

1988

# Heber Creeper, Inc. v. Gordon Mendenhall and Leon Ritchie : Brief of Appellant

Utah Supreme Court

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Peter C. Collins; Attorney for Respondent.

J. Harold Call; Attorney for Appellants.

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## Recommended Citation

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UTAH COURT OF APPEALS  
BRIEF

UT

Docket No.

KFJ

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DOCKET NO. 880024-CA

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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HEBER CREEPER, INC.,  
A Utah Corporation,

Respondent

=vs=

GORDON MENDENHALL and  
LEON RITCHIE,

Appellants

APPELLANTS' BRIEF

88-0024-11

Supreme Court No. 20962  
Category No. 14

APPEAL FROM FINAL JUDGMENT AND ORDER OF  
THE FOURTH JUDICIAL DISTRICT COURT  
WASATCH COUNTY, JUDGE CULLEN Y. CHRISTENSEN

---

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FILED

MAR 5 1986

Clerk, Supreme

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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HEBER CREEPER, INC.,  
A Utah Corporation,

Respondent

=vs=

GORDON MENDENHALL and  
LEON RITCHIE,

Appellants

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

HEBER CREEPER, INC.,	:	
A Utah Corporation,	:	APPELLANTS' BRIEF
	:	
Respondent	:	
	:	
=vs=	:	
	:	
GORDON MENDENHALL and	:	Civil No. 20962
LEON RITCHIE,	:	
	:	
Appellants	:::	

APPEAL FROM FINAL JUDGMENT AND ORDER OF THE FOURTH JUDICIAL DISTRICT  
COURT OF WASATCH COUNTY, JUDGE CULLEN Y. CHRISTENSEN

STATEMENT OF THE KIND OF CASE

This action raises the question of liability of directors to a corporation from which they had resigned or while they were serving as directors simultaneously on two corporations.

DISPOSITION IN THE LOWER COURT

After a trial to the court, the court found there was no breach of fiduciary duty by Appellants on any of the counts except one. The court found on that count, Appellants breached their fiduciary duty to Respondent by failing to get Timpanogas Preservation Society, a corporation, to pay food concession money to Respondent. Appellants moved to amend this judgment but the motion was denied.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment and order of the lower court.

### ISSUES PRESENTED ON APPEAL

1. When does the fiduciary duty cease between a corporation and its former directors?
2. If the fiduciary duty of Appellants to the Respondent did continue after their resignation, did they in fact breach that duty?
3. If a breach of duty by Appellants to the Respondent is found, is there sufficient evidence upon which a judgment can be granted?

### STATEMENT OF FACTS

Respondent corporation was organized in 1971 (see Exhibit 1) to operate a train commonly known as the Heber Creeper, from Bridal Veil Falls in Provo Canyon to Heber City, Utah. (TR49, L4-22)

The Timpanogas Preservation Society (hereinafter called TPS) was organized in August of 1978 by Lowe Ashton and Monte Bona for the purpose of obtaining grants as a non-profit corporation to assist in the economic development of Wasatch County and in the operation of the Heber Creeper. (TR 632, L 3-10)(TR 562, L 20-25)

Several grants were obtained by TPS and much of the money was spent in the developing of railroad tracks, terminal grounds of the Heber Creeper in Heber City, Utah, and establishing a railroad village at the terminal grounds. (TR 631, L 17-25)

At the time TPS was formed it was thought advisable to have a representative of the Respondent on the TPS Board of Trustees and Lowe Ashton, President of the Respondent, (TR 52, L 6-7) approved

the name of Gordon Mendenhall, which was accepted by the TPS Incorporators. (TR 68, L 9-22)

Leon Ritchie became a member of the Board of TPS as a representative of the Sons of the Utah Pioneers but was never elected. (TR 708, L 3-17)

At the time of their service on the Board of TPS, both Appellants were members of the Board of Directors of the Respondent. (See Exhibit 10)

Some trouble developed in the Respondent organization and Appellant Gordon Mendenhall was voted out as a member of the Board of Directors in November of 1981. (See Exhibit 10)

On May 14, 1982, Appellant Gordon Mendenhall was voted in again as a director of the Respondent, but thirty-eight days later, on June 22, 1982, he resigned. (See Exhibit 10) Gordon Mendenhall resigned from TPS in September, 1982. (TR 396, L 6-8)

Leon Ritchie was a member of the Board of Directors of the Respondent and continued as a member of the Board of Trustees of TPS until September of 1982. (See Exhibit 10)

Respondent and TPS had been working on an agreement to settle problems which had developed between them, which was approved May 12, 1982. (See Exhibit 2)

Among other things, the agreement provided that TPS would pay to Respondent a percentage of the food sales sold on the train but not less than \$10,000.00 per year. (See Exhibit 2, P 5)



TPS did not pay to the Respondent the food concession money. Appellants tried to get TPS to pay its obligation to the Respondent but were unable to get Monte Bona, President of TPS, to sign the check. (TR 643, L 12-25)(TR 644, L 1-17)(TR 650, L 19-21)

Monte Bona refused on three grounds. One, TPS was claiming an offset against the Respondent; two, the amount due was unknown because of a claim of a Mr. Maser; and three, no accounting of food sales could be obtained from Gordon Wheeler, the concessionaire and director of the Respondent. (TR 699, L 23-25)(TR 100, L 1-10)

Respondent claims all offsets were settled by the May 12, 1982 agreement and the payment should be made.

Respondent operated the Heber Creeper Train from 1971 through 1980. TPS operated the Heber Creeper Train for the years 1981 and 1982.

The Respondent filed suit against TPS and Monte Bona, President of TPS, for the food concession money in Suit No 5859 in Wasatch County, Utah.

The Respondent filed the present action against the Appellants December 30, 1982, alleging the Appellants had breached their fiduciary duty to Respondent in several different matters, but at the time of trial the alleged breach of fiduciary duty was limited to three issues. (TR 26, L 1-11) A fourth issue was rejected by the court, but evidence was allowed on the fourth issue in the event the Respondent persuaded the court this issue was properly before the court. (TR 43, L 17-25)(TR 44, L 1-12)

The three issues tried by the court were as follows:

1. Transfer of a right-of-way to TPS rather than to Heber Creeper, Inc.;
2. Permit dissipation of Heber Creeper, Inc. assets on the terminal grounds;
3. Failure to persuade TPS to honor the 1982 Settlement Agreement between Respondent and TPS and particularly as it pertained to the payment of money for food and beverage sales.

The fourth issue was rejected by the court but Respondent was allowed to make a proffer of proof as follows:

4. Failure to get TPS to purchase Respondent's assets and stock and assume debts of Heber Creeper. (TR 43, L 17-25)  
(TR 44, L 1-3)

The trial court found against the Respondent and for the Appellants, no cause of action on issues 1, 2, and 4. The court found for the Respondent and against the Appellants on issue 3 and granted judgment in the sum of \$17,385.00 plus interest from December 31, 1982, and costs in the sum of \$1,070.40.

Appellant Gordon Mendenhall was not a member or officer of the Respondent from November 1981, to May 14, 1982. It was during this period of time that the so called May 12, 1982 Settlement Agreement was formulated and signed. (See Exhibit 10)

Neither Appellant took part in the formation of the agreement, either in behalf of the Respondent or TPS (TR 117, L 3-9) (TR 123, L 25)(TR 124, L 1-8) The Appellants did not sign the agreement. (TR 75, L 8-21)

#### SUMMARY OF ARGUMENT

Both Appellants are original shareholders in the Respondent Heber Creeper, Inc.

Appellants were originally charged with breach of fiduciary duty to Heber Creeper, Inc., on four counts. The trial judge held for the Appellants on three of the four counts. On the fourth count the court found the breach of duty to have occurred when the Appellants failed to get TPS to pay food concession money according to an agreement, which is Exhibit 2. When the agreement, Exhibit 2, was prepared and signed, May 12, 1982, neither Appellant signed said agreement and neither Appellant was a director of Heber Creeper, Inc.

Gordon Mendenhall had been a director Heber Creeper, Inc. for several years but was voted out as a director in November of 1981. He was voted in again on May 14, 1982. (See page 15 of Exhibit 9.) He resigned thirty-eight days later on June 22, 1982. Mendenhall was a trustee of TPS from 1978 to September 1982, when he resigned. (See Exhibit 10.)

Leon Ritchie was elected director of Heber Creeper, Inc. May 14, 1982. (See page 15, Exhibit 9.) He was asked to resign as a

director in September of 1982 and when he refused to resign he was voted out. (See Exhibit 26.)

Leon Ritchie served on the TPS board from 1982 to September of 1982, as a representative of the Sons of the Utah Pioneers. (See Exhibit 10.)

The law is clear that a fiduciary duty between a director or an officer in the corporation ends when there is a termination of that relationship. The one exception involves trade secrets which is not involved in this lawsuit.

The law encyclopedias are unanimous on this rule of law and the cases cited in Appellants Brief show that various states, including Utah, follow this rule.

Even if the fiduciary relationship did not end with the resignation or termination of Appellants from Heber Creeper, Inc., there was still no breach of duty by the Appellants. There is no evidence that the Appellants did anything in violation of their duty. In fact, the record is clear, as pointed out in the arguments below, that Appellants took actual steps to try and see that TPS paid the money due Heber Creeper, Inc. Their efforts to get the payments made were thwarted by Monte Bona, President of TPS, who refused to sign the checks.

The Appellants were interested in operating a train because only through a going concern could anyone expect to receive any money or pay any bills.

The judgment should be reversed upon the following grounds:

1. No fiduciary relationship existed at the time of the alleged breach;
2. No breach of any fiduciary duty occurred either by acts of commission or omission;
3. There is insufficient evidence to determine the amount of money due to Heber Creeper, Inc. from TPS;
4. Any money due Heber Creeper, Inc. is an obligation of TPS and not these Appellants.

#### A R G U M E N T

##### POINT I

THE FIDUCIARY RELATIONSHIP BETWEEN A CORPORATION  
AND ITS OFFICERS OR DIRECTORS TERMINATES WHEN  
THE OFFICER OR DIRECTOR RESIGNS OR IS REMOVED.

