

1992

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

Utah Court of Appeals

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

vs.

Defendants/Respondents.

Category No. 16

APPEAL FROM A FINAL ORDER OF
THE THIRD DISTRICT COURT,
SALT LAKE COUNTY

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THE HONORABLE RICHARD H. MOFFAT, DISTRICT JUDGE

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III.

SUMMARY OF ARGUMENT

This reply brief is argued in response to issues raised by Memorial Estates.¹ Point I shows that the class decertification order has not received appellate review. Point II shows that the case or controversy at issue on appeal is the class decertification order. Point III shows that Schoney did not waive the right to appeal the class decertification. Point IV shows that Schoney has standing to represent the class to appeal the decertification order. Point V shows that due process requires notice to the putative class if Schoney is not allowed to appeal decertification. Point VI shows that Memorial Estates concedes the erroneous nature of the decertification order. Point VII discusses the inappropriateness of sanctions against Schoney's counsel.

¹ The Utah Rule 23 governing class actions is identical to Fed. R. Civ. Proc. 23. In the absence of contrary state rulings, Utah courts frequently follow the reasoning of federal courts interpreting identical or comparable rules. Wilson v. Lambert, 613 P.2d 765 (Utah 1980). Thus, most of the discussion below will focus on cases discussing the federal rule which is identical to the Utah rule.

IV.

ARGUMENT

POINT I

THE COURT OF APPEALS DID NOT DECIDE
THE ISSUE OF CLASS DECERTIFICATION

A. Procedural Setting

In 1983, Judge Fishler certified the underlying case as a class action. Schoney was appointed class representative. App. Ex. B. The order expressly stated that the class was certified under Rule 23(b)(1)(A) of the Utah Rules of Civil Procedure "[i]n order to give res judicata effect to the entire class." Id. at 3. No notice of the certification was given to the class members.

In 1985, Judge Dee decertified the class. Again, the court did not provide notice of the decertification to the class. See generally statement of facts in Brief of Appellant.

Thus, a "live" issue in the case was and is whether or not Judge Dee's decertification order was correct. Judge Dee's ruling directly affected each putative class member. However, because Judge Dee's decertification order was interlocutory, the plaintiffs had no right to appeal that order until a subsequent final judgment was entered. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 57 L.Ed. 2d 351, 98 S.Ct. 2454 (1978). When Judge Moffat entered a final judgment (Ex. E of Appellee's Brief), all class issues, including Judge Dee's decertification order, became ripe for appeal.

B. Analysis

Schoney's opening brief argues that the Court of Appeals only ruled on the discovery sanction against Schoney individually, and that the Court of Appeals never reached or decided the correctness of Judge Dee's decertification order. See Brief of Appellant, Point III.

Memorial Estates offers contradictory arguments as to whether or not the class issue received appellate review in Schoney v. Memorial Estates ("Schoney I"), 790 P.2d 584 (Utah Ct. App. 1990). Brief of Appellant, App. Ex. F. First, Memorial Estates argues that the ruling pertained only to Schoney:

Only the actual parties in this case--George and Erma Schoney, Memorial Estates, Inc., et al., and their respective successors in interest--are bound by the result and dismissal of this case. The plain and simple fact in this case is that no one else is bound by this judgment.

* * *

Suffice it to say that, except for the plaintiffs' [sic] Schoney, other putative class members retain their own rights and claims, if any.

Appellee's Brief at 22-24.

Schoney wholeheartedly agrees. The discovery sanction was against Schoney only. Thus, only Schoney was dismissed from the case. All other class members retain whatever rights they may have. This admission by Memorial Estates negates any issue between the parties as to the extent of the ruling in Schoney I. See

Fletcher v. Eagle River Memorial Hosp., Inc., 456 N.W.2d 788 (Wis. 1990) (discussing the effect of judicial admissions).

In the alternative, Memorial Estates argues: "Plaintiff has already had her appeal and determination of issues litigated. . . . The final judgment disposing of all claims and parties was affirmed." Appellee's Brief at 17-18. However, the specific language of the Schoney I shows that this Court did not rule on the correctness of Judge Dee's decertification order. The opinion plainly states that the ruling is limited to the narrow issue of whether the trial court erred in granting a default judgment against Schoney as a discovery sanction: "We affirm as to the default judgment and accordingly have no need to consider the propriety of the summary judgment." Schoney I at 584. See Brief of Appellant, App. Ex. F. This Court expressly stated that the ruling did not go beyond the narrow issue addressed in the opinion.

Moreover, the precise question of whether a ruling on decertification can be inferred from the appellate court's silence on the issue was recently addressed in American Tierra Corp. v. City of West Jordan, 186 Utah Adv. Rep. 3 (Utah 1992). In that case, the class was originally certified, and later decertified. The Utah Supreme Court ruled that appellate review of the trial court's class certification order cannot be inferred from the opinion's silence on the issue. Id. at 7 n.4.

American Tierra resolves the precise question at issue in this appeal. This Court's ruling on the discovery sanction against Schoney did not address the class decertification order. The Court was silent on the issue of class certification. Under American Tierra, appellate review of the class certification issue cannot be inferred from the court's silence. Thus, the class decertification issue in this case has not yet received appellate review. The putative class is entitled to appellate review of the decertification order.

POINT II

THE CASE OR CONTROVERSY IN THIS CASE IS THE DECERTIFICATION ORDER

Memorial Estates asserts: "Suffice it to say that, except for the plaintiffs' [sic] Schoney, other putative class members retain their own rights and claims, if any." Appellee's Brief at 24. One of the important "rights" which the class members had was to have the case proceed as a class action. Although Judge Dee decertified the class, class members still had a "right" to have that ruling reviewed by an appellate court. This case arises precisely because an important "right" has been taken away from the class members. Specifically, Judge Moffat's ruling (Ex. C to Appellee's Brief) has taken away any "right" to have this case proceed as a class action. That loss is the controversy at issue.

The basic shortcoming of Memorial Estates' argument is its assumption that Constitutional concepts work the same way in a

class context as in a traditional type of suit. Memorial Estates mistakenly asserts: "There was, and is, no case or controversy before this Court or the trial court. Absent a pending case and controversy, plaintiff cannot show that she is an 'aggrieved party' to the appeal." Appellee's Brief at p. 15.

Contrary to Memorial Estates' assertions, this appeal has nothing to do with the final ruling on Schoney's individual case. Since the rulings in Mrs. Schoney's case did not go to the merits of the class issues, the disposition of Schoney's individual case is nondispositive of the putative class claim. This appeal is limited to the order decertifying the class. App. Ex. C. See also Brief of Appellant, App. Ex. C and D.

The primary "case or controversy" at issue before this Court is the right of the putative class to appeal decertification. This is a separate question from the disposition of an individual plaintiff's separate action on a related claim:

A plaintiff who brings a class action presents two separate questions, namely the claim on the merits and the claim of entitlement to represent the class. Because "the denial of class certification stands as an adjudication of one of the issues litigated," [footnote omitted], the plaintiff may continue to press the class certification claim after the claim on the merits terminates, when the plaintiff . . . continues to advocate vigorously the right to have a class certified.

2 Newberg on Class Actions § 2.31 at 113-14 (1985) (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336 (1980)).

Although the putative class claim is separate from the named plaintiff's claim when the plaintiff proceeds individually, appeal of the decertification must await final resolution of the individual plaintiff's claim. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 324, 337 ("We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment."). This is because a decertification order is interlocutory and is generally not immediately appealable.² During the interlocutory period, the putative class members "remain parties until a final determination has been made that the action may not be maintained as a class action." Id., 342 (1980) (J. Stevens, concurring). Only after a final judgment is entered can the decertification order be appealed. See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1977) ("An order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members.").

The Roper Court further noted: "[A] decision that is 'final' for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run." Roper, supra,

²The Supreme Court noted in Deposit Guaranty Nat'l Bank v. Roper that interlocutory appeal for review of certification rulings might be appropriate in certain circumstances, but not as a matter of right. 445 U.S. 324, 338 n.8. (1980). In the instant case, no discretionary interlocutory appeal of the decertification was taken.

at 334. Thus, either an appeal of the certification issue or the running of the time for appeal must occur before the issue of class certification is finally and fully resolved.³

In summary, the case or controversy requirement of article III of the U.S. Constitution is satisfied as long as a live controversy concerns the class, and regardless of whether the representative's individual claims have been settled, mooted, or dismissed. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 338 (1980) (holding that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied). The decertification controversy here presented is viable.

POINT III

SCHONEY HAS STANDING TO APPEAL DECERTIFICATION ORDER

Memorial Estates suggests that Schoney is seeking "to pursue her personal claims on behalf of a putative call [sic] when all of her claims, including the class issues, either [sic] have been already fully and finally decided against her after appellate

³Counsel notes that any applicable statute of limitations is tolled pending resolution of the class certification issue. See American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1973) (holding that commencement of a class action tolls the applicable statute of limitations as to all class members). See also American Tierra Corp. v. City of West Jordan, 186 Utah Adv. Rep. 3 at 5-6 (Utah 1992) (holding that the statute of limitations for putative class claims is tolled during the interlocutory period and throughout the appeal on the certification issue).

review." Appellee's Brief at 16-17. This statement misconstrues the purpose of Schoney's presence before this Court.

In the instant case, Schoney's individual claims were finally resolved under a default judgment. However, the class claims were not encompassed in the ruling since Schoney's case had been previously severed from the putative class claim. Brief of Appellant, App. Ex. C. Moreover, the ruling in Schoney I did not reach the merits, since the case ended with a default judgment. Id., App. Ex. F. Thus, the question of whether the putative class claim is a live case or controversy has not been decided and is properly before this Court.

The standing or personal stake requirement for the class representative differs from that of the traditional plaintiff. This simply results from the fact that: "The class action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 155 (1982).

A "personal stake" in the litigation is required to ensure that the case involves "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1042 (5th Cir. 1981). As a class action involves an entire group of individual members, the personal stake requirement differs in that context. The personal stake requirement functions

in that arena primarily as a test for ensuring adequate representation of class claims.

The test for a personal stake in a class decertification appeal has two elements. The first element uses the relation-back doctrine to "examine the named plaintiff's personal stake at the time the district court denied the motion for class certification." Rocky v. King, 900 F.2d 864, 868 (5th Cir. 1990). This element is particularly important where the claim is inherently transitory in nature and will expire with the passing of time. Swisher v. Brady, 438 U.S. 204 (1978); Gerstein v. Pugh, 420 U.S. 103 (1975). The requirement is met if the plaintiff had a personal stake in the claim at the time of decertification.

Schoney satisfies this element since she was the named plaintiff of the class until it was decertified. App. Ex. B. Moreover, she has had a continuing personal stake in the related litigation pursued since class decertification. The relation-back doctrine thus pertains to the putative class in this litigation. Although the putative class claims are still viable, there can be no more entrants into the plaintiff class since Memorial Estates' pre-need program has ended and all class claims will expire with the passing of time.

The second element requires that the plaintiff will continue to adequately represent the class on appeal. "So long as the named plaintiff continues vigorously to advocate the right to

certify a class, the named plaintiff retains a sufficient personal stake in posing such a procedural challenge." Rocky v. King, supra, at 868 (citing United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)).

As Geraghty explains, this aspect of the personal stake requirement in the class context often relates more to the efforts of counsel than the named plaintiff. The analysis used is "more analogous to the private attorney concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." 445 U.S. at 403. See also Sosna v. Iowa, 419 U.S. 393, 403 (1975) (stating that mootness of the named plaintiff's claim shifts the "focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class'"). See generally Yeazell, Collective Litigation as Collective Action, 1989 U. Ill. L. Rev. 43 at 54 (discussing private attorney concept of class actions).

