

1988

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

Utah Supreme Court

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## Recommended Citation

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO.

**88-0024-CA**

IN THE SUPREME COURT OF THE STATE OF UTAH

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HEBER CREEPER, INC.,

:

RESPONDENT'S BRIEF

Respondent and  
Cross-Appellant,

:

:

-v-

:

**88-0024-CA**

GORDON MENDENHALL and  
LEON RITCHIE,

:

Appellants and  
Cross-Respondents.

: No. 20962

-----ooOoo-----

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

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FILED

APR 4 1986

Clk, Supreme Court Clerk

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Cross-Appellant,	:	
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GORDON MENDENHALL and	:	
LEON RITCHIE,	:	
	:	
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LEON RITCHIE.	:	
	:	
Appellants and	:	No. 20962
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ISSUES PRESENTED FOR REVIEW

The ultimate issues in this appeal are, rather than the three numbered in Appellants' brief at its page 2:

1. whether the trial court correctly determined that Heber Creeper, Inc. was entitled, by a fair preponderance of the evidence, to be awarded Judgment against Gordon Mendenhall and Leon Ritchie in the principal amount of at least \$17,385.00; and

2. whether the trial court erred in failing to determine that Heber Creeper, Inc. had proved, by a fair preponderance of the evidence, that Heber Creeper, Inc. was entitled to be awarded judgment against both Mr. Mendenhall and Mr. Ritchie in substantially larger sums.

RELIEF SOUGHT ON CROSS-APPEAL

Heber Creeper, Inc.'s position is that, at a minimum, the trial court's judgment against both Mr. Mendenhall and Mr.

Ritchie should be affirmed. Heber Creeper, Inc. seeks herein also to have the trial court's Judgment modified to award damages against Gordon Mendenhall in the total principal amount of \$299,194.00 and to award damages against Leon Ritchie in the total principal amount of \$52,475.00.

#### STATEMENT OF THE CASE

This action was filed by Heber Creeper, Inc., a Utah for-profit corporation, against Gordon Mendenhall and Leon Ritchie in the Fourth District Court of Wasatch County, on December 30, 1982. It was tried to the bench (Hon. Cullen Y. Christensen) on March 11, 12, 13, and 19, 1985.

The dispute concerns itself, generally, with the question of the duty of care and loyalty of directors of a for-profit corporation to the corporation, and, more specifically, with questions including the temporal duration of that duty and the answerability in damages to the corporation in the event that the duty is breached.

#### STATEMENT OF FACTS

Heber Creeper, Inc. respectfully submits that the "Statement of Facts" appearing at pages 2 through 4 of Appellants' Brief is both incomplete and, in many respects, inaccurate, and submits for the Court's consideration, in lieu thereof, the following relevant and indisputable facts patterned largely after the trial court's Findings appearing at pages numbered 32 through 42 of Appellants' Brief):

1. Heber Creeper, Inc. is a Utah business corporation which was incorporated on or about January 7, 1971 as Wasatch



Railway and Development Co. and whose name was duly changed, on or about June 28, 1972, to its present name. Exs. 10, 1; tr. at 50, 56.

2. Gordon Mendenhall was an incorporator of Heber Creeper, Inc. and was a director of the corporation uninterruptedly from the time of incorporation until December 1981. Ex. 10; tr. at 50, 55, 57-58, 217, 392-93.

3. Mr. Mendenhall was also a director of Heber Creeper, Inc. from May 14, 1982 until at least June 22, 1982. Ex. 10; Ex. 14; tr. at 169, 217-18, 392-93.

4. Mr. Mendenhall was an officer (vice-president) of Heber Creeper, Inc. from 1975 through 1979 and was again an officer (secretary-treasurer) of the corporation from May 14, 1982 until at least June 22, 1982. Ex. 10; Ex. 14; tr. at 217-18, 392-93.

5. Leon Ritchie was an incorporator of Heber Creeper, Inc. and was an original director of the corporation and a director during the years 1971, 1972, 1979, and 1980, as well. Ex. 10; tr. at 50, 55-56, 59.