The general rule is stated in 19 Am Jur 2d 681 as follows:

"After there has been a severance of official relationships, either because of resignation or removal, generally, a director or officer occupies no relation of trust or confidence to the corporation."

The same general rule is again expressed at 19 CJS 107 as follows:

"After a director of a corporation ceases to be such, he occupies no relation to it of trust or confidence and deals with it like any other stranger---."

This general rule is again stated in 3 Fletcher CYCL Corp. permanent edition 203 as follows:

"When a corporate officer ceases to act as such, either because of his resignation or removal from office, or because of the insolvency of the corporation, the fiduciary relationship ceases."

The general rule as stated above has been followed by court in various jurisdictions.

A leading case in from Florida, Renpack, Inc., v Oppenheimer 104 So.2d 642 where the Supreme Court of Florida held:

"Even though plans for establishing a competing business were made while a corporate officer and salesman were still connected with the corporation, and they obtained names of its customers, took away some of them and acquired distributorships of two manufacturers for whom corporation had been sole distributor, corporation was not entitled to injunctive relief restraining officers and salesmen and other defendants from engaging and competing competitive business with corporation and from soliciting business from its customers."

"After there has been a severance of official relationship, either because of resignation or removal, generally a director or officer occupies no relation to the corporation of trust or confidence and deals with it thereafter like any other stranger, and he is not precluded from engaging in competing business."

Kansas followed the general rule in the Case of Parsons Mobile Products v Remmert 351 P.2d 428 when it held as follows:

"At time director or officer of corporation is removed or resigns from the corporation, his position of trust with the corporation is terminated."

Wyoming, in a 1985 case, Lynch v Patterson, 701 P.2d 1125, followed the theory of this rule and stated:

"Absent an agreement to the contrary, a director or officer who terminates his position with the corporation has a right to open his own business and to compete for former clients."

Utah also followed this general rule in the case of Microbiological Research Corporation v Nademmm Muna 625 P.2d 690, wherein this court held:

"When corporate officers cease to act as such because of resignation or removal, the fiduciary relationship ceases; however, where transaction had it inception while fiduciary relationship was in existence, the employee cannot, by resigning, cannot disclose all he knows about the negotiations, subsequently continue and consummate the transaction in a manner in violation of its fiduciary duties."

## POINT II

### APPELLANTS TRIED TO GET TPS TO PAY TO HEBER CREEPER INC., THE FOOD CONCESSION MONEY.

Exhibit 42 is the minutes of TPS dated August 18, 1982. In the fifth paragraph of said exhibit, the parties indicate the desire to settle their differences and "any payment due to Heber Creeper, Inc. from TPS should be paid."

Exhibit 45 is minutes of TPS dated September 7, 1982. The fourth paragraph states: "Richard Buys made the motion that the ten percent payment due to Heber Creeper, Inc., on the sale of food and beverages be paid immediately. The motion was seconded by Gordon Mendenhall and approved."

Gordon Mendenhall as Treasurer of TPS prepared the checks but he did not control the signing of the checks. (TR 445, L 13-18) Gordon Mendenhall was authorized by TPS to pay the \$10,000.00 due Heber Creeper, Inc., but Monte Bona, President of TPS, told Gordon not to make the payment. (TR 643, L 12-25)(TR 644, L 1-17) Gordon Mendenhall did not make the \$10,000.00 payment because Monte Bona said "no". (TR 650, L 19-21)

Leon Ritchie indicated the desire that payments due the Heber Creeper, Inc. be made. (TR 651, L 19-25)(TR 652, L 1-4)

Monte Bona as President of TPS gave several reasons why the payment to Heber Creeper, Inc. was not made and one of them was that they could not get an accounting from Gordon Wheeler, who was operating the food concessions. (TR 696, L 20-25)(TR 699, L 24-25)(TR 700, L 1-10)

Gordon Mendenhall and Leon Ritchie tried to get the \$10,000.00 paid and Monte Bona had the payment held up until the other variables could be cleared. (TR 719, L 14-25)(TR 720, L 17)

Gordon Mendenhall testified he wrote to Gordon Wheeler on two occasions requesting the accounting of food sales but could not get a reply. (TR 726, L 25)(TR 727, L 1-20)

Monte Bona, President of TPS, testified that Leon Ritchie did not have anything to do with the failure of TPS to pay the \$10,000.00 to Heber Creeper, Inc. (TR 651, L 19-25)(TR 653, L 1-3)

### POINT III

THE JUDGMENT AWARDED TO RESPONDENT WAS BASED  
ON RECORDS SO INCOMPLETE THAT NO AWARD COULD  
PROPERLY BE MADE

The court's judgment in behalf of the Respondent of \$17,385.00 is based on Exhibit 34 and the testimony of Mr. King, accountant for Squires and Company, who also did some work for the Heber Creeper, Inc.

Exhibit 34 was objected to by Appellants and should not have been received in evidence by the court. (TR 365, L 15-25)



Information for the year 1982 was furnished to Mr. King by Mr. John Roberts. (TR 354, L 9-25)(TR 364, L 2-10) Mr. Roberts' information is Exhibit 33, which the court refused to admit in evidence. (TR 357, L 2-10) Mr. King saw no other records other than Exhibit 33 purporting to be records of TPS. (TR 355, L 1-8) Appellants objected to Exhibit 34 because it was based on Exhibit 33. (TR 365, L 15-24) None of the figures of Mr. King were audited. (TR 371, L 25), (TR 372, L 1-14) and (TR 375, L 24).

On cross-examination Mr. King testified that he did not know Mr. John Roberts except he was a bookkeeper, did not know his qualifications, did not know if the records given to King by Roberts were complete and King testified he did not know if he had all the records for 1982, when he made Exhibit 34. (TR 374, L 1-25) (TR 375, L 1-12)

Gordon Mendenhall did the accounting for TPS from May through September. (TR 395, L 12-16) Gordon Mendenhall did not give John Roberts any information regarding TPS. (TR 497, L 12-16) King testified that he never saw any accounting prepared by Gordon Mendenhall. (TR 375, L 13-16)

Based on incomplete records, records whose source is uncertain, and using information from Exhibit 33, which was rejected by the court, Mr. King made an estimate of the food sales for 1982. (TR 364, L 2-25) (TR 365, L 1-11)

The court used this estimate based on Exhibit 33, which the court had rejected, and on testimony of a witness who admitted he did not know if records were complete, admitted they were not

audited, and does not know if there were other records to render judgment.

#### POINT IV

#### THE AMOUNT DUE, IF ANY, FROM TPS TO RESPONDENT IS TOO UNCERTAIN TO BE A BASIS FOR A JUDGMENT AGAINST THE APPELLANTS

The Settlement Agreement, Exhibit 2, provided that TPS would pay to Heber Creeper, Inc., a minimum of \$10,000.00 or a percentage of the food sales, whichever was greater. Said agreement further provided that if the NARFRAM cars owned by a Mr. Maser and sometimes referred to as the Maser Cars, were not available that the minimum payment would be reduced \$2,000.00 per car or two percent per car of the gross food sales, depending on the method payment.

There were three cars that were not available which made a reduction of \$6,000.00 from \$10,000.00, or six percent from the gross food sales.

Nate Maser was constantly demanding that he be paid \$6,000.00 under the Settlement Agreement, contending his cars could not be used. (TR 696, L 17-20)

Gordon Wheeler was the food concessionair from the Heber Creeper Train in 1982. He was also a stockholder in Heber Creeper, Inc., owning 513 shares and page 2 of Exhibit 1 shows that for 1982 he was a director for Heber Creeper, Inc. Nevertheless he refused to give an accounting or pay any money over to TPS. (TR 696, L 20-25) (TR 700, L 7-10)

Monte Bona, President of TPS, states three reasons why TPS did not pay money to Heber Creeper, Inc. First, TPS claimed to have an

offset of \$37,000.00; second, was the Maser problem regarding the use of the NARFRAM Cars; and third, the failure of Gordon Wheeler to give an accounting of food sales. (TR 700, L 1-10)

Even so, this was a problem between Heber Creeper, Inc. and TPS and not the obligation of the Appellants.

#### POINT V

APPELLANT LEON RITCHIE ACTED AS A PEACEMAKER  
AND TRIED TO RESOLVE THE DIFFERENCES BETWEEN  
HEBER CREEPER, INC. AND TPS FOR THE BENEFIT  
OF ALL.

Leon Ritchie was interested in running a train, resolving the differences of the parties, and hoping that someday the stockholders would receive their investment.

Leon Ritchie was put on the Board of Trustees to represent the Sons of the Utah Pioneers. (TR 707, L 25-27)(TR 708, L-6)

Appellant Ritchie's interest was to do the best in the interest of the train. (TR 719, L 8-13)

Appellant Ritchie represented both corporations fairly and was interested in running a railroad. (TR 734, L 6-14)(TR 235, L 14-23) Leon Ritchie attended the TPS meetings to represent the Sons of the Utah Pioneers and help TPS and Heber Creeper, Inc. run the train. (TR 752, L 11-25)(TR 753, L 1-25) Leon Ritchie's object in serving as a director was to assist in operating the train and stop the lawsuits. (TR 757, L 10-25)(TR 758, L 1-6)

Leon Ritchie received no pay from any source and was just interested in seeing the trains run and the bills get paid. (TR 759, L 8-23)

## SUMMARY OF AGRUMENT

Both Appellants are original shareholders in the Respondent Heber Creeper, Inc.

Appellants were originally charged with breach of fiduciary duty to Heber Creeper, Inc., on four counts. The trial judge held for the Appellants on three of the four counts. On the fourth count the court found the breach of duty to have occurred when the Appellants failed to get TPS to pay food concession money according to an agreement, which is Exhibit 2. When the agreement, Exhibit 2, was prepared and signed, May 12, 1982, neither Appellant signed said agreement and neither Appellant was a director of Heber Creeper, Inc.

Gordon Mendenhall had been a director of Heber Creeper, Inc. for several years but was voted out as a director in November of 1981. He was voted in again May 14, 1982. (See page 15 of Exhibit No. 9.) He resigned thirty-eight days later on June 22, 1982. Mendenhall was a trustee of TPS from 1978 to September 1982, when he resigned. (See Exhibit 10.)