This aspect of the personal stake requirement has been expressed as a fiduciary duty imposed on counsel, or on the named plaintiff, to adequately represent the class interests in litigation. Soskel v. Texaco, Inc., 94 F.R.D. 201 (DC N.Y. 1982). Thus, the courts will examine "whether plaintiffs' counsel continues to pursue the class's interest in a competent, vigorous manner." Wilder v. Bernstein, 645 F. Supp. 1292, 1313 (S.D.N.Y.

1986) (citing Sosna v. Iowa, supra, 419 U.S. at 403). Schoney's ten-year involvement with the case and ongoing attempts to appeal the class decertification provide ample evidence of vigorous, continuing advocacy of the class interests. See Record Index, App. Ex. C.

Prudential considerations support letting the original named plaintiff appeal the class decertification when the personal stake requirement is met, even if the plaintiff lacks a continuing interest in the traditional sense:

Geraghty dealt with the ability of a class plaintiff with a moot claim to appeal the denial of class certification, and courts may choose to interpret its holding narrowly, though a more prudential construction would support the argument that, given the existence of a live controversy and the availability of substitution during all stages of litigation, absence of a personal stake through mootness of the representative's claims should not render the action moot on behalf of the class. An existing class representative should be permitted to continue, even if only on an interim basis pending appeal or until there has been an opportunity for a substitute class member with a live claim to intervene. The continued pursuit of litigation by a plaintiff who survived initial scrutiny for standing presumes vigorousness of prosecution [footnote omitted] and may not be much different from the plaintiff who forgoes a larger monetary recovery to bring a class action for lower statutory damages. The motive of the latter plaintiff may not be challenged.

Newberg on Class Actions § 2.33 at 123-24.

The courts have been willing to expand the boundaries of the personal stake requirement to facilitate appeals of class

certification orders. The Supreme Court set the example by ruling that a plaintiff's economic interest in shifting litigation costs to other putative class members conferred a sufficient personal stake to justify that plaintiffs representing the class upon appeal of the decertification order. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 337 (1980).

Rule 23 does not require that the plaintiff be identically situated with the rest of the class in order to represent the class on appeal. The commonality requirement:

does not require that all questions of law or fact raised by the dispute be common; nor does it establish any quantitative or qualitative test of commonality. All that can be divined from the rule itself is that the use of the plural "questions" suggests that more than one issue of law or fact must be common to the class.

7 C. Wright & A. Miller, Federal Practice and Procedure § 1763 (1969). Under Rule 23, the personal stake requirement focuses more on the plaintiff's ability to protect the interests of the class than on the plaintiff's "representativeness" of class members.

Schoney "will fairly and adequately protect the interests of the class" for appealing the decertification order. Utah R. Civ. P. 23(a). She has an adequate personal stake in the claim to appeal the class decertification. Her demonstrated long-term commitment to the case and to protecting the putative class interests demonstrate that she meets the personal stake requirement for class actions.

POINT IV

SCHONEY DID NOT WAIVE ANY CLASS CLAIMS

Memorial Estates argues that Schoney waived her right to challenge Judge Dee's decertification order.

[P]laintiff failed to properly preserve the issue before the Court of Appeals [during Schoney I] when her 39-page [sic] Appellant's Brief failed to discuss any of the arguments that she makes today. Failure to raise the issue in the Appellant's Brief and to support that argument with cogent legal authority fails to preserve the issue for appellate review. The decertification issue was waived.

Appellees' Brief at 19-20.

The only reason there was no discussion of the class decertification issue in Schoneys' brief was because this Court entered an order prohibiting the Schoneys from enlarging their brief to address the issue. Schoney responded to the order by filing a petition for writ of mandamus with the Utah Supreme Court. The petition for mandamus specifically argued that the Schoneys were wrongfully prevented from enlarging their brief to include arguments regarding Judge Dee's decertification order. See App. Ex. D.

The petition for mandamus was ultimately denied. At oral argument, however, Justice Zimmerman said that the Schoneys were still free to raise the issue of Judge Dee's decertification order at oral argument before the Court of Appeals.

Mr. Wells: . . . the court has ruled later that we failed to brief, and therefore waived [the right to appeal the decertification order.] That is a judgment of the court, which it affects the whole class under Rule 23 of the dismissal of class. [sic]

The Court: Have they entered an order saying you've waived it?

Mr. Wells: By refusing to allow the brief to be filed, the issue was not raised on the appeal.

The Court: Did you raise it in your docketing statement?

Mr. Wells: It was raised in the docket.

The Court: You can argue it at oral argument presumably, can't you?

* * *

The Court: You still have oral argument. You had a docketing statement, so you can still argue it, which means that everything is presently sort of in coed [sic] down there.

Oral Arguments from Electronic Tapes at 4, 6 (App. Ex. E).

Schoney's followed Justice Zimmerman's instructions. The issue of class decertification was argued at length during oral argument before this Court. See Transcript of Electronic Tapes at 14 and 21-24, Case No. 880630-CA, Court of Appeals (1990) (App. Ex. F). Those oral arguments were received without objection.

In summary, Schoney never waived the issue. It was presented to this Court. However, the Court of Appeals never ruled on or addressed this issue. See Point I of this Brief.

POINT V

DUE PROCESS REQUIRES THAT PUTATIVE CLASS RECEIVE NOTICE OR THAT SCHONEY BE ALLOWED TO APPEAL DECERTIFICATION

Class actions are entitled to special due process considerations because "a judgment in a class action may bind members of the class who did not receive the kind of notice and opportunity to be heard as would be required to render them 'parties' in the traditional sense, provided that their interests were adequately represented." Battle v. Liberty Nat'l Life Ins. Co., 770 F. Supp. 1499, 1544 (N.D. Ala. 1991) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985); Hansberry v. Lee, 311 U.S. 32 (1940); and H. Newberg, 3 Newberg on Class Actions § 13.41 at 81-82 (1985)).

Contrary to Memorial Estates' assertion that Schoney has waived Constitutional issues, Constitutional protections cannot be waived absent clear and compelling circumstances. Appellee's Brief at 28. See Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967). Rather, Schoney has now raised a due process issue because it has now arisen as a result of the District Court's denial of the putative class's right to appeal decertification. See Minute Entry, Brief of Appellant, App. Ex. G.

The Supreme Court has "observed that notice and an opportunity to be heard [are] fundamental requisites of the constitutional guarantee of procedural due process." Eisen v. Carlisle, 417 U.S. 156, 174 (1973) (citing Mullane v. Central

Hanover Bank & Trust Co., 339 U.S. 306 (1950)). This notice, the Court stated, must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane, supra at 314. The Eisen Court further concluded that:

individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. 28 U.S.C. App. pp. 7765, 7768.

Eisen, supra at 176. The Court explained that "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." Id.

This Court has recently emphasized the importance of notice in class actions:

Notice to absent members of a plaintiff class, and an opportunity for them to disassociate themselves from the class, are critical requirements for maintenance of a class action, requirements founded in the federally guaranteed right of the absent class members to due process of law. [citations omitted] A class action adjudicates the rights of persons who ordinarily are not actively involved in the litigation or aware of specific actions taken in it. Because of this fact, the court assumes some responsibility to protect the interests of the absent class members.

Workman v. Nagle Constr., Inc., 802 P.2d 749 (Utah Ct. App. 1990) (citing Phillips Petroleum Co. v. Shutts, 742 U.S. 797 (1985); In

re Temple, 841 F.2d 1269 (11th Cir. 1988); and Wehner v. Syntex Corp., 117 F.R.D. 641, 645 (N.D. Cal. 1987)).

Due process generally requires that notice and an opportunity to be heard must be given to any party whose liberty or property interests may be adversely affected by legal proceedings. Tulsa Professional Collection Serv. v. Pope, 485 U.S. 478 (1988) (citing U.S. Const. amend. V). This requirement is stressed by the open courts provision of the Utah Constitution. Utah Const. art. 1, § 11. The requirement for notice and an opportunity to be heard also underlies Rule 24(b) of the Utah Rules of Civil Procedure, which grants a party the right to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." This rule recognizes the right of persons to become involved in litigation affecting them.

The damages to the putative class include property interests. The claim involves relatively modest levels of monetary damages incurred by a considerable number of individuals. The limited monetary value of individual damages incurred effectively preclude the putative class members from litigating their claims separately. The decertification order thus operates, in effect, as a de facto ruling against the members' opportunity to litigate their claims.

Memorial Estates misleadingly suggests that individual class members are still free to litigate their claims. Although

their claims may be viable, their ability to litigate these claims is limited by monetary constraints. The limited damages which each individual can recover limits the feasibility of separate legal challenges. Thus, a class action is suitable to protect their interests. See Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (noting that the fact that each separate claim has little monetary value is a factor favoring class treatment).

The claim on its face presents a typical class setting, involving "the often subtle operation of classwide injuries, the sophistication of corporate defendants, and the victimization of small claimants." 2 Newberg on Class Actions § 2.33 at 122 (1985). The putative class is primarily composed of elderly persons, a category of citizens which are too often victimized in unscrupulous dealings. They are prime targets for the kinds of schemes for which class actions provide an ideal means of redress.

Furthermore, many individual claimants are unable to pursue their claims except as a class due to the applicable statute of limitations. Whereas the statute is tolled pending final determination of the class status, many individual claimants, if the right to appeal the class determination is not recognized, are unable to proceed. They will be denied due process because certain class members may have been awaiting a final order before appealing the class decertification.

The notice requirements under Rule 23 have been limited by the courts in certain circumstances. Memorial Estates has briefed this point quite trenchantly. Appellee's Brief, Point II. However, the limitations which some cases impose on Rule 23 notice provisions do not limit the courts' duty to ensure basic due process.

Memorial Estates' recitation of cases limiting Rule 23 notice requirements erroneously suggests that they govern this case. For example, Memorial Estates quotes Larenzano v. Texaco, Inc., 14 F.R. Serv.2d 679 (S.D. N.Y. 1971). The quoted language pertains only to cases where "it has been clearly demonstrated that the action is without merit and should be dismissed for failure to state a claim." Quoted in Appellee's Brief at 27. Although Schoney's individual claim was dismissed, her claim had been severed from the class claim. Further, since Schoney I reached only the discovery sanction, it did not reach the merits of the underlying claim. The reasoning of Larenzano does not apply to this case because merits of the class claim have neither been considered nor dismissed.

In summary, due process requires either that Schoney be allowed to appeal the decertification order, or that notice be given to the putative class to permit a substitute class representative to come forward to appeal the decertification order. If this Court denies to class members these protections, the putative

class will be effectively denied its day in court. Such a denial violates due process guarantees.

POINT VI

MEMORIAL ESTATES CONCEDES THAT JUDGE DEE ERRED BY DECERTIFYING THE CLASS

This case really presents a two-step analysis. Step one is to determine whether Judge Dee's decertification order is now ripe for appellate review. See Brief of Appellant, Points I, II and III. Step two is to actually review Judge Dee's decertification order. See id., Point IV.

Memorial Estates has devoted its entire brief to a challenge of step one. That is, Memorial Estates argues, exclusively, that Judge Dee's decertification order should not be reviewed. However, Memorial Estates has said nothing at all about step two. Nowhere does Memorial Estates argue that Judge Dee acted correctly by decertifying the class. Specifically, Memorial Estates has not responded to Point IV of the Brief of Appellant.

