal claim is lost, the claims of the unnamed class members are, therefore, also lost. In holding that the claims of the unnamed class members are lost, this Court relies upon traditional concepts of *res judicata* and "law of the case." (Slip Opinion at p. 3 & 4.)

However, traditional concepts such as *res judicata* and "law of the case" cannot be rigidly or automatically applied in class actions:

Application of the personal-stake requirement to a procedural claim, such as the right to represent a class, is not automatically or readily resolved. . . . A "legally cognizable interest" in the traditional sense rarely ever exists with respect to the class certification claim.

United State Parole Commission v. Geraghty, 445 U.S. 388, 402 (1980) (Emphasis added).

In two landmark opinions, the United States Supreme Court has dealt with the specific issue in this case: viz. what happens to the rights of the unnamed class members when the named class member (Schoney) is no longer eligible to represent the class. See Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); and United States Parole Commission v. Geraghty, supra. In Geraghty, the court stated:

We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification.

Geraghty, 414 U.S. at 402.

It is respectfully submitted that this case involves important constitutional rights for hundreds, if not thousands, of unnamed class members. Rehearing should be granted to analyze these

important constitutional rights in light of Roper and Geraghty, supra. Indeed the converse is also true, this case cannot be properly analyzed without reference to Roper and Geraghty, supra.

POINT II

THIS COURT'S CURRENT OPINION (IN SCHONEY II) HAS INCORRECTLY INTERPRETED THE PRIOR OPINION OF THIS COURT (IN SCHONEY I)

A separate panel of this court has issued a prior opinion in this case. Schoney v. Memorial Estates, Inc., 790 P.2d 584 (Utah App. 1990) (*Schoney I*). A threshold issue presented to the present panel (in *Schoney II*) is whether *Schoney I* had disposed of certain class issues; or in the alternative, whether *Schoney I* had simply failed to reach those issues. With respect to that threshold issue, this panel has written:

Our review of the trial court's ruling and our decision in *Schoney's* prior appeal [*Schoney I*] reveals that the trial court ruled against her on the "decertification" issue and that we affirmed the trial court.

(Slip Opinion at p. 3, fn. 3.)

However, this court's interpretation (above) is based upon a misreading of *Schoney I*. *Schoney I* specifically states:

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

790 P.2d at 584. (Emphasis added.)

Rehearing should be granted to analyze this case in light of the explicit language of *Schoney I* quoted above.

POINT III

APPELLATE COURT'S SHOULD NOT RELY UPON SILENCE TO INTERPRET IMPORTANT CLASS ISSUES

As noted in Point II, above, a threshold issue, in this appeal (*Schoney II*), required this panel to interpret a prior opinion of a different panel (in *Schoney I*). This panel's interpretation of *Schoney I* was based entirely upon the failure of *Schoney I* to discuss certain class issues. This panel interpreted the panel's silence (in *Schoney I*) as affirming the trial court. Thus this panel has written:

We determined (in *Schoney I*) that affirmance of the judgment by default was in order and that this was sufficient to conclude the case without addressing other [class] arguments.

* * *

We need not discuss or analyze every argument made by a party on appeal . . . the nature and extent of an opinion is within the discretion of the court.

(Slip Opinion at pp. 3-4, fn. 4.)

It is certainly true that, in a "garden variety" case, an appellate court might dispose of some issues by silence. However, in a procedurally identical case, the Utah Supreme Court has refused to interpret the silence of a prior opinion to preclude class action claims. See American Tierra Corp. v. City of West Jordan, 840 P.2d 757 (Utah 1992).

We have no way of knowing today whether our *Call I* affirmance should have been treated as the final resolution of the class question.

. . . The dissent's conclusion that *Call I* resolved the class certification appeal *sub silentio* is unwarranted.

840 P.2d at 762, fn. 4.

POINT IV

THERE CAN BE NO WAIVER BECAUSE THE CLASS WAS WITHOUT A REPRESENTATIVE

This panel's decision (in *Schoney II*) states that all of the present issues were waived by failing to file a Petition for Rehearing,¹ and by failing to file a Petition for Certiorari.² See Slip Opinion at p. 4, fn. 5. However, this panel's conclusion on waiver fails to consider that separate parties (named plaintiff and unnamed class members) are involved in a class action.

A plaintiff who brings a class action presents two separate issues for judicial resolution. One is a claim on the merits; the other is the claim that he is entitled to represent a class.

United States Parole Commission v. Geraghty, 445 U.S. 388, 402 (1980).

Therefore, the question is not whether *Schoney* should have filed a Petition for Rehearing or a Petition for Certiorari;

¹All of *Schoney*'s arguments were presented to the prior panel of this court in *Schoney I*. It seems a heavy burden to hold that a party "waives" rights by failing to tell the court twice. If uncorrected, this opinion will lead every careful attorney to file a petition for rehearing in every case; and that will certainly present a huge new burden to the appellate courts of this state.

²Petitioner is unaware of any other case which holds that an issue is waived by failing to seek a writ of certiorari.

rather, the issue is who could file such a petition on behalf of the class. In other words, after Schoney's personal claim, on the merits, was lost, the issue became whether Schoney could still represent the class. That issue had to be presented back in the trial court.

Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. . . . Upon remand, the district court can determine whether Geraghty may continue to press the class claims or whether another representation would be appropriate.

Geraghty, supra at pp. 405, 407.

That is exactly the procedural posture of this case. After the panel, in *Schoney I*, ruled against Schoney's personal claim, the case had to go back to the trial court to determine who would represent the class with respect to the unresolved class issues.

V.

CERTIFICATION

The undersigned, counsel of records, hereby certifies that the foregoing Petition for Rehearing is tendered in good faith and not for purposes of delay.

DATED this 8th day of November, 1993.

By:

Robert J. DeBry
ROBERT J. DEBRY

*By
Edmund A. Hall*

CERTIFICATE OF MAILING

I certify that two true and correct copies of the foregoing PETITION FOR REHEARING (Schoney v. Memorial Estates, et al.), was mailed, postage prepaid, on the 8th day of November, 1993 to the following:

Clark Nielson
Stephen L. Henroid
HENROID, HENROID & NIELSON
185 S. State Street
Suite #500
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "Robert T. Wells", written over a horizontal line.

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