Leon Ritchie was elected director of Heber Creeper, Inc. May 14, 1982. (See page 15, Exhibit 9.) He was asked to resign as a director in September of 1982 and when he refused to resign he was voted out. (See Exhibit 26.)

Leon Ritchie served on the TPS board from 1981 to September of 1982, as a representative of the Sons of the Utah Pioneers. (See Exhibit 10.)

The law is clear that a fiduciary duty between a director or an officer in the corporation ends when there is a termination of that relationship. The one exception involves trade secrets which is not involved in this lawsuit.

The law encyclopedias are unanimous on this rule of law and the cases cited in Appellants Brief show that various states, including Utah, follow this rule.

Even if the fiduciary relationship did not end with the resignation or termination of Appellants from Heber Creeper, Inc., there was still no breach of duty by the Appellants. There is no evidence that the Appellants did anything in violation of their duty. In fact, the record is clear, as pointed out in the arguments below, that Appellants took actual steps to try and see that TPS paid the money due Heber Creeper, Inc. Their efforts to get the payments made were thwarted by Monte Bona, President of TPS, who refused to sign the checks.

The Appellants were interested in operating a train because only through a going concern could anyone expect to receive any money or pay any bills.

The judgment should be reversed upon the following grounds:

1. No fiduciary relationship existed at the time of the alleged breach;
2. No breach of any fiduciary duty occurred either by acts of commission or omission;

3. There is insufficient evidence to determine the amount of money due to Heber Creeper, Inc. from TPS;
4. Any money due Heber Creeper, Inc. is an obligation of TPS and not these Appellants.

## C O N C L U S I O N

Any money due to the Respondent is owed by TPS and not the Appellants.

There is no evidence in the transcript of the trial to show that either Appellant did anything to hurt or harm the Respondent. There is ample evidence that they tried everything they could to make the Heber Creeper a successful operation so the community and the stockholders might benefit from a profitable operation. This could only result in good for the Respondent. There was no breach of a fiduciary duty while the Appellants were directors of Respondent, or after their resignations.

The fiduciary duty of Appellants as officers or directors to the Respondent terminated when the Appellants resigned from Heber Creeper, Inc. There would be no hold over responsibility to Respondent unless secret or confidential matters were involved and this is not the case.

The judgment awarded the Respondent against the Appellants was based upon Exhibits 2 and 34. Exhibit 2 is an agreement between Heber Creeper, Inc. and TPS. Neither Appellant had any part in its preparation or adoption. The food concession money to be paid under Exhibit 2 was an obligation of TPS. The transcript shows that both Appellants made efforts to have TPS make payment to the Respondent, but that payment was stopped and refused by Monte Bona, President of TPS. Heber Creeper, Inc. recognized TPS was the party responsible

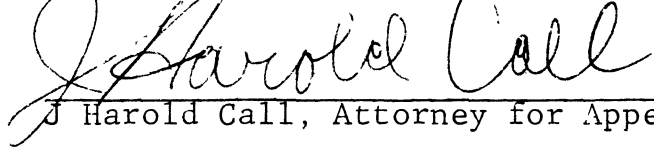
and actually filed suit against TPS and monte Bona before bringing this action against Appellants.

Exhibit 34 was based upon incomplete records and an estimate of an accountant who damits that his records were not complete and taken from Exhibit 33. Exhibit 33 was refused by the court and not admitted into evidence.

Appellants used reasonable efforts to get TPS to pay Respondent. However, the Appellants are not and were not guarantors of any money due Respondent.

The judgment against Appellants should be reversed.

Respectfully submitted,

A handwritten signature in cursive script that reads "J. Harold Call". The signature is written in dark ink and is positioned above a horizontal line.

J. Harold Call, Attorney for Appellants



IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY  
STATE OF UTAH

HEBER CREEPER, INC., a  
Utah corporation,

Plaintiff,

vs.

GORDON MENDENHALL and  
LEON RITCHIE,

Defendants.

MEMORANDUM DECISION

Civil No. 5871

This action was tried to the Court, the Honorable Cullen Y. Christensen presiding, in Heber City, Wasatch County, State of Utah, on March 11, 12, 13, and 19, 1985. Peter C. Collins represented plaintiff. J. Harold Call represented defendant Gordon Mendenhall. Grant G. Orton represented defendant Leon Ritchie. The Court, having fully reviewed and considered the pleadings and other documents on file and the evidence admitted at trial and being fully advised in the premises, now finds and concludes as follows:

1. Plaintiff is a Utah business corporation and has been, at all times material thereto, qualified to do business in Wasatch County, State of Utah, and all of its shareholders were, at the time of trial, and have been, at all times

material hereto, minority shareholders.

2. Both defendants have been, at all times material hereto, residents of Wasatch County, State of Utah.

3. The acts and conduct complained of herein occurred in Wasatch County, State of Utah.

4. Plaintiff was incorporated on or about January 7, 1971, as Wasatch Mountain Railway & Development Company.

5. On or about June 28, 1972, plaintiff's name was duly changed to its present name.

6. Defendant Mendenhall was an incorporator of plaintiff and was a director of plaintiff uninterruptedly from the time of plaintiff's incorporation until December 1981.

7. Defendant Mendenhall was also a director of plaintiff from May 14, 1982, until at least June 22, 1982.

8. Defendant Mendenhall was an officer (vice-president) of plaintiff from 1975 through 1979.

9. Defendant Mendenhall was also an officer (Secretary-treasurer) of plaintiff from May 14, 1982, until at least June 22, 1982.

10. Defendant Ritchie was an incorporator of plaintiff and was an original director of plaintiff and a director of plaintiff during the years 1971, 1972, 1979, and 1980.

11. Defendant Ritchie was also a director of plaintiff from May 14, 1982, until February of 1983.

12. Defendant Ritchie was an officer (vice-president) of plaintiff from May 14, 1982, until at least September 17, 1982.

13. Timpanogos Preservation Society (hereinafter, "TPS"), a Utah not-for-profit corporation, was incorporated on August 29, 1978.

14. Defendant Mendenhall was an incorporator of TPS, was approved by plaintiff to be a member of the governing board of trustees of TPS for the purpose of protecting plaintiff's interests, and served as a trustee of TPS uninterruptedly from the time of the incorporation of TPS until at least November 30, 1982.

15. Defendant Mendenhall served as an officer of TPS uninterruptedly from the time of the incorporation of TPS until at least November 30, 1982, holding positions, at various times during that period, as treasurer, secretary, and secretary-treasurer.

16. Defendant Ritchie served as a trustee on the governing board of TPS uninterruptedly from at least July 10, 1981, until at least November 30, 1982.

17. Defendant Ritchie served as an officer (treasurer) of TPS at least during a part of 1982 and was released from that position on July 13, 1982.

18. Both defendants have been represented herein by the same law firm (Richards, Brandt, Miller & Nelson of Salt Lake City, Utah) that represented TPS in related litigation in this Court (Civil No. 5859).

19. Plaintiff operated the train commonly known as the Heber Creeper from the 1971 through 1980 operating seasons.

20. TPS operated the Heber Creeper train during the 1981 and 1982 operating seasons.

21. The Heber Creeper line ran, at all times material hereto, from terminal grounds located in Heber City, Wasatch County, State of Utah, to the Bridal Veil Falls terminal, located in Provo Canyon, in Utah County, State of Utah.

22. Plaintiff's operation of the Heber Creeper train showed a small annual average cash loss (\$1,085.00) for operating seasons 1971 through 1980.

23. Excluding operating years 1975 and 1976, during which years plaintiff suffered cash losses in connection with certain non-train-operation business enterprises, plaintiff showed an average annual cash profit of \$2,881.00 for the years during which plaintiff operated the Heber Creeper train.

24. Plaintiff was in financial difficulty at all times material hereto.

25. Part of the right-of-way on which the Heber Creeper line runs, that section running from the Heber City terminal grounds to the Deer Creek Reservoir dam, was given by an agency of the State of Utah to TPS in August of 1980, prior to the time TPS began operating the Heber Creeper train.

26. Although he was aware, since at least as early as March 6, 1980, of the possibility that the State of Utah would be giving away the said right-of-way section, defendant Mendenhall took no affirmative action to further the chances of plaintiffs being given the said right-of-way section; that in connection with such matter, the defendant Mendenhall was informed by Monte Bona, as was Lowe Ashton, president of plaintiff, some weeks prior to the transfer of said property, that the plaintiff corporation would not be eligible to receive title to such property because of the "For-Profit" status of plaintiff; that the possibility of such a transfer of property was communicated to the plaintiff's board members through Bona and Ashton; that Ashton as president of plaintiff did not disagree with the transfer as proposed, and he relied on the representations of Bona; that it was not unreasonable for defendant Mendenhall to fail to question the recommendations of Bona at the time (August 1980), and under the circumstances then existing.

27. In early 1981 plaintiff and TPS discussed, in a series of joint and separate board meetings, propositions by which TPS would lease from plaintiff the right to operate the Heber Creeper train for one year and that TPS would, in connection with that lease, among other things, acquire certain assets of and discharge certain debts of plaintiff.

28. In connection with the discussions referenced in the foregoing paragraph 27 TPS was, among other things, (1) to satisfy debts owed by plaintiff to Ashton Oil and Transportation Company in the amount of at least \$130,000.00; and (2) to acquire the then outstanding 116,719 shares of plaintiff by paying one dollar per share, for a total additional payment of \$116,719.00.

29. The arranged-for lease was in fact executed by plaintiff and TPS, but the said purchase and debt retirement arrangement between plaintiff and TPS was never consummated.

30. On August 18, 1981, the TPS board of trustees approved a proposal that would have, if consummated, among other things, caused TPS in exchange for TPS's acquisition of plaintiff's subject assets to assume plaintiff's obligation to Ashton Oil (Lowe Ashton) in the sum of \$125,000.00 and plaintiff's obligation to SBA in the amount of \$315,000.00; that defendant Mendenhall and Richard Buys, then-president

of TPS, were directed to make to plaintiff the formal proposal so adopted by TPS.