By failing to respond to step two, Memorial Estates has essentially admitted the point. Generally, a party's failure to address debatable issues in an answering brief constitutes a confession of reversible error. A confession of reversible error takes its most extreme form when an appellee fails to file a responsive brief. Harrison v. Harrison, 462 P.2d 170, 174 (Utah 1969). On a lesser scale, a confession as to a particular point

results from an appellees' failure to address debatable issues in the brief. "Arguments not fully developed on appeal are deemed waived." Lilley v. Johns-Manville Corp., 596 A.2d 203, 207 n.2 (Pa. Super. 1991) (citing Cosner v. United Penn. Bank, 517 A.2d 1337 (1986)).

Thus, Memorial Estates, though arguing that Schoney has no right to appeal the decertification, apparently concedes that the decertification was improper. Memorial Estates offered no statement of law or fact to counter Schoney's arguments that the decertification order was erroneous. Memorial Estates therefore must be deemed to agree with Schoney that the order was wrong.

POINT VII

SANCTIONS AGAINST SCHONEY SHOULD BE REVERSED

As the foregoing analysis amply demonstrates, Schoney has a valid basis for appealing the class decertification. Her counsel also has a fiduciary duty to protect the interests of the class. Soskel v. Texaco, Inc., 94 F.R.D. 201 (D.C. N.Y. 1982). The trial court apparently misunderstood the basis of Schoney's attempts to appeal the class decertification when it imposed Rule 11 sanctions upon Schoney's counsel. Incredibly, Memorial Estates seeks further sanctions imposed, and asks this Court to uphold the trial court's conduct. Appellee's Brief, Point III.

While the procedural and Constitutional issues presented by this appeal may be complicated, they do not lack a genuine legal

or factual basis. Memorial Estates' applause of the trial court's sanctions and request for further sanctions is itself a meritless position.

This Court should uphold the rights of the class to appeal the decertification order. This Court should deny further sanctions against Schoney and her counsel. As this Court recently admonished: "The 'sanction' for bringing a frivolous appeal is applied only in egregious cases, 'lest there be an improper chilling of the right to appeal erroneous lower court rulings.'" Maughan v. Maughan, 770 P.2d 156, 162 (Utah Ct. App. 1989) (quoting Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988)).

The instant case involves a valid right of appeal and certainly does not fit the model of egregious violations which would warrant further sanctions. This Court should reverse the trial court's impositions of Rule 11 sanctions against Schoney's counsel. Only thus can the right of the putative class to appeal the decertification order be protected.

V.

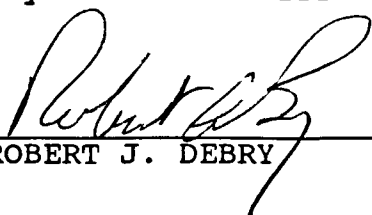
CONCLUSION

The putative class has a right to appeal the decertification order. That order has not yet received appellate review. Either Schoney or another class representative should be

allowed the opportunity to appeal decertification on behalf of the class. Otherwise, the putative class will be denied due process of law.

DATED this 6 day of Nov, 1992.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By: 
ROBERT J. DEBRY

APPENDIX

Exhibit A - Constitutions, Statutes and Rules

Exhibit B - Order Certifying the Class, Third District Court, dated December 14, 1982

Exhibit C - Record Index from the Supreme Court for Schoney v. Memorial Estates

Exhibit D - Petition for Writ of Mandamus to the Utah Supreme Court, dated May 24, 1989

Exhibit E - Oral Argument before the Utah Supreme Court in the case of Schoney v. Memorial Estates, dated December 4, 1989

Exhibit F - Oral Argument before the Utah Court of Appeals in the case of Schoney v. Memorial Estates, dated March 12, 1990

CERTIFICATE OF MAILING

I certify that four true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS (Schoney v. Memorial Estates, et al.), was mailed, postage prepaid, on the 6th day of November, 1992 to the following:

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

Karen M. Skonaw

SP8-070\sc

EXHIBIT A

be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within the Period any other Emolument from the United States, or any of them.

[8.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Sec. 2. [Commander-in-Chief — Pardons — Treaties — Appointment of officers.]

[1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3.] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Sec. 3. [Miscellaneous powers and duties.]

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Sec. 4. [Impeachment.]

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

[JUDICIAL DEPARTMENT]

Section

1. [Judicial power.]
2. [Extent of judicial power — Supreme Court — Trial and places of trial.]
3. [Treason, proof and punishment.]

Sec. 1. [Judicial power.]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Sec. 2. [Extent of judicial power — Supreme Court — Trial and places of trial.]

[1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—[between a State and Citizens of another State;]—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]

[2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Sec. 3. [Treason, proof and punishment.]

[1.] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2.] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

[STATE AND TERRITORIAL RELATIONS]

Section

1. [Full faith and credit to records and judicial proceedings of states.]
2. [Privileges and immunities — Fugitives from justice and service.]
3. [Admission of states — Rules and regulations respecting the territory and property of the United States.]
4. [Guaranty of republican form of government and against invasion.]

Sec. 1. [Full faith and credit to records and judicial proceedings of states.]

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts,

AMENDMENT III

[Quartering soldiers.]

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial by jury in civil cases.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

[Rights retained by people.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

[Powers reserved to states or people.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

[Suits against states — Restriction of judicial power.]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

[Election of President and Vice-President.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

Section

1. [Slavery prohibited.]
2. [Power to enforce amendment.]

CONSTITUTION OF UTAH

PREAMBLE

Article

- I Declaration of Rights.
- II State Boundaries.
- III Ordinance.
- IV Elections and Right of Suffrage.
- V Distribution of Powers.
- VI Legislative Department.
- VII Executive Department.
- VIII Judicial Department.
- IX Congressional and Legislative Apportionment.
- X Education.
- XI Counties, Cities and Towns.
- XII Corporations.
- XIII Revenue and Taxation.
- XIV Public Debt.
- XV Militia.
- XVI Labor.
- XVII Water Rights.
- XVIII Forestry.
- XIX Public Buildings and State Institutions.
- XX Public Lands.
- XXI Salaries.
- XXII Miscellaneous.
- XXIII Amendment and Revision.
- XXIV Schedule.

PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION. 1896

ARTICLE I

DECLARATION OF RIGHTS

Section

1. [Inherent and inalienable rights.]
2. [All political power inherent in the people.]
3. [Utah inseparable from the Union.]
4. [Religious liberty — No property qualification to vote or hold office.]
5. [Habeas corpus.]
6. [Right to bear arms.]
7. [Due process of law.]
8. [Offenses bailable.]
9. [Excessive bail and fines — Cruel punishments.]
10. [Trial by jury.]
11. [Courts open — Redress of injuries.]
12. [Rights of accused persons.]
13. [Prosecution by information or indictment — Grand jury.]
14. [Unreasonable searches forbidden — Issuance of warrant.]
15. [Freedom of speech and of the press — Libel.]
16. [No imprisonment for debt — Exception.]
17. [Elections to be free — Soldiers voting.]
18. [Attainder — Ex post facto laws — Impairing contracts.]
19. [Treason defined — Proof.]
20. [Military subordinate to the civil power.]
21. [Slavery forbidden.]
22. [Private property for public use.]
23. [Irrevocable franchises forbidden.]

Section

24. [Uniform operation of laws.]
25. [Rights retained by people.]
26. [Provisions mandatory and prohibitory.]
27. [Fundamental rights.]

Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right. 1896

Sec. 2. [All political power inherent in the people.]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require. 1896

Sec. 3. [Utah inseparable from the Union.]

The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land. 1896

Sec. 4. [Religious liberty — No property qualification to vote or hold office.]

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution. 1896

Sec. 5. [Habeas corpus.]

The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it. 1896

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. 1894

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law. 1896

Sec. 8. [Offenses bailable.]

(1) All persons charged with a crime shall be bailable except:

- (a) persons charged with a capital offense when there is substantial evidence to support the charge; or

(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or

(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law. 1896

Sec. 9. [Excessive bail and fines — Cruel punishments.]

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor. 1896

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded. 1896

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. 1896

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense. 1896

Sec. 13. [Prosecution by information or indictment — Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature. 1947

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and a warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized. 1896

Sec. 15. [Freedom of speech and of the press — Libel.]

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. 1896

Sec. 16. [No imprisonment for debt — Exception.]

There shall be no imprisonment for debt except cases of absconding debtors. 1896

Sec. 17. [Elections to be free — Soldiers voting.]

All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law. 1896

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed. 1896

Sec. 19. [Treason defined — Proof.]

Treason against the State shall consist only in levying war against it, or in adhering to its enemies in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. 1896

Sec. 20. [Military subordinate to the civil power.]

The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner; nor in time of war except in a manner to be prescribed by law. 1896

Sec. 21. [Slavery forbidden.]

Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the State. 1896

Sec. 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation. 1896

Sec. 23. [Irrevocable franchises forbidden.]

No law shall be passed granting irrevocably a franchise, privilege or immunity. 1896

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation. 1896

Sec. 25. [Rights retained by people.]

This enumeration of rights shall not be construed to impair or deny others retained by the people. 1896

FEDERAL RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

For effective dates, see Rule 86

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of

separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action

proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class 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 all members of the class in such manner as the court directs.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Notes of Advisory Committee on Rules.

Note to Subdivision (a). This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 *Georgetown L J* 551, 570 et seq (1937); Moore and Cohn, *Federal Class Actions*, 32 *Ill L Rev* 307 (1937); Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 *Ill L Rev* 555–567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 *Minn L Rev* 34 (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 *Minn L Rev* 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see *Del Ch Rule* 113; *Fla Comp Gen Laws Ann* (Supp, 1936) § 4918(7); *Georgia Code* (1933) § 37-1002, and see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see *Ala Code Ann* (Michie, 1928) § 5701; 2 *Ind Stat Ann* (Burns, 1933) § 2-220; *NYCPA* (1937) § 195; *Wis Stat* (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v Stiglitz*, 260 *Ky* 430, 86 *SW2d* 155 (1935). The rule adopts the test of former Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 *Mich L Rev* 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 *Corn L Q* 399 (1934); Note, 36 *Harv L Rev* 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v Brotherhood of Locomotive Firemen and*

Terry's Sales, Inc. v. Vander Veur, 618 P.2d 29 (Utah 1980).

Taxation.

Complaint by taxpayer to compel two counties to interplead as to which was entitled to tax as result of apportionment by State Tax Commission was held insufficient. See Union Pac. R.R. v. Summit County, 48 Utah 540, 161 P. 463 (1916).

Termination.

—Decision on all issues.

If the action in interpleader accomplishes the purpose for which the plaintiff instituted it, it is not necessarily a requisite to its termination that it decide all of the issues between the adverse claimants. Terry's Sales, Inc. v. Vander Veur, 618 P.2d 29 (Utah 1980).

COLLATERAL REFERENCES

Am. Jur. 2d. — 45 Am. Jur. 2d Interpleader § 29 et seq
C.J.S. — 48 C.J.S. Interpleader § 11.
A.L.R. — Amount of attorney's compensa-

tion in absence of contract or statute fixing amount, 57 A.L.R.3d 475

Key Numbers. — Interpleader ⇐ 14.

Rule 23. Class actions.

(a) **Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of Subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under Subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under Subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in conduct of actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or compromise.** A class 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 all members of the class in such manner as the court directs.

Compiler's Notes. — This rule is identical to Rule 23, F.R.C.P.

Cross-References. — Advancement, conduct, and hearing of actions, orders for, reasonable notice, Rule 78

Antidiscrimination Act, § 34-35-1 et seq
Appearance by attorney, proof of authority, § 78-51-33

Capacity to sue or be sued need not be averred, Rule 9(a)(1).

NOTES TO DECISIONS

ANALYSIS

Action barred.

—Plaintiffs not shareholders at time of wrongful act.

Class action distinguished.

Action barred.

—Plaintiffs not shareholders at time of wrongful act.

Shareholders' action against former corporate directors and officers for alleged conversion of corporate assets and for breach of fiduciary

duties was barred by this rule where the shareholders did not acquire their stock until after the events complained of and the shares did not devolve on them by operation of law. *Noland v. Barton*, 741 F.2d 315 (10th Cir. 1984).

Class action distinguished.

Action by corporate shareholders which alleged injury to the corporation only, and not to them as individuals, was a derivative action and could not be brought as a class action. *Richardson v. Arizona Fuels Corp.*, 614 P.2d 636 (Utah 1980).

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations § 2250.

C.J.S. — 18 C.J.S. Corporations §§ 564 to 566.

A.L.R. — Communications by corporation as privileged in stockholders' action, 34 A.L.R.3d 1106.

Allowance of punitive damages in stockholder's derivative action, 67 A.L.R.3d 350.

Application to derivative actions for breach

of fiduciary duty, under § 36(b) of Investment Company Act of 1940 (15 USC § 80a-35(b)), of requirement, stated in Rule 23.1 of the Federal Rules of Civil Procedure that complaint in derivative actions allege what efforts were made by shareholders to obtain desired action or reasons for failure to do so, 65 A.L.R. Fed. 542.

Key Numbers. — Corporations ⇨ 206, 207.

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. (Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 24, F.R.C.P.

Cross-References. — Claims for relief and defenses, Rule 8.

Fee for filing complaint in intervention, §§ 78-3-16.5, 78-4-24, 78-6-14.

Form for motion to intervene as defendant, Form 24.

Misjoinder and nonjoinder of parties, Rule 21.

Necessary joinder of parties, Rule 19.

Parties plaintiff and defendant; capacity, Rule 17.

Permissive joinder of parties, Rule 20.

NOTES TO DECISIONS

ANALYSIS

Appeal.

—Order denying intervention.

Intervention of right.

—Adverse effect.

—Court's disposition of property.

—Insurer.

—Uninsured motorist coverage.

Jurisdiction.

—Error by court clerk.

Postjudgment intervention.

—Not allowed.

—Showing required.

Timeliness.

Appeal.

—Order denying intervention.

Order which denies with prejudice an application for intervention is appealable. *Tracy v. University of Utah Hosp.*, 619 P.2d 340 (Utah 1980).

Intervention of right.

—Adverse effect.

—Court's disposition of property.

When the application for intervention is made timely, this rule permits intervention as a matter of right when the applicant will be adversely affected by the trial court's disposition of property. *Jenner v. Real Estate Servs.*, 659 P.2d 1072 (Utah 1983).

—Insurer.

—Uninsured motorist coverage.

Where interests of insurance company providing uninsured motorist coverage would not be adequately represented in a tort action between its insured as plaintiff and an uninsured motorist tort-feasor as defendant, insurance company was entitled to intervene as a party defendant as of right. *Lima v. Chambers*, 657 P.2d 279 (Utah 1982).

Jurisdiction.

—Error by court clerk.

Court erred in dismissing for failure of jurisdiction a complaint in intervention which court clerk had erroneously put in different file than that of the original action, where all the parties had notice of the intervention and made no objection to the presence of intervenor's attorney at the trial. *Centurian Corp. v. Cripps*, 577 P.2d 955 (Utah 1978).

Postjudgment intervention.

—Not allowed.

Undisclosed partner of a purchaser under a land sale contract was not entitled to intervene after default judgment had been entered in an action to declare a forfeiture of the contract since the undisclosed partner permitted his partner to assume the role of sole owner of their interest under the contract and the known purchaser had been duly served with notice of default in the contract payments and for demand for payment and had been duly served with summons in the forfeiture action. *Jenner v. Real Estate Servs.*, 659 P.2d 1072 (Utah 1983).

—Showing required.

Generally, intervention is not permitted after entry of judgment, with exceptions to this general rule made only upon a strong showing of entitlement and justification, or such unusual or compelling circumstances as will justify the failure to seek intervention earlier. *Jenner v. Real Estate Servs.*, 659 P.2d 1072 (Utah 1983).

Timeliness.

Use of the word "timely" in Subdivisions (a) and (b) requires that the timeliness of the application for intervention be determined under the facts and circumstances of each particular case, and in the sound discretion of the court. *Jenner v. Real Estate Servs.*, 659 P.2d 1072 (Utah 1983); *Republic Ins. Group v. Doman*, 774 P.2d 1130 (Utah 1989).

parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading.

(b) **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes.

(d) **Paper quality, size, style and printing.** All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8½" x 11"), with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for matters customarily single-spaced or indented, and shall not be smaller than pica size. Typing or printing shall appear on one side of the page only.

(e) **Signature line.** Names shall be typed or printed under all signature lines, and all signatures shall be made in permanent black or blue ink.

(f) **Enforcement by clerk; waiver for pro se parties.** The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) **Replacing lost pleadings or papers.** If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(Amended effective Jan. 1, 1983; April 1, 1990.)

Advisory Committee Note. — As a general matter, Rule 10 deals with the form of papers filed with the court — both "pleadings" as defined in Rule 7(a) and "other papers filed with the court," including motions, memoranda, discovery responses, and orders. The changes in the present rule were promulgated to clarify ambiguities in the prior rule and to address specific problems encountered by the courts. Paragraphs (b), (c) and (e) of the rule were not

changed, except that paragraph (e) was redesignated as (g) and new paragraphs (e) and (f) were added.

Paragraph (a). This paragraph specifies requirements for captions in every paper filed with the court. In addition to the other requirements, the caption must contain the name of the judge to whom the case is assigned, if the judge's name is known at the time the paper is filed. In the top left-hand corner of the first

page, each paper must state identifying information concerning the attorney representing the party filing the paper. Finally, every pleading must state the name and current address of the party for whom it is filed; this information should appear on the lower left-hand corner of the last page. This information need not be set forth in papers other than pleadings.

Paragraph (d). The changes in this paragraph make it clear that papers filed with the court must be "typewritten, printed or photocopied in black type." The Advisory Committee considered suggestions from different groups that so-called "dot matrix" printing be specifically allowed or specifically prohibited. The Advisory Committee, however, settled on the requirements that "typing or printing shall be clearly legible . . . and shall not be smaller than pica size." If typing or printing on papers filed with the court complies with these standards, the papers should not be deemed to violate the rule merely because they were prepared in a dot matrix printer. As currently written, this paragraph also removes any confusion concerning the top margin and left margin requirements (now 2 inches and 1 inch respectively), and this paragraph imposes new requirements for right and bottom margins (both one-half inch).

Paragraph (e). This paragraph, which is an addition to the rule, requires typed signature lines and signatures in permanent black or blue ink.

Paragraph (f). The changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule, but the clerk may require counsel to substitute conforming for nonconforming papers. The clerk is given discretion to waive requirements of the rule for parties who are not represented by counsel; for good cause shown, the court may relieve parties of the obligation to comply with the rule or any part of it.

Amendment Notes. — The 1990 amendment added "and other papers" to the rule catchline and added similar language in two places in Subdivision (a); in Subdivision (a), added the last phrase in the subdivision heading, added the last two phrases in the first sentence, deleting "and a designation as in Rule 7(a)," added the last two sentences, and made stylistic changes; rewrote Subdivision (d); added Subdivisions (e) and (f); and redesignated former Subdivision (e) as Subdivision (g).

Compiler's Notes. — This rule is similar to Rule 10, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Exhibits.

—Use as pleadings.
Cited.

Exhibits.

—Use as pleadings.
While an exhibit may be considered as a part

of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments nor can the content of the exhibit be taken as part of the allegations of the pleading itself. *Girard v. Appleby*, 660 P.2d 245 (Utah 1983).

Cited in *State ex rel. Cannon v. Leary*, 646 P.2d 727 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 23 to 56, 69, 117.

C.J.S. — 71 C.J.S. Pleading §§ 5, 9, 63 to 98, 371 to 375, 418.

A.L.R. — Propriety of attaching photographs to a pleading, 33 A.L.R.3d 322.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 A.L.R. Fed. 369.

Key Numbers. — Pleading ⇨ 4, 13, 15, 38½ to 75, 307 to 312, 340

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when other-

wise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended effective Sept. 4, 1985.)

Compiler's Notes. — This rule is substantially similar to Rule 11, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Amendment of complaint.
Nature of duty imposed.
Reasonable inquiry.
Violation.
—Question of law.
—Sanctions.
—Standard
Cited.

Amendment of complaint.

Amendment by an attorney of the facts stated in a complaint was sufficient to establish those facts as they would have been by a verified complaint before the changes made by this rule making verification unnecessary. *Culder v. Third Judicial Dist. Court ex rel. Salt Lake County*, 2 Utah 2d 309, 273 P.2d 168 (1954).

Nature of duty imposed.

This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. *Clark v. Booth*, 168 Utah Adv. Rep. 7 (1991).

Reasonable inquiry.

Certification by an attorney "that to the best of his knowledge, information, and belief formed after a reasonable inquiry the complaint is well grounded in fact and is war-

ranted by existing law" does not require him to obtain a favorable expert medical opinion before filing a medical malpractice action. *Deschamps v. Pulley*, 784 P.2d 471 (Utah Ct. App. 1989).

Violation.

—Question of law.

Whether specific conduct amounts to a violation of this rule is a question of law. *Taylor v. Estate of Taylor*, 770 P.2d 163 (Utah Ct. App. 1989); *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991).

—Sanctions.

This rule gives trial courts great leeway to tailor the sanction to fit the requirements of the particular case. *Taylor v. Estate of Taylor*, 770 P.2d 163 (Utah Ct. App. 1989).

Imposition of \$5,000 in attorney fees as a sanction for violating this rule was not an abuse of discretion, where the wrong document was attached to the complaint, causing defendants to incur legal expense in researching the validity of an irrelevant document and preparing a motion to dismiss based thereon. *Taylor v. Estate of Taylor*, 770 P.2d 163 (Utah Ct. App. 1989).

—Standard.

Sanctions were improper against an attorney, where opposing parties conceded that no

particular document was signed in violation of the rule, but simply argued that even if the attorney believed the case was well grounded when he filed the complaint, he should have known after he met with counsel for defendants that the case could not go forward.

Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).

Cited in *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987); *State v. Perdue*, 813 P.2d 1201 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Attorney's Fees, 1989 Utah L. Rev. 342.

Brigham Young Law Review. — Curbing Discovery Abuse in Civil Litigation: Enough Is Enough, 1981 B.Y.U. L. Rev. 579.

Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 B.Y.U. L. Rev. 597.

Note, Appellate Review of Rule 11 Issues — De Novo or Abuse of Discretion? *Thomas v. Capital Security Services, Inc.*, 1989 B.Y.U. L. Rev. 877.

Rule 11 and Federalizing Lawyer Ethics, 1991 B.Y.U. L. Rev. 959.

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 339 to 349.

C.J.S. — 71 C.J.S. Pleading §§ 339 to 366.

A.L.R. — Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, 77 A.L.R. Fed. 789.

Comment Note — General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 95 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation, 95 A.L.R. Fed. 181.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, 96 A.L.R. Fed. 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 A.L.R. Fed. 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in anti-trust actions, 99 A.L.R. Fed. 673.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556.

Key Numbers. — Pleading ⇌ 287 to 304.