31. On August 19, 1981, defendant Mendenhall, along with the said Richard Buys, submitted to plaintiff a formal proposal substantially in accordance with the TPS adopted proposal referenced in paragraph 30 hereof; that such proposal did not include any provision for TPS to buy the outstanding shares of plaintiff.

32. That on August 27, 1981, plaintiff through its president, Lowe Ashton, rejected such proposal.

33. That the record does not establish by a preponderance of the evidence what steps defendant Mendenhall thereafter took, affirmative or otherwise, in the furtherance or withdrawal of the arrangement referenced in paragraph 30 hereof.

34. On May 12, 1982, a Settlement Agreement was executed, of which both defendants were aware, resolving certain prior litigation and to which plaintiff and TPS, *(except for civil cases No 5722 & No 5720, neither of which is pertinent here)* among others, were signatories, which expressly did away with and laid to rest any and all past claims and disputes between and among its signatories, and which, among other things, (a) required plaintiff to allow TPS to operate the Heber Creeper train in operating seasons beginning in 1982; (b) required TPS to pay to plaintiff (i) 10%

of the gross income from the sale of certain food and non-alcoholic beverage sales made in connection with the operation of the Heber Creeper train in operating seasons beginning in 1928, or (ii) \$10,000.00 per operating season, whichever figure was greater; (c) required TPS to establish, in connection with the operation of the Heber Creeper train, accounting procedures in conformity with generally accepted principles of accounting so the audits and financial statements could be adequately prepared; and (d) required TPS to employ internal and external accounting controls for the purpose of assuring an accurate reflection of cash intake and expenditures relative to the operation of the Heber Creeper train.

35. Both defendnats were present at the May 14, 1982, conclusion of plaintiff's 1982 annual shareholders' meeting, during which those present who were about to be named directors, including both defendants, were informed that if they should accept their positions of directors, they would assume fiduciary obligations and would breach their fiduciary obligations if they should do anything that would undermine the Settlement Agreement referenced in the foregoing paragraph 34 hereof.



36. On June 12, 1982, plaintiff's board of directors met, with defendant Mendenhall present as director and secretary of plaintiff, and at that meeting there was discussed, among other things, concerns of one or more directors with respect to the competence and honesty, or lack thereof, of Mr. Monte Bona, the then manager of TPS, and at that meeting those present (all directors of plaintiff except defendant Ritchie) unanimously approved a policy of confidentiality with respect to the discussion of plaintiff's affairs with other parties.

37. On June 14, 1982, defendant Mendenhall related to the TPS board of trustees some of the items that were discussed in plaintiff's said meeting and made the motion that the said Mr. Monte Bona be appointed to the board of trustees of TPS, which motion was seconded and approved.

38. From at least May 1982 until at least September 1982, defendant Mendenhall was paid \$400.00 per month by TPS for the rendering of accounting and related services to TPS.

39. At some time prior to June 22, 1982, defendant Mendenhall became aware of the fact that TPS planned to assert a substantial claim against plaintiff based on matters

arising prior to the execution of the said Settlement Agreement referenced in paragraph 34 hereof; that defendant Mendenhall did not apprise plaintiff of his said awareness or of the fact of such claim prior to June 22, 1982.

40. On or about June 22, 1982, defendant Mendenhall submitted to Mr. Gene Moore, then-president of plaintiff, a letter of resignation from defendant Mendenhall's position as director and secretary-treasurer of plaintiff.

41. On or about July 1, 1982, defendant Mendenhall wrote Mr. Gene Moore a letter asserting a claim in favor of TPS and against plaintiff in the amount of \$37,737.35 for alleged claims that arose, if at all, prior to the execution of the said Settlement Agreement referenced in paragraph 34 hereof.

42. Defendant Mendenhall, who was paid by TPS to do the TPS accounting work, failed, both prior to and subsequent to June 22, 1982, to cause TPS to establish reasonably acceptable accounting procedures, and to cause TPS to employ the internal and external cash controls required by the said Settlement Agreement.

43. On September 17, 1982, at a meeting of plaintiff's board of directors, defendant Ritchie was removed as plaintiff's vice president.

44. Subsequent to May 14, 1982, and both prior to and subsequent to July 1, 1982 until at least November 30, 1982, neither defendant took action to assure that payments under the said Settlement Agreement referred to in paragraph 34 would be made to plaintiff.

45. The regular 1982 Heber Creeper train operating season ended on or about the first Monday in September, 1982, and TPS operated the Heber Creeper train throughout the 1982 season.

46. At all times subsequent to May 14, 1982, until at least November 30, 1982, TPS had the ability to pay plaintiff all sums due plaintiff under the terms of the said Settlement Agreement; that TPS, with the concurrence of both defendants, in effect treated any such sums as an offset against amounts claimed by TPS to be due from plaintiff, which claims pre-dated said Settlement Agreement.

47. No payment whatsoever has been made to plaintiff by TPS since the time the said Settlement Agreement was executed.

48. TPS is now in bankruptcy proceedings and the 1982 season was the last operating season during which TPS operated the Heber Creeper train.

49. Based on the reported 1982 total gross income from the operation of the Heber Creeper train and on the historic relationship between total gross income and food and non-alcoholic beverage gross income experienced in the operation of the Heber Creeper train, the Court finds that the food and non-alcoholic beverage gross income of TPS for 1982 was \$173,850.00, and that plaintiff's entitlement thereto, pursuant to the terms of the said Settlement Agreement, would thus be \$17,385.00.

50. Both defendnats breached their duty of loyalty and care to plaintiff during the 1982 Heber Creeper operating season by allowing and actively participating in the TPS policy and practice of non-payment to plaintiff of the monies whose payment was mandated by the said settlement agreement.

51. Both defendants knew that TPS owed plaintiff for the food sales and knew or should have known that their said allowing and participating in said policy and practice would damage plaintiff in the amount of \$17,385.00.

52. Plaintiff's proven damages against both defendants, suffered as a direct and proximate result of both defendants' acts and omissions in connection with the said policy and practice of non-payment, is \$17,385.00.

53. Sometime prior to June 22, 1982, a Harriman railroad coach belonging to plaintiff and located on the Heber City terminal grounds was gutted by TPS workmen and re-fitted as a dining car; that the seats have been removed from the Heber City terminal grounds and have never been replaced; that the evidence does not preponderate in support of the plaintiff's contention that the defendants are chargeable, as directors of plaintiff, with such removal, nor with the contention that plaintiff has in fact sustained damage as a result of the conversion of such coach to a dining car.

54. During the 1982 Heber Creeper operating season metal scrap belonging to plaintiff was taken from the Heber City terminal grounds as part of and pursuant to TPS policies and practices; that the evidence does not preponderate in support of plaintiff's contention that defendants knew or should have known that such scrap may have been something more than junk and may have been of value in the operation of said railroad.

Based on the foregoing the Court now concludes as follows:

1. The Court has jurisdiction over the parties hereto and subject matter hereof and venue is properly

laid in this Court.

2. Both defendants owed plaintiff a fiduciary duty of loyalty and care, both while they were serving as directors of plaintiff and thereafter, with respect to corporate matters existing at the time of such service which matters were within their knowledge or of which they should have been aware as directors of the plaintiff.

3. Defendant Mendenhall breached his fiduciary duty of loyalty and care to plaintiff with respect to his failure to honor and insist upon performance by TPS of the 1982 Settlement Agreement as it pertains to payment to plaintiff of food and non-alcoholic beverage sales percentage amounts, and defendant Mendenhall is jointly and severally liable in damages to plaintiff in connection therewith.

4. Plaintiff has been damaged as a direct and proximate result of defendant Mendenhall's breaches of his fiduciary duty of loyalty and care to plaintiff in the principal amount of \$17,385.00, and plaintiff is entitled to and should be granted judgment against defendant Mendenhall in that amount.

5. Defendant Ritchie breached his fiduciary duty of loyalty and care to plaintiff with respect to his failure to honor and insist upon performance by TPS of the 1982 Settlement Agreement as it pertains to payments to

(Mem. Dec.)

-15-

plaintiff of food and non-alcoholic beverage sales percentage amounts, and defendant Ritchie is jointly and severally liable in damages to plaintiff in connection with each said incident.

6. Plaintiff has been damaged, as a direct and proximate result of defendant Ritchie's duty of loyalty and care to plaintiff, in the principal amount of \$17,385.00, and plaintiff is entitled to and should be granted judgment against defendant Ritchie in that amount.

7. Plaintiff is entitled to interest as provided by law and to its costs of court expended.

8. That the claims of defendant Ritchie for indemnification for attorney fees should be denied.

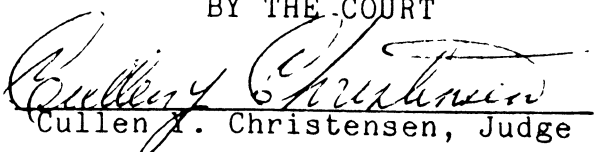
9. That except as above indicated, the claims of plaintiff against the defendants and each of them should be dismissed.

10. Counsel for plaintiff is directed to prepare and serve, pursuant to Rule 2.9, appropriate Findings of Fact, Conclusions of Law and Judgment in accordance with the foregoing.

--ooOoo--

Dated this 16<sup>th</sup> day of July 1985.

BY THE COURT

  
Cullen A. Christensen, Judge

PETER C. COLLINS 0700  
Bugden, Collins & Keller  
Attorney for Plaintiff  
Judge Building, Suite 426  
#8 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7282

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

-----oo0oo-----

HEBER CREEPER, INC., a	:	
Utah corporation,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Plaintiff,	:	
	:	
-v-	:	
	:	
GORDON MENDENHALL and	:	Civil No. 5871
LEON RITCHIE,	:	Judge Christensen
	:	
Defendants.	:	

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This action was tried to the Court, the Honorable Cullen Y. Christensen presiding, in Heber City, Wasatch County, State of Utah, on March 11, 12, 13, and 19, 1985. Peter C. Collins represented plaintiff. J. Harold Call represented defendant Gordon Mendenhall. Grant G. Orton represented defendant Leon Ritchie. The Court, having fully reviewed and considered the pleadings and othere documents on file and the evidence admitted at trial and being fully advised in the premises, now makes and enters its

FINDINGS OF FACT

1. Plaintiff is a Utah business corporation and has been, at all times material hereto, qualified to do business in



Wasatch County, State of Utah, and all of its shareholders were, at the time of trial, had have been, at all time material hereto, minority shareholders.