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim,

EXHIBIT B

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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,)	ORDER
)	
vs.)	
)	
MEMORIAL ESTATES, INC. and,)	
MEMORIAL ESTATES CEMETERY)	
DEVELOPMENT CORP., corpora-)	
tion and JOHN DOES 1 through)	
10, individuals,)	
)	
Defendants)	Civil No. C 82-4983
)	
)	

Plaintiff's Motion for Class Certification was heard by the Court on December 14, 1982. Plaintiff was represented by Robert J. DeBry. Defendant was represented by David Swope. The Court has considered the memoranda and the arguments of counsel.

The Court now makes the following findings:

1. Defendant has sold a total of 124 crypts at their Mountain View Cemetery. Defendant has sold an additional 388 crypts at their Redwood Road Cemetery. The total of 512 satisfies the numerosity requirement

of Rule 23(a)(1) U.R.C.P. If it becomes necessary to divide the class into subclasses under Rule 23(c)(4)(B); the Redwood Road subclass would independently satisfy the numerosity requirement and the Mountain View subclass would independently satisfy the numerosity requirement.

2. All members of the class have executed identical contract forms. The standard form contract satisfies the commonality requirement of Rule 23(a)(2) U.R.C.P. Some common issues are: when is defendant required to build the mausoleums? Has defendant oversold the existing mausoleum facilities? Is defendant obligated to provide chapel space?
3. The Schoneys signed the same form contract which was signed by other class members. Therefore the Schoneys satisfy the typicality requirement of Rule 23(a)(3) U.R.C.P.
4. Defendants have stipulated that plaintiffs' counsel will fairly and adequately protect the interests of the class; and the provision of Rule 23(a)(4) U.R.C.P. is therefore satisfied.
5. Defendant must build a mausoleum for everyone--or no mausoleum at all. Moreover, defendant must build a chapel for everyone--or no mausoleum at all. Defendant cannot be ordered by one court to build a chapel, only to have another court order them not to build a chapel. Therefore, this case satisfies Rule

23(b)(1)(A) U.R.C.P. in that inconsistent adjudications with respect to individual members of the class would create a risk of establishing incompatible standards of conduct for the party opposing the class.

6. This case also satisfies the requirements of Rule 23(b)(3) U.R.C.P. in that common questions predominate over individual questions.

Based on the foregoing findings it is hereby ordered that:

1. This case is hereby certified to proceed as a class action.
2. The class members are all those persons who have signed a standard form agreement for the purchase of mausoleum space from defendant.
3. It will not be necessary to create sub-classes at the present time.
4. The class will be certified under Rule 23(b)(1)(A), U.C.R.P. In order to give res judicata effect to the entire class, the case will not be certified under Rule 23(b)(3) U.R.C.P., Johnson v. Baton Rouge, 50 F.R.D. 295(1970).

5. Because the class is certified under Rule 23(b)(1)(A) U.R.C.P., it will not be necessary to give notice. Rule 23(c)(2) U.R.C.P.

BY THE COURT:

PHILIP FISCHLER

DAVID SWOPE

Approved as to form

ROBERT J. DEBRY

Approved as to form

EXHIBIT C

George Schoney, et al - Appellant
VS
Memorial Estates - Respondent

*includes supplemental
12/8*

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Memorial Estates - Respondent

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GEORGE K SCHONEY-APPELLANT VS MEMORIAL ESTATES, INC-APPELLEE

APRIL 9, 1992

SUPPLEMENTAL INDEX (PG 10)
DISTRICT COURT NO. 820904983
SUPREME COURT NO. 910292

APR 14 1992

CLERK OF DISTRICT COURT
UTAH

MINUTE ENTRY DATED MAY 1, 1991

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I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH.

DATE: 4-9-92

M. J. Clark
DEPUTY COURT CLERK

EXHIBIT D

ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
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Telephone: (801) 262-8915

IN THE UTAH SUPREME COURT

GEORGE K. SCHONEY and)	
ERMA J. SCHONEY, et al.,)	
Plaintiffs/Appellants,)	PETITION FOR WRIT OF
)	MANDAMUS TO THE UTAH
)	COURT OF APPEALS
vs.)	
)	Case No.
THE UTAH COURT OF APPEALS,)	
)	
Defendants/Respondents.)	

Plaintiffs-Appellants (hereinafter Schoneys) petition this Court for a Writ of Mandamus compelling the Court of Appeals to receive the Brief of Appellant dated February 21, 1989. This petition is supported by the memorandum of points and authorities filed herewith.

INTERESTED PARTIES

The interested parties to this petition include: Memorial Estates, Inc. (Defendant-appellee below); the Utah Court of Appeals; and petitioners (plaintiffs-appellants).

ISSUES PRESENTED

1. Whether the Court of Appeals has power to refuse

to extend time for filing a brief without considering the "good cause" for the delay.

2. Whether the Court of Appeals should be required to honor its own order (or letter) which granted a continuance for filing a Brief.

RELIEF SOUGHT

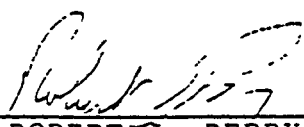
1. A writ directing the Court of Appeals to receive petitioner's appeal brief dated February 24, 1989.

REASONS FOR EXTRAORDINARY WRIT

The facts necessary to consider the issues presented by this petition are set forth in the supporting memorandum filed separately. The reasons why no other relief is adequate, and the orders necessary to consider the petition, are also set forth in the supporting memorandum and appendix.

DATED this 24 day of Feb May 1989.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant

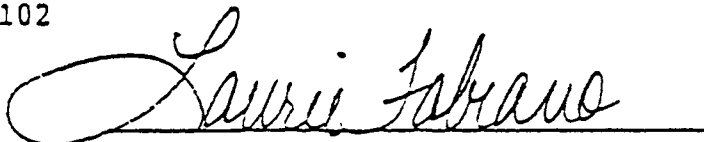
By: 
ROBERT J. DEBRY

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing PETITION FOR WRIT OF MANDAMUS TO THE UTAH COURT OF APPEALS, postage prepaid, this 25th day of February 1989 to the following:

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

Clerk
Court of Appeals
230 South 500 East, #400
Salt Lake City, Utah 84102



schoney.001

EXHIBIT E

ORIGINAL

BEFORE THE UTAH SUPREME COURT

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

Plaintiffs and Appellants,

vs.

MEMORIAL ESTATES, INC.,
et. al.,

Defendants and Appellees

Case No. 890213

ORAL ARGUMENTS

FROM ELECTRONICS TAPES

TAKEN AT: Supreme Court, 332 State Capitol, Salt Lake City,
Utah

DATE: December 4, 1989

REPORTED BY: Beverly Lowe. CSR

From the Reporting Offices of:

Capitol Reporters

P. O. Box 1477, Salt Lake City, Utah 84110

(801) 363-7939

9837

File No.

DISCOVERY XX-

APPEARANCES

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JUDGE GORDON R. HALL
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Salt Lake City, Utah 84114

JUDGE MICHAEL D. ZIMMERMAN
322 State Capitol Building
Salt Lake City, Utah 84114

JUDGE CHRISTINE M. DURHAM
322 State Capitol Building
Salt Lake City, Utah 84114

1 Monday, December 4, 1989, 9:00 a.m. (tape)

2 LAW AND MOTION

3 Appellant's Motion to Recall Jurisdiction

4

5 THE COURT: Moving to Number 3, Schoney
6 versus Memorial Estates.

7 MR. WELLS: I'm Edward Wells, appearing on
8 behalf of the Schoneys. Your Honor, basically the
9 relief we're seeking here is to have this court
10 bring the matter which has been forwarded over to
11 the court of appeals back to this court pursuant to
12 the provisions of Rule 4AF. Under that rule, this
13 court can review the court order and can bring the
14 case back on jurisdictional matters.

15 It's our position, Your Honor, that under
16 7822 subparagraph 3(a), this court has jurisdiction
17 over the judgments of the court of appeals. I
18 think it's important that this --

19 THE COURT: What judgment of the court of
20 appeals is involved?

21 MR. WELLS: Well, Justice Zimmerman --
22 what has happened is not, in effect, a formal
23 judgment.

24 THE COURT: Well, then how can we have
25 jurisdiction over it?

1 (Oral Argument)

2 MR. WELLS: Well, it has the effect of a
3 judgment.

4 THE COURT: Because you failed to breach
5 some things on appeal and waive them, but there's
6 no final judgment been entered.

7 MR. WELLS: Back to the question, the court
8 has ruled later that we failed to brief,
9 and therefore waived. That is a judgment of the
10 court, which it affects the whole class under Rule
11 23 of the dismissal of class.

12 THE COURT: Have they entered an order
13 saying you've waived it?

14 MR. WELLS: By refusing to allow the brief
15 to be filed, the issue was not raised on the
16 appeal.

17 THE COURT: Did you raise it in your
18 docketing statement?

19 MR. WELLS: It was raised in the docket.

20 THE COURT: You can argue it at oral
21 argument presumably, can't you?

22 MR. WELLS: Well, there's a question of
23 whether or not that is sufficient. It appears to
24 us that through what we perceive to be a procedural
25 mistake in the clerk's office, they have

1 (Oral Argument)

2 misconstrued what occurred.

3 What happened is that there was a
4 breakdown on the computer at the office, which
5 coincided, unfortunately, with the death of
6 Mr. DeBry's father. The attorney was helping
7 Mr. DeBry on a case, went to the court of appeals
8 in an effort to comply with the deadline and said,
9 "We need an additional extension because basically
10 the brief is locked in the computer and we can't
11 get it out. Now, to show good faith, that we are
12 in fact working on the brief, we will file this
13 preliminary draft," which was done.

14 Then a letter was received back from the
15 clerk's office saying that they had until the 24th
16 of February to file the brief. The brief was in
17 fact filed ahead of that with the motion to allow
18 an oversized brief to be filed. Computer was then
19 repaired, and we got the brief back.

20 THE COURT: And the motion was denied,
21 since presumably it was filed -- should have been
22 filed earlier before you finished your brief, but
23 that seems to be kind of local practice, to hope
24 that we'll give you forgiveness and not
25 permission.

1 (Oral Argument)

2 MR. WELLS: Well, that's true. I think
3 where the error occurred is that instead of
4 allowing us to file a brief that was logged into
5 the computer -- lost in the computer, they required
6 us to use as our brief the first draft that had
7 been prepared long before that.

8 Now, I can understand that, saying that
9 you've got to file what was there on the day that
10 you asked for the extension, but to prejudice the
11 class by saying that because it was lost in the
12 computer, and that as a good faith effort to show
13 that you were moving forward in filing a previous
14 addition that didn't have all the issues in it,
15 you're now locked into those issues --

16 THE COURT: They haven't said that. You
17 say that.

18 MR. WELLS: The effect of what they have
19 done says that.

20 THE COURT: You still have oral argument.
21 You had a docketing statement, so you can still
22 argue it, which means that everything is presently
23 sort of in coed down there.

24 We don't know what's going to happen.
25 Aren't you just up here doing the same thing you

1 (Oral Argument)

2 tried to do about a month ago when you filed a
3 Mandamus petition against the court of appeals?

4 MR. WELLS: Well, what we're trying to do
5 now is to get this court to take it back and allow
6 it to proceed expeditiously and on the basis it
7 should have proceeded in the first place.

8 That's basically what we're asking, is
9 that this -- it would be somewhat nebulous to allow
10 the court of appeals to review its own judgment,
11 and in effect sit in review of its own judgment as
12 an appellate court reviewing itself.

13 What we're asking this court to do in your
14 position as the appellate court over the court of
15 appeals, is to take a look at what's happened in
16 this case --

17 THE COURT: What is the judgment that they
18 would be reviewing?

19 MR. WELLS: You would be reviewing the
20 refusal of the court to allow the brief to be
21 filed. We can understand that if they deny an
22 overlength brief, that's in their discretion. We
23 have no problem with that. But we think once they
24 do that they are, under fairness and due process
25 consideration, required to give us at least a day

1 (Oral Argument)

2 or two to edit it down to the page requirement.

3 THE COURT: Why? The rules provide that if
4 you want to file an overlength brief, you can get
5 permission in advance. If you ask for it the day
6 you file the brief, you take the risk it will be
7 thrown out.

8 Local practioners seem to have the notion
9 that they'll come up here and people will accept
10 any old thing you can crank out, no matter how many
11 pages, but the rules are very explicit.

12 If you want an overlength brief, you can
13 ask for permission before you write it, instead of
14 waiting and not editing it and hoping that they'll
15 just take whatever you get done with.

16 It seems to me there isn't anything here
17 except a refusal of them to grant you permission to
18 file an overlength brief, which you want to
19 appeal.

20 MR. WELLS: Well, but what they did at that
21 point was they then said, "Not only are we going to
22 deny that to you, but we won't even allow you to
23 file the actual brief that was in the computer on
24 the date that it should have been filed."

25 THE COURT: The rules require you to file

1 (Oral Argument)

2 something physical, not whatever you happen to have
3 in your head, on your computer, in the car, or in
4 the mail.

5 MR. WELLS: Well, unfortunately, Your
6 Honor, we live in a technical age. Sometimes
7 something gets into a computer and it's physically
8 impossible to get it out at a certain time. To say
9 that, because of a computer breakdown, a whole
10 class of defendants are now wiped out of this case,
11 I think denies due process.

12 THE COURT: It's not because of a computer
13 breakdown. It's because you filed an overlength
14 brief two weeks late.

15 MR. WELLS: That wasn't the original
16 problem, Your Honor. The original problem was that
17 on the day that they filed this preliminary draft,
18 the computer was broken. They could not get the
19 current addition on that. So, in an effort to show
20 good faith, they filed something.

21 Now, to say that because of the computer
22 breakdown, we can't get it out of the court of
23 appeals, this class of defendants is just wiped out
24 of the lawsuit, I think is a basic denial of due
25 process.

1 (Oral Argument)

2 THE COURT: No, they're only saying because
3 you filed an overlength brief which they chose not
4 to accept, that you may have prejudiced your class
5 -- your clients. That's true.

6 MR. WELLS: That's true, but then to go
7 back and say you can't file -- they ordered us to
8 go back and file what we had on our tape. That was
9 locked into the computer. What had been delivered
10 was the preliminary draft.

11 To say that you have to live with the
12 preliminary draft, you can't even bring in what you
13 have on that date because it was in the computer
14 and we couldn't get it out; that's where I think
15 the problem was.

16 It isn't the exercise of the discretion
17 denying the right to file an oversized brief. It's
18 saying that you can't pull it out of the computer
19 and file what you had on that date. You've got to
20 file the preliminary draft, which was only given as
21 an effort to show that we were, in fact, working on
22 a brief at that point.

23 And as you say, the court can't enter
24 their lodging policy, lodge something that doesn't
25 exist. But what we're saying is, that due to

1 (Oral Argument)

2 consideration of the computer breakdown, that basic
3 due process should allow us to at least take what
4 we had on that date and file it.

5 THE COURT: How long was it, do you know?

6 MR. WELLS: I do not know, Your Honor.

7 THE COURT: Since it was in the computer,
8 presumably it didn't have pages.

9 MR. WELLS: Well, I don't know that either,
10 Your Honor. What I'm saying is that they should be
11 allowed to pull it out and take it over there, and
12 at least have the opportunity to have the court
13 look back and then decide.

14 THE COURT: Mr. Wells, about the authority
15 for this court to recall jurisdiction, you
16 mentioned Rule 4AF, I believe.

17 MR. WELLS: Yes.

18 THE COURT: Does that specifically provide
19 for that procedure?

20 MR. WELLS: That provides that the --
21 that's the provision that says the only basis on
22 which this court can review a decision to
23 (inaudible) over is on jurisdictional grounds.

24 We're saying is, we want you to review
25 that and basically say, "All right, we as an

1 (Oral Argument)

2 appellate court will look at what's happened there,
3 because we are the only court that can do that."

4 I don't think it's appropriate -- that
5 would be, I think, violating the statute that says
6 a court can't review its own order.

7 THE COURT: Well, this really isn't a
8 jurisdictional problem, is it?

9 MR. WELLS: Pardon me?

10 THE COURT: This really is not a
11 jurisdictional problem.

12 MR. WELLS: Well, it's jurisdictional in
13 the sense that this court has the power to
14 review -- the jurisdictional power to review the
15 judgments of the court of appeals.

16 It would be our position that if the court
17 of appeals is applying their internal rules in such
18 a manner as to deny basic constitutional rights to
19 litigants, that this court has a right to take a
20 look at that and review them.

21 THE COURT: Mr. Henriod?

22 MR. HENRIOD: I'm Stephen Henriod and I
23 represent the Respondent, Memorial Estates. The
24 court has anticipated my argument, as indicated by
25 the questions. It's the position of the

(Oral Argument)

respondents that this is not a jurisdictional matter, but rather a procedural one, that the court of appeals properly enforced the rules regarding briefing schedule.

We'd also like to point out to the court that the timing on this whole thing is somewhat suspect.

The class issue which the plaintiff wants to make a lot out of was dismissed by a lower court between four and five years ago. The appellate's brief was due in December of 1938. It was over 60 days in which this brief could and should have been filed, between the 30 day extension and the ex parte extension and then the two motions for additional time.

Clearly the substitute brief that was filed with the court was filed pursuant to the court of appeal's lodging policy. The very language included in the pleading, that they wanted to file a substitute brief and move on with the technical corrections that are allowed in the policy shows there's no explanation in the motion that a longer and a more detailed brief existed in the computer.

1 (Oral Argument)

2 THE COURT: These issues seem to us to be
3 completely (inaudible). Mr. DeBry's father's death
4 was unfortunate, but as a matter of fact, Mr. DeBry
5 hasn't been involved in this case in the sense of
6 signing the pleadings in at least over a year.

7 We will submit that this is a procedural
8 matter and will refer it back to the court of
9 appeals where these very arguments appear and
10 appellate's reply to them, and that they can exhaust
11 these petitions.

12 THE COURT: Anything further, Mr. Wells?

13 MR. WELLS: Yes, your Honor. I would just
14 note that in response to Justice Zimmerman's
15 question about whether or not this is, in effect, a
16 final judgment and affecting a class, I believe the
17 court is correct in that if that does not happen,
18 and if the court does, in fact, allow those, then
19 perhaps the due process questions disappear.

20 But I have a concern that counsel is going
21 to argue to the court of appeals that that issue
22 has in fact been waived. If they do that, then I
23 believe the very problem that I have suggested to
24 the court, of the due process considerations to the
25 class involved will then raise their head.

1 (Oral Argument)

2 Perhaps this is free choice, but I do have
3 that consideration because I've experienced that,
4 where going to a court of appeals, it's been my
5 experience that the only issues with which the
6 court was generally familiar in argument are those
7 that are raised in briefs.

8 We've been basically precluded from
9 raising the class issues in brief. That's where
10 the concern arises, is that this could have an
11 impact on the class. Perhaps this would be a due
12 process consideration.

13 THE COURT: Thank you, gentlemen. The
14 court will take the matter under advisement.

15 (Concluded)

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25

REPORTER'S CERTIFICATE

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) ss.
COUNTY OF SALT LAKE)

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That this transcript is full, true and
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I further certify that I am not of kin or
otherwise associated with any of the parties to said
cause of action and that I am not interested in the
outcome thereof.

That certain parties were not identified
in the record and therefore the name associated with
the statement may not be the correct name as to the
speaker.

WITNESS MY HAND AND SEAL this 12th day
of December, 1989.

My commission expires:

Feb 22, 1992

[Signature]
NOTARY PUBLIC

Residing in Utah County

EXHIBIT F

ORIGINAL

COURT OF APPEALS

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

Plaintiffs/Appellants,

vs.

MEMORIAL ESTATES, INC.,
et. al.,

Defendants/Respondants.

Case No. 880630-CA

TRANSCRIPT OF ELECTRONIC TAPES

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File No.

DISCOVERY WFF

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-oOo-

1 March 12, 1990 Oral Argument

2 (Electronically recorded)

3 P R O C E E D I N G S

4 THE COURT: Please proceed.

5 MR. DeBRY: If it please the Court, Robert
6 DeBry representing the appellant.

7 In this case during the final briefing in
8 February of 1989, about two weeks before the final
9 brief was due my father passed away. Because of
10 that I was with family matters, away from the
11 office and out of action.

12 We'd already received a couple of
13 continuences, modest continuences because of
14 illness and vacation schedules. So, with a death
15 in the family we were trying to meet the final
16 briefing schedule.

17 On the due date of the brief, with a lot
18 of scurrying around, we were ready to file, except
19 that at the last minute the word processor broke
20 down. Because of that quandary, we brought to this
21 Court a preliminary draft brief that had been done
22 and had been circulated around the office before
23 the computer broke down, and we filed that brief
24 with a motion for permission to file a substitute
25 brief after we got the word processor repaired.

1 Our motion specifically stated the draft
2 of the brief is not the current one -- that is the
3 draft we left with the Court -- the current one is
4 in the word processor memory.

5 Later on there was some motions, and Judge
6 Bench ruled that we were not permitted to file the
7 brief which was finished, albeit in the computer
8 memory and we were stuck with the original 30-page
9 brief.

10 Now, I'm not trying to reargue those
11 earlier rulings, but I think since this is the
12 hearing panel and you have to hear this on the
13 merits, a word of explanation is in order as to why
14 the brief you have in front of you is rather
15 sketchy; the fact it was a partial preliminary
16 draft brief, and by its very appearance is sketchy.

17 Although we don't wish to reargue the
18 earlier ruling by Judge Bench, we certainly would
19 be available if the Court has some questions or
20 some problems or if you require some additional
21 assistance on any issue that's not clear from our
22 sketchy brief. We'd certainly be available to file
23 a supplemental brief if the Court requests that on
24 any issues.

25 THE COURT: The problem with that was that

1 you asked for an extension -- there was a
2 misunderstanding -- you asked for an extension on
3 filing the brief, but you didn't ask for permission
4 to file an overlength brief, as I recall; is that
5 correct? So, you did get the extension, but you
6 didn't get permission to file the overlength brief
7 under Judge Bench's ruling.

8 MR. DeBRY: I think that's true, your
9 Honor, and there certainly was a misunderstanding.

10 Of course, our problem is, as I understand
11 computers, we don't know how many pages -- you
12 know, it's the last minute. There's been a
13 funeral. We're cramming all in the computer. We
14 didn't know how many pages were in the computer, so
15 we couldn't really ask for the overlength brief
16 until we got the computer fixed and it could spit
17 it out, but it was a misunderstanding.

18 THE COURT: Am I understanding correctly
19 that a copy of the 79-page brief was appended to
20 your motion asking leave to file an overlength
21 brief?

22 MR. DeBRY: No.

23 THE COURT: So, that's nowhere in our
24 record?

25 MR. DeBRY: I don't think it's even here in

1 the courthouse. I think that was returned. When
2 we filed for permission -- we filed the preliminary
3 brief -- made a motion to file a supplemental brief
4 after the computer was fixed.

5 What was with that was a 30-page brief,
6 which was according to my recollection about a week
7 old. It was a preliminary draft. The 79-page
8 brief was in the computer.