2. Both defendants have been, at all times material hereto, residents of Wasatch County, State of Utah.

3. The acts and conduct complained of herein occurred in Wasatch County, State of Utah.

4. Plaintiff was incorporated on or about January 7, 1971 as Wasatch Mountain Railway & Development Co.

5. On or about June 28, 1972, plaintiff's name was duly changed to its present name.

6. Defendant Mendenhall was an incorporator of plaintiff and was a director of plaintiff uninterruptedly from the time of plaintiff's incorporation until December 1981.

7. Defendant Mendenhall was also a director of plaintiff from May 14, 1982 until at least June 22, 1982.

8. Defendant Mendenhall was an officer (vice-president) of plaintiff from 1975 through 1979.

9. Defendant Mendenhall was also an officer (secretary-treasurer) of plaintiff from May 14, 1982 until at least June 22, 1982.

10. Defendant Ritchie was an incorporator of plaintiff and was an original director of plaintiff and a director of plaintiff during the years 1971, 1972, 1979, and 1980.

11. Defendant Ritchie was also a director of plaintiff from May 14, 1982 until February of 1983.

12. Defendant Ritchie was an officer (vice-president)

of plaintiff from May 14, 1982 until at least September 17, 1982.

13. Timpanogos Preservation Society (hereinafter, "TPS"), a Utah not-for-profit corporation, was incorporated on or about August 29, 1978.

14. Defendant Mendenhall was an incorporator of TPS, was approved by plaintiff to be a member of the governing board of trustees of TPS for the purpose of protecting plaintiff's interests, and served as a trustee of TPS uninterruptedly from the time of the incorporation of TPS until at least November 30, 1982.

15. Defendant Mendenhall served as an officer of TPS uninterruptedly from the time of the incorporation of TPS until at least November 30, 1982, holding positions, at various times during that period, as treasurer, secretary, and secretary-treasurer.

16. Defendant Ritchie served as a trustee on the governing board of TPS uninterruptedly from at least July 10, 1981 until at least November 30, 1982.

17. Defendant Ritchie served as an officer (treasurer) of TPS at least during a part of 1982 and was released from that position on July 13, 1982.

18. Both defendants have been represented herein by the same law firm (Richards, Brandt, Miller & Nelson of Salt Lake City, Utah) that represented TPS in related litigation in this Court (Civil No. 5859).

19. Plaintiff operated the train commonly known as the Heber Creeper from the 1971 through 1980 operating seasons.

20. TPS operated the Heber Creeper train during the 1981 and 1982 operating seasons.

21. The Heber Creeper line ran, at all time material hereto, from terminal grounds located in Heber City, Wasatch County, State of Utah, to the Bridal Veil Falls terminal, located in Provo Canyon, in Utah County, State of Utah.

22. Plaintiff's operation of the Heber Creeper train showed a small annual average cash loss (\$1,085.00) for operating seasons 1971 through 1980.

23. Excluding operating years 1975 and 1976, during which years plaintiff suffered cash losses in connection with certain non-train-operation business enterprises, plaintiff showed an average annual cash profit of \$2,881.00 for the years during which plaintiff operated the Heber Creeper train.

24. Plaintiff was in financial difficulty at all times material hereto.

25. Part of the right-of-way on which the Heber Creeper line runs, that section running from the Heber City terminal grounds to the Deer Creek Reservoir dam, was given by an agency of the State of Utah to TPS in August of 1980, prior to the time TPS began operating the Heber Creeper train.

26. Although he was aware, since at least as early as March 6, 1980, of the possibility that the State of Utah would be giving away the said right-of-way section, defendant Mendenhall took no affirmative action whatsoever to further the chances of plaintiff's being given the said right-of-way section; in connection with such matter, the defendant Mendenhall was informed by

Monte Bona, as was Lowe Ashton, president of plaintiff, some weeks prior to the transfer of said property, that the plaintiff corporation would not be eligible to receive title to such property because of the "For-Profit" status of plaintiff; the possibility of such a transfer of property was communicated to the plaintiff's board members through Bona and Ashton; that Ashton as president of plaintiff did not disagree with the transfer as proposed, and he relied on the representations of Bona; that it was not unreasonable for defendant Mendenhall to fail to question the recommendations of Bona at the time (August 1980), and under the circumstances then existing.

27. In early 1981 plaintiff and TPS discussed, in a series of joint and separate board meetings, propositions by which TPS would lease from plaintiff the right to operate the Heber Creeper train for one year and that TPS would, in connection with that lease, among other things, acquire certain assets of and discharge certain debts of plaintiff.

28. In connection with the discussions referenced in the foregoing paragraph 27 TPS was, among other things, (1) to satisfy debts owed by plaintiff to Ashton Oil and Transportation Company in the amount of at least \$130,000.00; and (2) to acquire the then outstanding 116,719 shares of plaintiff by paying one dollar per share, for a total additional payment of \$116,719.00.

29. The arranged-for lease was in fact executed by plaintiff and TPS, but the said purchase and debt retirement arrangement between plaintiff and TPS was never consummated.

30. On August 18, 1981, the TPS board of trustees approved a proposal that would have, if consummated, among other things, caused TPS in exchange for TPS's acquisition of plaintiff's subject assets to assume plaintiff's obligations to Ashton Oil (Lowe Ashton) in the sum of \$125,000.00 and plaintiff's obligation to SBA in the amount of \$315,000.00; defendant Mendenhall and Richard Buys, then-president of TPS, were directed to make to plaintiff the formal proposal so adopted by TPS.

31. On August 19, 1981, defendant Mendenhall, along with the said Richard Buys, submitted to plaintiff a formal proposal substantially in accordance with the TPS adopted proposal referenced in paragraph 30 hereof; such proposal did not include any provision for TPS to buy the outstanding shares of plaintiff.

32. That on August 27, 1981, plaintiff through its president, Lowe Ashton, rejected such proposal.

33. That the record does not establish by a preponderance of the evidence what steps defendant Mendenhall thereafter took, affirmative or otherwise, in the furtherance or withdrawal of the arrangement referenced in paragraph 30 hereof.

34. On May 12, 1982, a Settlement Agreement was executed, of which both defendants were aware, resolving certain prior litigation and to which plaintiff and TPS, among others, were signatories, which expressly (except for civil cases No. 5722 and 5720, neither of which is pertinent here) did away with and laid to rest any and all past claims and disputes between and among its signatories, and to which, among other things, (a) required plaintiff to allow TPS to operate the Heber Creeper

train in operating seasons beginning in 1982; (b) required TPS to pay to plaintiff (i) 10% of the gross income from the sale of certain food and non-alcoholic beverage sales made in connection with the operation of the Heber Creeper train in operating seasons beginning in 1982, or (ii) \$10,000.00 per operating season, whichever figure was greater; (c) required TPS to establish, in connection with the operation of the Heber Creeper train, accounting procedures in conformity with the generally accepted principles of accounting so that audits and financial statements could be adequately prepared; and (d) required TPS to employ internal and external accounting controls for the purpose of assuring an accurate reflection of cash intake and expenditures relative to the operation of the Heber Creeper train.

35. Both defendants were present at the May 14, 1982 conclusion of plaintiff's 1982 annual shareholders meeting, during which those who were present were about to be named directors, including both defendants, were informed that if they should accept their positions of directors, they would assume fiduciary obligations and would breach their fiduciary obligations if they should do anything that would undermine the Settlement Agreement referenced in the foregoing paragraph 34 hereof.

36. On June 12, 1982, plaintiff's board of directors met, with defendant Mendenhall present as director and secretary of plaintiff, and at that meeting there was discussed, among other things, concerns of one or more directors with respect to the competence and honesty, or lack thereof, of Mr. Monte Bona,

the then-manager of TPS, and at that meeting those present (all directors of plaintiff except defendant Ritchie) unanimously approved a policy of confidentiality with respect to the discussion of plaintiff's affairs with other parties.

37. On June 14, 1982, defendant Mendenhall related to the TPS board of trustees some of the items that were discussed in plaintiff's said meeting and made the motion that the said Mr. Monte Bona be appointed to the board of trustees of TPS, which motion was seconded and approved.

38. From at least May 1982 until at least September 1982 defendant Mendenhall was paid \$400.00 per month by TPS for the rendering of accounting and related services to TPS.

39. At some time prior to June 22, 1982, defendant Mendenhall became aware of the fact that TPS planned to assert a substantial claim against plaintiff based on matters arising prior to the execution of the said Settlement Agreement referenced in paragraph 34 hereof; defendant Mendenhall did not apprise plaintiff of his said awareness or of the fact of such claim prior to June 22, 1982.

40. On or about June 22, 1982, defendant Mendenhall submitted to Mr. Gene Moore, then-president of plaintiff, a letter of resignation from defendant Mendenhall's position as director and secretary-treasurer of plaintiff.

41. On or about July 1, 1982, defendant Mendenhall wrote Mr. Gene Moore a letter asserting a claim in favor of TPS and against plaintiff in the amount of \$37,737.35, for alleged claims that arose, if at all, prior to the execution of the

Settlement Agreement referenced in paragraph 34 hereof.

42. Defendant Mendenhall, who was paid by TPS to do the TPS accounting work, failed, both prior to and subsequent to June 22, 1982, to cause TPS to establish reasonably acceptable accounting procedures, and to cause TPS to employ the internal and external cash controls required by the said Settlement Agreement.

43. On September 17, 1982, at a meeting of plaintiff's board of directors, defendant Ritchie was removed as plaintiff's vice president.

44. Subsequent to May 14, 1982, and both prior to and subsequent to July 1, 1982, until at least November 30, 1982, neither defendant took action to assure that payments under the said Settlement Agreement referred to in paragraph 34 would be made to plaintiff.

45. The regular 1982 Heber Creeper train operating season ended on or about Labor Day of that year, the first Monday in September, 1982, and TPS operated the Heber Creeper train throughout the 1982 season.