9 Turning to the merits, I would like to
10 suggest, this is a summary judgment motion handled
11 by Judge Moffat below; a reasonably complex case.
12 I don't think any individual issue is terribly
13 difficult, but I think there are a lot of issues.
14 Reasonably class action and a reasonably complex
15 case. About five or seven years old, as I recall,
16 when Judge Moffat heard this.

17 I suggest the heart of our argument is
18 this. What colors everything in Judge Moffat's
19 ruling, is that he didn't read the record.

20 When the parties appeared for oral
21 argument -- had the transcript of the oral argument
22 -- Judge Moffat basically says, "Good morning,"
23 quote, "I haven't had a chance to look at the
24 file."

25 So, we have a judge who is ruling on a

1 fairly complex summary judgment motion with many
2 contested fact issues, and what he says is, "I
3 haven't read the file."

4 THE COURT: Did he rule from the bench at
5 that hearing?

6 MR. DeBRY: Yeah, he ruled from the bench.

7 What he had in his hand -- the only thing
8 he had in his hand that he could look at is, as I
9 recall a transcript, opposing counsel handed him a
10 copy of the fifth amended complaint.

11 Now, what follows is -- if I can
12 characterize the hearing -- about the first half of
13 the hearing we have defense counsel basically
14 making proffers of proof, saying, "Judge this is my
15 version of the facts." Then the second half we
16 have the plaintiff's counsel sort of making
17 proffers and saying, "Judge, well, this is my
18 version of the facts." Then the judge without
19 making any independent inquiry or looking at
20 affidavits or any documents or depositions, rules
21 from the bench.

22 THE COURT: Let me just ask a question,
23 Mr. DeBry. Maybe I misunderstood, but my notes on
24 reading the briefs indicate that the judge
25 dismissed the complaint as a sanction for failure

1 to respond to discovery. Is that incorrect?

2 MR. DeBRY: That was one ground.

3 THE COURT: Now, he wouldn't need to look
4 at anything except the timeliness of your response
5 to discovery in order to rule on that issue, would
6 he?

7 MR. DeBRY: I think that's partially right.
8 I think there are three or four issues that were
9 legal issues on which he could rule based on an
10 oral argument. That's one of them. But I do think
11 you have to look at something. Let me comment on
12 that.

13 THE COURT: Well, and the judgment itself
14 is clear, that he premised it on the two distinct
15 grounds. First of all, the default judgment will
16 be entered for alleged failure to comply with the
17 discovery schedule.

18 Secondly -- and assuming that he probably
19 had it in the back of his mind that that wouldn't
20 stick on appeal -- secondly, also, summary judgment
21 will be granted on the merits.

22 So, I think he expressly articulated on
23 both of those grounds.

24 MR. DeBRY: That's right. I think it was
25 the other way around. I think he said summary

1 judgment on the merits, and by the way, in case
2 that doesn't stick as a discovery sanction -- a
3 ruling on the discovery sanction.

4 Now, to answer Judge Dillon's question, I
5 think sort of he can rule on that as a matter of
6 law, but the judge at that point has to exercise
7 some discretion. Our reading of all the cases is
8 that as a discovery sanction, yes, the judge can
9 rule as a matter of law and dismiss the complaint,
10 but as a matter of discretion he should inquire
11 into whether or not anyone is prejudiced, and the
12 circumstances of why the discovery was late.

13 In this case the discovery -- our
14 viewpoint is, and we told him at the brief -- was
15 basically cumulative. It had all been done before.
16 The case was five or six years old anyway. They
17 had taken depositions of the parties.

18 Our representation at the hearing was that
19 although the mailing certificate was accurate, it
20 appeared -- at least from our records -- we'd
21 (inaudible) and found it in the office, and the
22 judge didn't even look at the discovery; didn't
23 even read the questions. It wasn't handed to him.
24 The answers were filed that morning. He didn't
25 look at the answers. So, he couldn't inquire into

1 whether anyone was prejudiced, nor could he
2 inquire -- or balance the circumstances to apply
3 his discretion.

4 What he said at the end of the hearing
5 was -- and his words were -- there's a Gardner
6 case, Gardner versus Parkwest Village. The
7 citation is in the briefing, but what the judge
8 said at the end of the hearing was, "The Gardner
9 case," quote, "requires dismissal," end quote.

10 Now, I would suggest that that is error as
11 a matter of law. The Gardner case, as well as all
12 of the other cases on discovery sanctions say that
13 the judge has discretion and he may exercise that
14 discretion. He has a range of options, and one
15 option is to dismiss.

16 When he says the Gardner case requires
17 dismissal, I think he's saying that he's not
18 exercising his discretion, nor did he have anything
19 to look at.

20 THE COURT: Typically, locally at least,
21 when a case is dismissed as discovery sanction,
22 that's the second of a two-step process.

23 First a party is ordered to answer by a
24 date certain or appear for a deposition at a date
25 certain. Only upon that failure is the ultimate

1 sanction issued.

2 Do I understand correctly that that first
3 step was omitted in this case?

4 MR. DeBRY: Yes. There had never been a
5 first step. There had never been a motion to --

6 THE COURT: There was a discovery cut-off
7 date, but there was no order directed against you
8 or your client --

9 MR. DeBRY: That's right.

10 THE COURT: -- to answer by a certain
11 date?

12 MR. DeBRY: That's right.

13 THE COURT: Let me just, before you get
14 into the merits, ask another kind of preliminary
15 question that I was concerned about in reading the
16 briefs. That was that you cite to a number of
17 depositions in your statement of facts as to why
18 they were material issues of fact that precluded
19 summary judgment. Is it true that these
20 depositions were never filed at the district court
21 level, and therefore were not before Judge Moffat
22 at the hearing?

23 MR. DeBRY: Well, I'm troubled by that as
24 well. Let me represent to the Court that when we
25 went to the Court -- back to the clerk of the

1 Court, my understanding is those -- that several of
2 those had, in fact, been filed and been lost by the
3 clerk of the Court. Our motion was to file a
4 motion to supplement the record to get all those
5 depositions in the record and be clear they're in
6 the record.

7 Then when I started thinking about it, I
8 thought, wait a minute. It's true we had written
9 the facts section and quoted from those briefs, but
10 what should the appellate court be looking at? The
11 reason we didn't do that is I suggest appellate
12 court should be looking at what Judge Moffat had in
13 his hand. The only thing that Judge Moffat had in
14 his hand was the fifth amended complaint. Since he
15 didn't look at the record, I don't think those
16 depositions mattered.

17 THE COURT: We could agree on that.

18 MR. DeBRY: Now, to respond to Judge
19 Billings' further point, there were a couple of
20 other issues that I think were purely legal issues
21 for which the Judge could rule from the bench. I
22 can just tick those off, because I think they're
23 reasonably well covered in the briefs, and I'll be
24 happy to answer questions on those.

25 One was there was a question about

1 dismissing a party who had died. The question is
2 whether under the rule if someone dies there has to
3 be a suggestion of death on the record, and
4 there was a question whether or not there was a
5 suggestion of death on the record.

6 That is sort of a legal issue on which the
7 judge might rule from the bench, but again, the
8 judge didn't have anything in his hand except a
9 fifth amended complaint. He didn't have in his
10 hand the earlier pleading that defense counsel
11 claimed was a suggestion of death.

12 There's another issue that's legal that
13 the Court could rule on, and that is whether
14 Section 22-4-1 of the Utah Code would require the
15 mortuary or the cemetary to keep 75 percent of the
16 money in trust.

17 Now, what happens is cemeteries go out and
18 the sell pre-need funeral programs. So, they sell
19 a burial plot or whatever for peace of mind, and
20 maybe somebody dies in five or ten years, and the
21 statute is to protect the public, so they have to
22 keep that money in a trust.

23 The question is whether that section
24 applies to this case, and I think it is a legal
25 issue, and I think it's fairly well covered by the

1 briefs.

2 Now, the last issue, and I'll touch on it
3 quickly, is whether or not Judge Dee erred as a
4 matter of law by dissolving the class. Originally
5 Judge Fishler had certified the class. Later Judge
6 Dee decertified the class. He uncertified the
7 class.

8 Although the briefs are sketchy, we do
9 have in -- the Court did accept our appendix, and
10 our appendix includes the findings of fact by Judge
11 Dee, and the conclusions of law when he decertified
12 it. I can just quickly say in my minute remaining,
13 that Judge Dee, as a matter of law, he used the
14 wrong legal rules when he decertified it.

15 First of all he, on the numerosity
16 question, one issue in a class action is whether
17 the class is so numerous, et cetera. His test was
18 in the Conclusion of Law No. 1, since the names and
19 addresses of individuals signing the same form of
20 contract are readily available, you can't have a
21 class action.

22 As a matter of law, that's the wrong test.

23 That's part of the test. The test is much
24 broader, and since I don't have time, the complete
25 test is in a Utah Supreme Court case, Call versus

1 the City of West Jordan.

2 Again, Judge Dee used the wrong test
3 because he said that the plaintiffs, in his
4 Conclusion of Law No. 3, had failed to prove that a
5 class action is superior to other available
6 methods. That's the wrong test because there are
7 three alternative tests.

8 If the Court will look at the rules, there
9 are three alternatives. You can either qualify
10 under 23-B-1 or B-2 or B-3, and I don't have time,
11 but he basically ruled as a matter of law you have
12 to qualify under 23-B-3, and that's wrong.

13 The last thing -- if I can -- I'm over,
14 but if I can take 15 seconds -- that Judge Dee did
15 wrong is there was a motion to enlarge the class,
16 to make the class larger, and Judge Dee simply
17 didn't hear that on the basis that he thought it
18 had been ruled on before, and it hadn't.

19 Now, I'm overtime, so I'll --

20 THE COURT: We'll give you a minute on
21 rebuttal.

22 MR. DeBRY: Thank you.

23 MR. HENRIOD: May it please the Court, I'm
24 Stephen Henroid. I represent the respondent,
25 Memorial Estates.

1 I think some clarification of what went on
2 in the lower court would be helpful in light of the
3 appellant's argument.

4 In December of 1987, the respondent filed
5 a motion for summary judgment. That motion for
6 summary judgment was argued in January of 1988.

7 At that argument, Judge Moffat had
8 completely reviewed the file; had discussed the
9 case extensively with counsel for both the
10 plaintiff and the defendant; and indicated that in
11 his opinion the motion had merit, and indicated
12 that he was prepared to rule on it to the detriment
13 of the plaintiff.

14 The response that the plaintiff made was
15 to acknowledge that certain problems had arisen,
16 primarily because this complaint was filed in 1982.

17 The principal factual matter alleged in it
18 is that the couple of mausoleums hadn't been
19 constructed, and by the time this matter was being
20 argued, both mausoleums had been constructed.

21 So, counsel for the plaintiff said, "Let
22 me address these issues by filing a new complaint."
23 As counsel for the defendant, I stipulated that
24 that was fine. The judge denied the motion without
25 prejudice, and instructed the plaintiff that he had

1 20 days, I believe, to file a fifth amended
2 complaint --

3 THE COURT: That is to say he denied the
4 motion for summary judgment without prejudice?

5 MR. HENRIOD: Yes, your Honor, not the
6 motion to amend.

7 Instructed the plaintiff to narrow the
8 issues and cut out those items that were obviously
9 no longer pertinent, and to refile, and we set a
10 schedule.

11 What happened a month later was that the
12 fifth amended complaint was filed with five totally
13 new causes of action, with no deletions. All of
14 the other causes remained in the matter, and at the
15 same time the plaintiff asked for an expedited
16 trial setting.

17 The Court held a pre-trial, at which
18 counsel for the plaintiff didn't appear and wasn't
19 available by telephone, and had set a schedule.

20 The schedule said that the trial would
21 commence on July 6th; that the discovery cut-off
22 was June 10th, and that the last day to file
23 motions was June 16th, as I recall.

24 The defendant filed a fourth set of
25 interrogatories going into the new causes of

1 action, which were significant causes of action;
2 one for intentional infliction of emotional
3 distress and one based on the fact that the
4 plaintiff claimed the mausoleum didn't look the way
5 she thought it was going to look when she bought
6 her contract.

7 Those interrogatories were never answered.
8 They weren't answered by the due date, which was
9 June 1st. They weren't answered by the discovery
10 cut-off, which was June 10th.

11 No certificate of service of an answer has
12 ever been filed in the case, although answers were
13 hand-delivered at the hearing on the motion for
14 summary judgment and for dismissal for failure to
15 respond, pursuant to Rule 37, on June 21st, which
16 was when the motion was heard.

17 With trial only two weeks later, I believe
18 that falls squarely within the parameters of the
19 WWB Gardner case, in which there also was no
20 two-step procedure, as referred to by Judge Orme.
21 The reason was, with five brand new causes of
22 action and no response to the discovery, the
23 defendants were severely prejudiced, both in the
24 motion for summary judgment argument, and would
25 have been in the event of a trial.

1 Now, the Rule 37-B dismissal has not been
2 appealed by the appellant in this matter. It is
3 not addressed in either the appellant's brief or
4 the reply brief, and stands. I believe that's all
5 this Court needs to consider to resolve this
6 matter.

7 Our second principal point is -- has
8 already been addressed by the Court, and that is
9 that the only matters which were before the Court
10 in response to the defendant's motion for summary
11 judgment in the affidavits in support thereof, was
12 the affidavit of Erma Schoney.

13 Now, all of the affidavits had been filed
14 before the Court heard the argument in January of
15 1987.

16 So, the fact that Judge Moffat, when he
17 was hearing the argument later, hadn't made an
18 extensive re-reading of the file and the
19 affidavits, I do not believe in any way weakens the
20 ruling and the basis upon which it was made.

21 As a bottom line, the appellant simply
22 failed to controvert the facts which were put into
23 evidence by the defendant, which showed that there
24 was no material issue of fact, and that the
25 plaintiff wasn't going to be able to prevail upon

1 the evidence.

2 Now, in filing their brief, they've quoted
3 extensively from depositions which were never
4 filed, and have not to this day been filed, and
5 were not lost by the lower court.

6 This morning, in checking the file before
7 the hearing, to my surprise I found that a number
8 of depositions have now been filed in this court
9 that were filed in October of 1988. Our brief was
10 filed in May of 1988. These are all unsigned
11 copies, and I would assume that they come from the
12 files of the appellant. They were not in the lower
13 court. They were not available to Judge Moffat.

14 As this Court has ruled in the past -- I'm
15 quoting from the Shearer versus State, by and
16 through Utah Department, found at 657 Pacific 2nd
17 1337 -- where the moving party's evidentiary
18 material is in itself sufficient, and the opposing
19 party fails to proffer any evidentiary matter when
20 he is presumably in a position to do so, the Court
21 should be justified in concluding that no genuine
22 issue of fact is present, nor would one be present
23 at trial.

24 Judge Moffat didn't have a burden to ask
25 where the unfiled depositions were, and to get them

1 in front of him and review them. The plaintiff
2 simply failed to (inaudible) burden on that issue
3 in the lower court.

4 Now, with respect to a couple of the
5 issues that have been raised --

6 THE COURT: Before you get to that,
7 Mr. Henroid, tell me again -- walk me through your
8 analysis as to why no appeal has properly been
9 taken from the entry of default judgment at the
10 discovery sanction.

11 MR. HENRIOD: It's not raised in the
12 appellan't docketing statement as an issue on
13 appeal. It's not argued in the appellant's brief.
14 It's something that the lower court did
15 erroneously. It's not even referred to in the
16 reply brief, which, as a matter of fact, replies
17 to all kinds of things that weren't in the
18 respondent's brief. That's my position. I've
19 looked for it and I can't find it.

20 THE COURT: It's not in the docketing
21 statement, you say?

22 MR. HENRIOD: It's not in the docketing
23 statement either.

24 Now, with respect to Judge Dee's
25 decertification, I think the Court should note

1 about a year after the case was filed, Judge
2 Fishler certified it as a class action under Rule
3 23. He did that based upon the allegations
4 contained in the plaintiff's complaint. They
5 alleged sufficient members of the class. They
6 alleged a certain identity of issues. They alleged
7 that they could properly represent the group, and
8 based on their allegations, the judge properly
9 certified the case.

10 Two years thereafter, when the motion to
11 decertify was made, it was made on the basis of
12 evidence. Judge Dee entered findings of fact. His
13 findings of fact are in the record. The findings
14 of fact specify that there are only 27 agreements
15 containing the same terms; that the identity of
16 all the parties entering into those agreements is
17 known; that the -- well, the questions do not
18 predominate over the group as a whole, because
19 Schoney's questions involved for all evidence
20 issues as to what occurred after they entered into
21 the contract.

22 It seems to me that the appellant's burden
23 on that particular issue -- which is, of course,
24 not part of the summary judgment or the Rule 37
25 dismissal -- is to marshal the evidence in support

1 of Judge Dee's findings, and to show that there was
2 clearly relevance. That has not been done.

3 As a matter of fact, that also is not
4 addressed, except for some conclusionary argument
5 without citations to any authorities or any facts
6 other than the record on the actual order of
7 certification and the findings and conclusions
8 regarding decertification. So, I think the
9 appellant's argument has to fail on that as well.

10 The motion to enlarge was considered by
11 Judge Dee, and it is obviously so when you read his
12 findings and conclusions.

13 In the transcript which is quoted in the
14 reply brief, he indicates that the points made in
15 the motion to enlarge, were points that were
16 already addressed in the second amended complaint,
17 which was the complaint before the Court at that
18 point in time.

19 So, they weren't new, they weren't
20 different, and they didn't form a basis for
21 enlarging the class.

22 THE COURT: Well, that motion was before
23 him simultaneously with the motion to decertify?

24 MR. HENRIOD: Yes, right, and he ruled on
25 both of them.

1 THE COURT: I suspect that even if he
2 hadn't explicitly ruled on the motion to enlarge,
3 if you're decertifying a class, implicitly at
4 least, you have determined not to enlarge it.

5 MR. HENRIOD: I suppose.

6 With respect to the matters that Counsel
7 has indicated the Court could properly have
8 addressed as a matter of law, the suggestion of
9 death on the record very simply was a suggestion
10 made in the motion for summary judgment which was
11 filed in December of 1987, and there was no
12 response ever filed to the suggestion of death on
13 the record. Some 27 months had expired since the
14 death of Mr. Schoney, and there was no substitution
15 made.

16 With respect to Section 22-4-1 that
17 requires the 75-percent trust, that section in the
18 form that it existed at the time the parties
19 entered into the contract and completed their
20 payments under the contract did not require the
21 75-percent trust in connection with mausoleum
22 crypts. In fact, the Schoneys paid off their
23 contracts in 1977. This statute was amended in
24 1983. Their money had all been paid before that
25 time.

1 The amendment inserted, vaults,
2 unconstructed mausoleum crypts, unconstructed
3 niches and markers as substantive areas where the
4 trust would apply; and deleted vaults, mausoleum
5 crypts, niches, cemetery burial privileges.

6 In their brief, the appellant argues that
7 the amendment should relate back, as a mere
8 clarification of the earlier statute.

9 This was a significant substantive change
10 in the statute. It wasn't a clarification. It
11 shouldn't relate back. And lastly, both mausoleums
12 had been constructed.

13 So, any argument that the monies were not
14 put in trust and therefore the appellant in this
15 case was damaged, simply doesn't work. The
16 mausoleums were constructed. The mausoleums have
17 been in place. The plaintiff has not had any
18 damage. Submit it.

19 THE COURT: Thank you. Mr. DeBry, if you'd
20 like to take another minute.

21 MR. DeBRY: Appreciate it. Thank you, your
22 Honor.

23 Taking the last point first, what opposing
24 Counsel, Mr. Henroid said about there's no damage.
25 The mausoleums had been finished, that sounds a lot

1 like the transcript in front of Judge Dee. They're
2 really arguing his version of facts. We just don't
3 agree with those facts.

4 The problem is, that's his version of the
5 facts, and Judge Dee didn't have any -- or Judge
6 Moffat didn't have anything to look at. We don't
7 think judges should rule based on a proffer --
8 basically a proffer of somebody's version of the
9 facts.

10 Now, the other question is whether we
11 appealed the ruling, the dismissal for discovery
12 sanction. The answer to that is that at Exhibit I
13 of the appendix prepared by the respondent, there
14 is the judge's order -- Judge Moffat's order, and
15 he says in some detail, "Judgment should be entered
16 upon the additional ground that the plaintiff has
17 failed to respond to the defendant's fourth set of
18 interrogatories." We specifically appealed from
19 that order.

20 Now, it may not be in the docketing
21 statement, because I haven't looked at that for a
22 while, but we certainly appealed from that order,
23 and that is one of the issues that was in our brief
24 that was locked in the computer that we would have
25 presented to the Court in more detail if we had

1 been permitted to file that brief. Certainly it is
2 clear error for a judge to say that if you're 15
3 days late on discovery, that, quote, "requires
4 dismissal."

5 Finally, I think our basic argument is
6 that Judge Moffat didn't have anything in front of
7 him except verbal argument, and the Court shouldn't
8 rule on summary judgment, especially in a
9 complicated case based on oral argument.

10 THE COURT: What about the suggestion,
11 Mr. DeBry, that he had had all that stuff in front
12 of him in January and been over it thoroughly at
13 that point in time?

14 MR. DeBRY: Well, that's a good question.

15 THE COURT: I guess we're speculating about
16 whether several months later --

17 MR. DeBRY: And I want to comment on it. I
18 just simply think that's a stretch. That's a long
19 stretch, and it's basically a lot of speculation to
20 say, "Well, he must have read it." Then that
21 really gives a lot of -- every benefit of the doubt
22 to say, "Well, if he didn't read it today or this
23 week, he certainly must have read it."

24 If it was that clear that the motion was
25 the same, why did they file a new motion, and why

1 did they file three new affidavits with their
2 motion -- now, he didn't have that motion in his
3 hand, he hadn't read it, and he hadn't read those
4 affidavits, then they should have just asked for
5 oral argument on the old motion.

6 In fact, there were five new causes of
7 action that had been pleaded. So, he certainly
8 couldn't have read any of the fact issues or
9 affidavits or interrogatories or depositions that
10 relate to those five new fact issues. I'll be
11 happy to answer questions, but I'm overtime now.

12 THE COURT: Thank you very much, Mr. DeBry.
13 We'll take the matter under advisement.

14 (Adjourned)
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REPORTER'S CERTIFICATE

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

I, Beverly Lowe, a Notary Public in and
for the State of Utah, do hereby certify:

That the foregoing proceedings were
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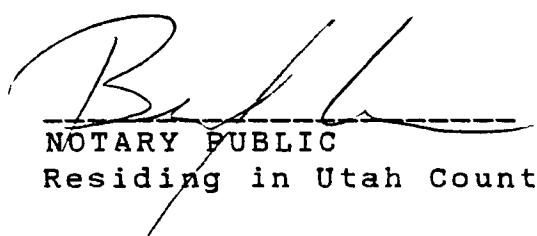
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I further certify that I am not of kin or
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said cause of action, and that I am not interested
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WITNESS MY HAND AND SEAL this 30th day of
August, 1990.

My commission expires:
February 24, 1992


NOTARY PUBLIC
Residing in Utah County