46. At all times subsequent to May 14, 1982 until at least November 30, 1982, TPS had the ability to pay plaintiff all sums due plaintiff under the terms of the said Settlement Agreement; TPS, with the concurrence of both defendants, in effect treated any such sums as an offset against amounts claimed by TPS to be due from plaintiff, which claims pre-dated said Settlement Agreement.

47. No payment whatsoever has been made to plaintiff by



TPS since the time the said Settlement Agreement was executed.

48. TPS is now in bankruptcy proceedings and the 1982 season was the last operating season during which TPS operated the Heber Creeper train.

49. Based on the reported 1982 total gross income from the operation of the Heber Creeper train and on the historic relationship between total gross income and food and non-alcoholic beverage gross income experienced in the operation of the Heber Creeper train, the Court finds that the food and non-alcoholic beverage gross income of TPS for 1982 was \$173,850.00, and that plaintiff's entitlement thereto, pursuant to the terms of the said Settlement Agreement, would thus be \$17,385.00.

50. Both defendants breached their duty of loyalty and care to plaintiff, during the 1982 Heber Creeper operating season, by allowing and actively participating in the TPS policy and practice of non-payment to plaintiff of the monies whose payment was mandated by the said Settlement Agreement.

51. Both defendant knew that TPS owed plaintiff for the food sales and knew or should have known that their said allowing and participating in said policy and practice would damage plaintiff in the amount of \$17,385.00.

52. Plaintiff's proven damages against both defendants, suffered as a direct and proximate result of both defendants' acts and omissions in connection with the said policy and practice of non-payment, is \$17,385.00.

53. Sometime prior to June 22, 1982, a Harriman railroad coach belonging to plaintiff and located on the Heber

City terminal grounds was gutted by TPS workmen and re-fitted as a dining car; the seats have been removed from the Heber City terminal grounds and have never been replaced; the evidence does not preponderate in support of the plaintiff's contention that the defendants are chargeable, as directors of plaintiff, with such removal, nor with the contention that plaintiff has in fact sustained damage as a result of the conversion of such coach to a dining car.

54. During the 1982 Heber Creeper operating season, metal scrap belonging to plaintiff was taken from the Heber City terminal grounds as part of and pursuant to TPS policies and practices; the evidence does not preponderate in support of plaintiff's contention that defendants knew or should have known that such scrap may have been something more than junk and may have been of value in the operation of said railroad.

Based on the foregoing Findings of Fact, the Court now makes and enters its

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties hereto and subject matter hereof and venue is properly laid in this Court.

2. Both defendants owed plaintiff a fiduciary duty of loyalty and care while they were serving as directors of plaintiff and thereafter, with respect to corporate matters existing at the time of such service which matters were within their knowledge or of which they should have been aware as directors of the plaintiff.

3. Defendant Mendenhall breached his fiduciary duty of loyalty and care to plaintiff with respect to his failure to honor and insist upon performance by TPS fo the 1982 Settlement Agreement as it pertains to payment to plaintiff of food and non-alcoholic beverage sales percentage amounts, and defendant Mendenhall is jointly and severally liable in damages to plaintiff in connection therewith.

4. Plaintiff has been damaged as a direct and proximate result of defendant Mendenhall's breaches of this fiduciary duty of loyalty and care to plaintiff in the principal amount of \$17,385.00, and plaintiff is entitled to and should be granted judgment against defendant Mendenhall in that principal amount.

5. Defendant Ritchie breached his fiduciary duty of loyalty and care to plaintiff with respect to his failure to honor and insist upon performance by TPS of the 1982 Settlement Agreement as it pertains to payments to plaintiff of food and non-alcoholic beverage sales percentage amounts, and defendant Ritchie is jointly and severally liable in damages to plaintiff in connection therewith.

6. Plaintiff has been damaged, as a direct and proximate result of defendant Ritchie's duty of loyalty and care to plaintiff, in the principal amount of \$17,385.00, and plaintiff is entitled to and should be granted judgment against defendant Ritchie in that principal amount.

7. Plaintiff is entitled to and should be granted its costs of court expended herein and interest accruing on the aforesaid principal amount at the legal rate of 10% per annum

from December 31, 1982 until the date judgment is entered herein and at the judgment rate of 12% thereafter.

8. The claims of defendant Ritchie for idemnification for attorney fees should be denied.

9. That except as above indicated, the claims of plaintiff against the defendants and each of them should be dismissed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1985.

BY THE COURT:

\_\_\_\_\_  
CULLEN Y. CHRISTENSEN  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of August, 1985, I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to J. Harold Call, 30 North Main Street, Heber City, Utah 84032; and to Grant G. Orton, Orton & Pettey, 2060 East 3300 South, Suite 102, Salt Lake City, Utah 84109.

\_\_\_\_\_

PETER C. COLLINS 0700  
Bugden, Collins & Keller  
Attorney for Plaintiff  
Judge Building, Suite 426  
#8 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7282 '

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

-----ooOoo-----

HEBER CREEPER, INC., a  
Utah corporation,

:

JUDGMENT

:

Plaintiff,

:

-v-

:

GORDON MENDENHALL and  
LEON RITCHIE,

Civil No. 5871

: Judge Cullen Y. Christensen

Defendants.

:

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The Court having heretofore made and entered its Findings of Fact and Conclusions of Law and having reviewed and approved the Affidavit of Costs and Disbursements submitted by plaintiff's counsel, and good cause appearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff is awarded JUDGMENT against defendant Gordon Mendenhall and defendant Leon Ritchie, jointly and severally, in the sum of \$17,385.00 plus interest accruing thereon, at the rate of 10% per annum from December 31, 1982 up to and including the date hereof, plus allowed costs of court in the amount of \$1,070.40;

2. The said JUDGMENT shall bear interest at the rate  
12% per annum from the date hereof.

DATED this 16 day of <sup>end of</sup> ~~July~~, 1985.

BY THE COURT:

\_\_\_\_\_  
CULLEN Y. CHRISTENSEN  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 5<sup>th</sup> day of <sup>August</sup> ~~July~~, 1985,  
mailed, pursuant to Rule 2.9 of the Rules of Practice, a true and  
correct copy of the foregoing proposed Judgment to J. Harold  
Call, 30 North Main Street, Heber City, Utah 84032; and to Gra  
G. Orton, Orton & Pettey, 2060 East 3300 South, Suite 102, Salt  
Lake City, Utah 84109.

Janet Curtis

*Filed  
8-26, 1985*

PETER C. COLLINS 0700  
Bugden, Collins & Keller  
Attorney for Plaintiff  
Judge Building, Suite 426  
#8 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7282

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

-----ooOoo-----

HEBER CREEPER, INC., a  
Utah corporation,

Plaintiff,

-v-

GORDON MENDENHALL and  
LEON RITCHIE,

Defendants.

:

AFFIDAVIT OF COSTS AND  
DISBURSEMENTS

:

:

Civil No. 5871  
Judge Cullen Y. Christensen

:

-----ooOoo-----

STATE OF UTAH )  
: ss  
County of Salt Lake )

Peter C. Collins, being first duly sworn, deposes and  
says:

1. I am and have been, since the inception of this  
action, the attorney for plaintiff herein;

2. The following is a statement of costs of court that  
have been incurred and paid on behalf of plaintiff herein:

a. Complaint filing fee: \$ 25.00

b. Service of process on defendant

Mendenhall: \$ 4.50

c. service of process of defendant

Ritchie: \$ 4.50

d. cost of deposition of defendant

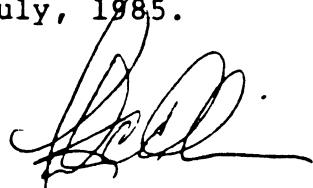
Mendenhall: \$ 715.02

e. cost of deposition of defendant

Ritchie: \$ 321.45


TOTAL: \$1,070.40

DATED this 29<sup>th</sup> day of July, 1985.



PETER C. COLLINS

SUBSCRIBED AND SWORN to before me this 29 day of  
July, 1985.



NOTARY PUBLIC

Residing in Salt Lake County

My Commission Expires:

2-5-88

CERTIFICATE OF MAILING

I hereby certify that on the 29<sup>th</sup> day of August, 1985,  
mailed a true and correct copy of the foregoing Affidavit of  
Costs and Disbursements to J. Harold Call, 30 North Main Street,  
Heber City, Utah 84032; and to Grant G. Orton, Orton & Pettey,  
2060 East 3300 South, Suite 102, Salt Lake City, Utah 84109.





J HAROLD CALL 0540  
Attorney for Defendants  
30 North Main Street  
Suite 3  
Heber City, Utah 84032  
Telephone: (801) 654-0742

---

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY  
STATE OF UTAH

---

HEBER CREEPER, INC.	:	
A Utah Corporation,	:	MOTION TO AMEND FINDINGS OF
	:	FACT, CONCLUSIONS OF LAW,
Plaintiff	:	AND JUDGMENT.
	:	
=vs=	:	
	:	
GORDON MENDENHALL and	:	
LEON RICHIE,	:	Civil No. 5871
	:	Hon. Cullen Y. Christensen
Defendants	:::	

The Defendants Mendenhall and Richie, by and through their counsel, J Harold Call, herewith move the above entitled court pursuant to Rule 52(b), Utah Rules of Civil Procedure, to alter, amend, supplement and modify the Findings of Fact, Conclusions of Law and Judgment entered on the 26th day of August, 1985.

Under Rule 52(b) the Defendants make the motion upon the grounds and for the reasons that in one or more parts, the Findings of Fact as entered, do not conform to the evidence where the weight of the evidence, misstate the evidence or eliminate material facts; that the Conclusions of Law, as entered, misapply, misconstrue, or erroneously adjudicate the applicable legal principals. All of the basis for said Rule 52(b) Motion will be supported by a trial

Memorandum of Law to be submitted hereafter.

RULE 52 MOTION TO AMEND

The Defendants move the court that the Findings of Fact and Conclusions of Law and Judgment of August 26, 1985, be altered, amended or modified in the following particulars:

FINDINGS OF FACT

1. There should be a finding that Defendants were not parties to the May 12, 1982 Agreement between Heber Creeper and Timpanogas Preservation Society and that Defendant Gordon Mendenhall was not an officer of the Plaintiff Corporation and had not been for approximately six (6) months, that thereafter Gordon Mendenhall was a director of Plaintiff Corporation from May 14, to June 22, 1982.

2. That Defendants breached no fiduciary duty.

3. That letters submitted to Gene Moore on or about July 1, 1982, asserting a claim in favor of Timpanogas Preservation Society against the Plaintiff did not breach any fiduciary duty between the Plaintiff and the Defendants.

4. That any money due Heber Creeper under the May 12, 1982 Agreement, was due from Timpanogas Preservation Society and not from the Defendants.

5. Gordon Wheeler was a director of the Plaintiff Heber Creeper for the year 1982.

6. Gordon Wheeler ran the food concessions for the year 1982 on the Heber Creeper.

7. That said Gordon Wheeler never gave an accounting to

Timpanogas Preservation Society or turned to them any money so that a percentage of sales could be completed.

8. That several letters were written by Gordon Mendenhall to the Heber Creeper attempting to settle the food concessions and requesting a meeting but Heber Creeper did not respond.

9. That Heber Creeper never presented to Timpanogas Preservation Society or to the Defendants, any claim for food concessions based upon a percentage of sales.

10. Heber Creeper could have obtained a percentage of sales from its own director, Gordon Wheeler.

11. All Findings of Fact contrary to these findings should be stricken from the Order filed August 26, 1985 in the above entitled court.

#### ALTERNATE FINDINGS OF FACT

From the evidence the Court could determine that the Defendants are liable to the Plaintiff only in the following manner:

1. There is no evidence before this court upon which a judgment can be granted upon a percentage of food sales as provided in the May 12, 1982 Agreement.

2. The maximum amount due under the Agreement of May 12, 1982, without an accounting, would be Ten Thousand (\$10,000.00) Dollars.

3. This sum is to be reduced by the failure of the Plaintiff to provide for the use of Timpanogas Preservation Society the three cars listed in Exhibit "C" of the May 12, 1982 Agreement, or Two Thousand (\$2,000.00) Dollars for each car.

4. That the maximum amount of damage to the Plaintiff by the Defendants is Four Thousand (\$4,000.00) Dollars.

From the foregoing Findings of Fact, the Court concludes as follows:

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties hereto and subject matter hereof and venue is properly laid in this Court.

2. Heber Creeper was constantly in financial difficulty.

3. There are no records or evidence to prove the amount of food sales, if any.

4. The Defendant should be granted judgment on each claim of the Plaintiff, no cause of action.

As alternate Conclusions of Law, the Court could find all of the above except Plaintiff is entitled to judgment against the Defendants in the sum of Four Thousand (\$4,000.00) Dollars.

Defendants should be awarded their costs expended herein.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1985.

BY THE COURT:

\_\_\_\_\_  
Cullen Y. Christensen  
District Judge

J HAROLD CALL 0540  
Attorney for Defendants  
30 North Main Street  
Suite 3  
Heber City, Utah 84032  
Telephone: (801) 654-0742

---

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY  
STATE OF UTAH

---

HEBER CREEPER, INC.,	:	
A Utah Corporation,	:	MEMORANDUM OF DEFENDANTS
	:	
Plaintiff	:	
	:	
=vs=	:	
	:	
GORDON MENDENHALL and	:	
LEON RICHIE,	:	Civil No. 5871
	:	
Defendants	:::	

Come now the defendants and through this Memorandum support their Motion to Amend the Findings of Fact and Conclusions of Law and the Judgment heretofore entered in this case upon the following grounds:

1. The parties did not violate any fiduciary duty;
2. Defendants made reasonable efforts to get the food concession paid to Heber Creeper;
3. Defendants and Timpanogas Preservation Society could not get an accounting from Gordon Wheeler, the food concessionaire;
4. There is no evidence of food sale receipts on which a judgment can be based;
5. The maximum judgment under which the defendants can be found liable would be the sum of \$4,000.00 because of the failure

of the Heber Creeper to provide the NARFRAM Cars.

These matters are set forth in detail below.

I

THE PARTIES DID NOT VIOLATE ANY FIDUCIARY DUTIES

The Utah Case of Nicholson v Evans 642 Pac 2d, 727 stated the general rule of law and particularly as it applies to Utah and stated that directors and officers have a fiduciary duty of loyalty to their corporation and its stockholders.

The defendants do not challenge this holding of the court, but maintain that after their resignation from the Heber Creeper Board of Directors they were not under this same fiduciary duty.

19 Am Jur 2d, 681 states the general rule as follows:

"After there has been a severance of official relationships, either because of resignation or removal, generally, a director or officer occupies no relation of trust or confidence to the corporation."

This general rule was adopted in the Utah Case of Micro Biologic Research Corporation v Muna 625 Pac 2d, 690, where our Supreme Court stated:

"When corporate officers cease to act as such, because of his resignation or removal, the fiduciary relationship ceases; however, where transaction has its inception while fiduciary relationship is in existence, employee cannot, by resigning and not disclosing all he knows about the negotiations, subsequently continue and consummate the transaction in a manner in violation of his fiduciary duties."

Defendant Gordon Mendenhall was not a party to the formation of the May 12, 1982 Agreement which is Exhibit 2. Neither defendant

was a party to the formation of the agreement. Letters from Governor Rampton which are in evidence, indicate that he consulted with Richard Buys of Timpanogas Preservation Society and with Lowe Ashton of Heber Creeper in developing the agreement. This agreement did not have its inception while the defendants were in a fiduciary relationship with Heber Creeper, and there is no evidence that Defendant Leon Richie did anything to hinder payment but he was present in Timpanogas Preservation Society Meetings when approval of the payment was made. The fact that the payment, in fact, was not made, was beyond the control of Leon Richie and was not his fault as is set forth hereafter in this Memorandum.

Defendant Gordon Mendenhall was not an officer or director for six (6) months prior to the formation and signing of Exhibit 2 and was not a party to the formation of the exhibit either as a director of Heber Creeper or Timpanogas Preservation Society.

## II

### DEFENDANTS MADE REASONABLE EFFORTS TO GET THE FOOD CONCESSIONS PAID TO HEBER CREEPER

Exhibit 39 is minutes of the Board of Directors of Timpanogas Preservation Society dated July 7, 1982. The minutes show that Monte Bona Said:

"He would prepare a statement for the months of May and June for the amounts due Heber Creeper on the food sales."

Gordon Mendenhall seconded this motion and it was passed unanimously.

Exhibit 40 is minutes of Timpanogas Preservation Society dated July 13, 1982. In paragraph 6 it states that the food service income was discussed and that Monte Bona would bring the records to date relating to the snack bar income and that sub-lessee would be contacted to see if he was current on his account.

Exhibit 24 is a letter from Gordon Mendenhall to Gene Moore, dated July 24, 1982, wherein Timpanogas Preservation Society acknowledged receiving a letter from Gene Moore dated July 2, 1982, in which Gene Moore requests a payment on the percentage due to Heber Creeper from food sales. Exhibit 24 indicated there are some problems in reconciling accounts between the two entities and that a meeting should be held to adjust the accounts.

Exhibit 42 is a copy of the minutes of Timpanogas Preservation Society in which it was stated:

"It was also felt that any payment due to Heber Creeper from Timpanogas Preservation Society for food sales should be paid."

Exhibit 45 is minutes of Timpanogas Preservation Society dated September 7, 1982. The fourth paragraph indicates that Richard Buys made a motion that the ten percent payment to the Heber Creeper on sale of food and beverages be paid immediately. The motion was seconded by Gordon Mendenhall and approved.

Gordon Mendenhall and Monte Bona both testified in open court that this direction was not carried out because the following morning Monte Bona refused to approve the payment and refused to sign the check. Neither defendant could make payment on the food



sales without the consent and approval of Monte Bona.

Exhibit 13 is a letter dated June 18, 1982, from Calvin Rampton to Gene Moore, President of the Heber Creeper, Inc. Page 2 of the letter discusses the concern Lowe Ashton has of payment of 10 percent of the gross food sales excluding certain items.

When this payment on food sales was not made, Heber Creeper instituted a lawsuit against Timpanogas Preservation Society and Monte Bona to recover damages for food sales along with other claims of damages against Timpanogas Preservation Society and Monte Bona. It is interesting to note that neither defendant was made a party to that lawsuit although the claim was exactly that which was made later against these defendants.

### III

DEFENDANTS AND TIMPANOOGAS PRESERVATION SOCIETY COULD NOT GET AN ACCOUNTING FROM GORDON WHEELER, THE FOOD CONCESSIONAIRE.

Exhibit 46 is minutes of the Timpanogas Preservation Society Board of Trustees dated September 28, 1982. Near the bottom of the exhibit it states:

"Monte Bona was to determine the amount of the money due from Gordon Wheeler and then the secretary was to notify Mr. Wheeler of this amount and demand payment."

Gordon Wheeler ran the food concession.

Exhibit 47 is the minutes of the Timpanogas Preservation Society Board of Trustees dated October 12, 1982. The fourth paragraph states as follows:

"The matter of the accounts receivable from Gordon Wheeler was again discussed and it was estimated to be about \$1,000.00. The secretary was to put Mr. Wheeler on

notice regarding his amount due as quickly as the exact amount could be determined."

Exhibit 56 is the minutes of the Timpanogas Preservation Society Board of Trustees dated November 30, 1982. Near the middle of the minutes is the following entry:

"Since no response has been received from Gene Moore or Gordon Wheeler on letter previously written to them, the secretary was instructed to write another letter requesting a reply."

Gordon Wheeler during 1982, was a director and during 1983 an officer of Heber Creeper, Inc. (See Exhibit 1)

Dan Bates testified he prepared meals for the night train during 1982 at Gordon Wheeler's request. He also testified he could not get an accounting and lost money and refused to furnish any more meals.

Heber Creeper, Inc. had among its own directors the information needed so payment could be made but refused and failed to give the information to Timpanogas Preservation Society or the defendant.

#### IV

THERE IS NO EVIDENCE OF FOOD SALES RECEIPT UPON WHICH A JUDGMENT CAN BE BASED.

Exhibit 34, which was received over the objection of the defendants, states on the margin that the food sales were estimated to be 173850. That same exhibit states that the cash expenses for food purchases for 1982 were \$10,000.00. It is obvious that a \$10,000.00 food purchase would not generate an income of \$173,850. No date is on this exhibit, it was never given to Timpanogas Preservation Society or either defendant, no demand was ever made of

these defendants to assist Heber Creeper in collecting ten percent of this amount.

Exhibit 34 was received by the court over objections of the defendants. No evidence was offered to show who made the written notation on the margin of the exhibit or when he obtained the information. This is the only piece of evidence to support the Court's findings. Exhibit 34 in and of itself is not sufficient to support a judgment against the defendants in light of all the evidence.

V

THE MAXIMUM JUDGMENTS UNDER WHICH THE DEFENDANTS CAN BE FOUND  
LIABLE WOULD BE THE SUM OF \$4,000.00 BECAUSE OF THE FAILURE OF  
HEBER CREEPER TO PROVIDE THE NARFRAM CARS

The Settlement Agreement provides that if the three (3) NARFRAM Cars used in the train and particularly in the food sales, were not available, the amount due would be reduced by \$2,000.00 per car.

Exhibit 8 is a copy of the minutes of the Annual Stockholders Meeting of the Heber Creeper dated May 7, 1982. At page 3 of the minutes, C. H. Nielsen raised the question about the Mazer or Wasatch Museum Foundation or the NARFRAM Cars. The minutes reflect that the new officers and Board of Directors are to assume negotiation with the Mazer Group in Ogden regarding these cars.

Exhibit 23 is a letter from Gordon Mendenhall to Gene Moore dated July 29, 1982, which informs the Heber Creeper that attorney for NARFRAM have indicated the cars listed on Exhibit C of the

Settlement Agreement dated May 12, 1982, are no longer available for use by Timpanogas Preservation Society and that the amount due from Timpanogas Preservation Society to Heber Creeper on food sale should be reduced in the amount of \$6,000.00.

Exhibit 9 is a continuation of the Annual Stockholders Minutes of the Heber Creeper dated May 14, 1982. At page 14 of the minutes Governor Rampton pointed out one of the problems they had to work out were these cars belonging to the museum foundation in the Ogden Group, which are the NARFRAM Cars.

Exhibit 27 is the minutes of the Heber Creeper dated June 12, 1982, and at the bottom of the first page it states:

"Contracts and agreements with NARFRAM, Reed Hatch, TAPS and other matters were discussed but no action was taken at this time, however, further action should be taken immediately on these and other matters."

Thus it is evident that the Heber Creeper knew that the three cars were not available to Timpanogas Preservation Society and that they had been told by their legal counsel that action must be taken to clear up this matter. With this in mind, the most the defendants could be found liable would be the sum of \$4,000.

#### SUMMARY

Neither defendant breached a fiduciary duty to the plaintiff. Defendants made efforts to pay food money to the plaintiff.

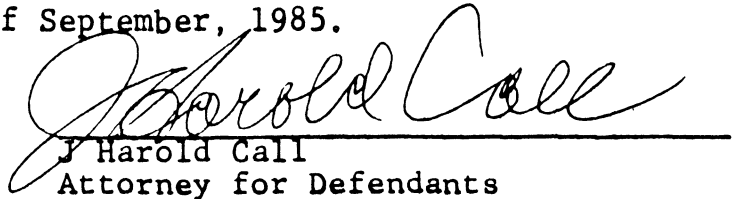
The plaintiff officer, Gordon Wheeler, was the stumbling block in the actual payment along with Monte Bona. The defendants had no control over either of these men.

There is no competent evidence as to the amount of food sale and judgment cannot be awarded on speculation.

The best the plaintiff can hope for is a judgment of \$4,000.00 and this should be against Timpanogas Preservation Society and not these defendants.

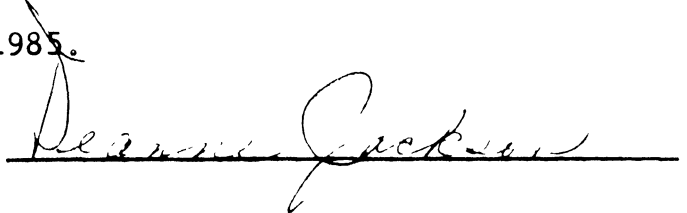
Respectively submitted.

DATED this 11th day of September, 1985.

  
J. Harold Call  
Attorney for Defendants

CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing Memorandum was served upon the plaintiff by mailing a true copy to its attorney, Peter Collins at 424 South Fifth East, Salt Lake City, Utah 84102, this 11<sup>th</sup> day of September, 1985.

  
Deanne Jackson

PETER C. COLLINS 0700  
Bugden, Collins & Keller  
Attorney for Plaintiff  
Judge Building, Suite 426  
#8 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7282

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

-----ooOoo-----

HEBER CREEPER, INC., a  
Utah corporation,

Plaintiff,

-v-

GORDON MENDENHALL and  
LEON RITCHIE,

Defendants.

:  
MEMORANDUM IN OPPOSITION TO  
: MOTION TO AMEND FINDINGS OF  
FACT, CONCLUSIONS OF LAW,  
: AND JUDGMENT

:  
Civil No. 5871  
: Judge Cullen Y. Christensen

:

-----ooOoo-----

Plaintiff, by and through its attorney, submits this  
Memorandum in opposition to defendants' Motion to Amend Findings  
of Fact, Conclusions of Law, and Judgment.

I. THE MOTION WAS NOT FILED IN TIMELY FASHION

The Findings of Fact and Conclusions of Law and the  
Judgment were both entered by the Court on August 16, 1985. The  
pending Motion was not filed until September 5, 1985. Rule  
52(b), relied on by defendants, provides, in pertinent part:

Upon motion of a party made not later  
than ten days after entry of judgment  
the court may amend its findings or make  
additional findings and may amend the  
judgment accordingly.

(Empasis added.) The maximum ten-day period is not subject to extension. E.g., Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843, 844-45 (1970); In Re Bundy's Estate, 121 Utah 299, 241 P.2d 462, 467 (1982). Plaintiff submits that the tardy filing reason is enough, standing alone, to deny the pending Motion.

II. THE MOTION IS MERELY ANOTHER ATTEMPT TO HAVE THE COURT ACCEPT DEFENDANT'S VERSION OF THE FACTS AND APPLICATION OF THE LAW TO THOSE FACTS.

As the Court will recall, this matter was tried to the Court on four days in March of this year, during which in excess of 50 exhibits were offered into evidence, during which numerous witnesses testified, and during which the Court took copious notes. Thereafter, the parties submitted post-trial briefs and proposed Findings and Conclusions. The Court then issued its detailed Memorandum Decision, 15 pages in length. Plaintiff's counsel then, at the Court's directive, prepared the subject Findings of Fact and Conclusions, carefully tracking the Court's Memorandum Decision, and the subject Judgment. Neither defendant objected to any part of the Findings and Conclusions or Judgment prior to their entry. The Court signed, without alteration, the proposed Findings and Conclusions and Judgment.

The Court has thoroughly considered the evidence and the arguments, and there is no reason to amend any Finding or any Conclusion or any aspect of the Judgment. Plaintiff submits that defendants, under guise of a "Motion to Amend," are attempting virtually to relitigate the case. The proposed amended Findings are either surplusage, irrelevant, totally without evidentiary

support, have already been contrarily decided, or a combination of two or more of the above.

There is simply no good reason to adopt any of defendants' proposed "amendments," and defendants' Motion should be denied.

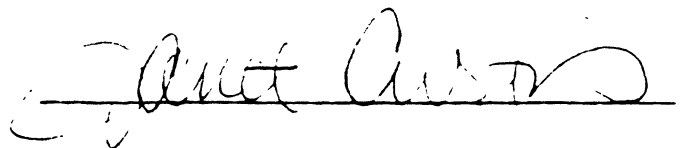
Respectfully submitted this 10<sup>th</sup> day of September, 1985.



PETER C. COLLINS  
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of September, 1985, I mailed a true and correct copy of the foregoing Memorandum in Opposition to Amend Findings of Fact, Conclusions of Law, and Judgment to J. Harold Call, 30 North Main Street, Heber City, Utah 84032 and to Grant G. Orton, Orton & Pettey, 2060 East 3300 South, Suite 102, Salt Lake City, Utah 84109.





IN THE DISTRICT COURT OF WASATCH COUNTY, STATE OF UTAH

HEBER CREEPER, INC.,

Plaintiff,

Case No. 5871

vs.

RULING

GORDON MENDENHALL, et al

Defendants.


This matter comes before the Court, under Rule 2.8, on the motion of Defendants seeking to amend Findings of Fact, Conclusions of Law and Judgment. The Court has reviewed the file, considered the memoranda of counsel, and upon being advised in the premises, now makes the following:

RULING

1. Said motion to Amend is denied.

Dated this 17 day of September, 1985.

By the Court



CULLEN Y. CHRISTENSEN, JUDGE

cc: Peter C. Collins, Atty.

J. Harold Call, Atty.

Grant G. Orton, Atty.

J HAROLD CALL 0540  
Attorney for Defendants  
30 North Main Street  
Suite 3  
Heber City, Utah 84032  
Telephone: (801) 654-0742

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IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY  
STATE OF UTAH

---

HEBER CREEPER, INC.,	:	
	:	O R D E R
Plaintiff	:	
=vs=	:	
GORDON MENDENHALL and	:	
LEON RITCHIE,	:	
	:	Civil No. 5871
Defendants	:	
	:::	

The defendants having made a Motion to Amend Findings of Fact and Conclusions of Law and Judgment, and the court having reviewed the file, considered the Memorandum of Counsel and being fully advised in the premises, makes the following Order:

1. Said Motion to Amend is denied.

DATED this 15<sup>th</sup> day of October, 1985.

BY THE COURT:

/s/ Cullen G Christensen  
Judge

CERTIFICATE OF SERVICE

This is to certify that on the 5 day of March, 1986, I served ten (10) copies of this Brief to the Utah Supreme Court by personally delivering them, and one copy to Peter C. Collins was mailed, postage prepaid, to his address at Judge Building, Suite 426, #8 East Broadway, Salt Lake City, Utah 84111, this 5 day of March, 1986.

J. Harold Gay