6. Mr. Ritchie was again a director of Heber Creeper, Inc. from May 14, 1982 until February 1983. Ex. 8; Ex. 9; Ex. 10; Complaint, ¶ 5, record at 1; Answer, record at 9.

7. Mr. Ritchie was an officer (vice-president) of Heber Creeper, Inc. from May 14, 1982 until September 17, 1982. Ex. 8; Ex. 9; Ex. 26.

8. Timpanogos Preservation Society (hereinafter, "TPS"), a Utah not-for-profit corporation, was incorporated on or about August 29, 1978. Ex. 10, tr. at 66, 632.

9. Mr. Mendenhall was an incorporator of TPS, was approved by Heber Creeper, Inc.'s president to be a member of the Board of Trustees of TPS for the purpose of protecting Heber Creeper, Inc.'s interests, and was a member of the TPS Board uninterruptedly from the time of the incorporation of TPS until at least November 30, 1982. Ex. 56; Tr. at 68-69; 131-32; 397.

10. Mr. Mendenhall was an officer of TPS uninterruptedly from the time of the incorporation of TPS until at least November 30, 1982, and he held the positions, at various times during that period, of treasurer, secretary, and secretary-treasurer. E.g., exs. 5, 11, 38, 39, 40, 46, 47, and 56.

11. Mr. Ritchie was a member of the TPS Board of Trustees uninterruptedly from at least July 10, 1981 until at least November 30, 1982. E.g., exs. 51, 55, 56; tr. at 695, 707-09.

12. Mr. Ritchie was an officer (treasurer) of TPS at least during a part of 1982 and was released from that position on July 13, 1982. Ex. 40.

13. Heber Creeper, Inc. operated the train commonly known as the "Heber Creeper" (hereinafter "the train") from the 1971 through 1980 operating seasons.

14. TPS operated the train during the 1981 and 1982 operating seasons. Tr. at 572.

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

Canyon, in Utah County, Utah.

16. Heber Creeper, Inc.'s operation of the train showed a small annual average cash loss (\$1,085.00) for operating seasons 1971 through 1980. Ex. 34; tr. at 367-71.

17. Excluding operating years 1975 and 1976, during which years Heber Creeper, Inc. suffered cash losses in connection with certain non-train-operation business interprises, Heber Creeper, Inc. showed an annual cash profit of \$2,881.00 for the years during which Heber Creeper, Inc. operated the train. Ex. 34; Tr. at 367-71.

18. In early 1981, Heber Creeper, Inc. and TPS discussed, in a series of joint and separate Board meetings, an arrangement according to which

- (a) TPS would lease from Heber Creeper, Inc. the right to operate the train and,
- (b) in connection with that proposed lease arrangement, TPS would, among other things, (i) satisfy certain debts owed by plaintiff in the amount of at least \$130,000.00; and (ii) acquire, by paying one dollar per share, the then-outstanding 116,719 shares of Heber Creeper, Inc. stock. Ex. 3; Tr. at 95-100, 536-37, 683.

19. The arranged-for lease was in fact executed by and between Heber Creeper, Inc. and TPS (Ex. 3, tr. at 100) but the debt retirement and stock purchase arrangement was never consummated. Tr. at 108.

20. On July 10, 1981, the president of Heber Creeper,

Inc. appeared at a TPS Board Meeting and demanded that the TPS Board members honor the early 1981 debt-retirement and purchase arrangement. Ex. 5; tr. at 104-07.

21. On August 18, 1981, the TPS Board of Trustees approved a proposal that would have, if consummated, caused TPS to strike a business agreement with Heber Creeper, Inc. on terms at least as favorable to Heber Creeper, Inc. as those contemplated in early 1981; and Mr. Mendenhall and one Richard Buys, fellow TPS Board Member and then-president of TPS, were directed to present to Heber Creeper, Inc. the formal proposed so adopted by TPS. Ex. 48.

22. The next day, August 19, 1981, Mr. Mendenhall and the said Mr. Buys submitted to Heber Creeper, Inc. a formal proposal which was substantially less favorable to Heber Creeper, Inc., than the one so approved by the TPS Board; the one formally adopted by the TPS Board the day earlier was deemed by Mr. Mendenhall to be not financially feasible from the TPS perspective. The deal, which would have been a good deal for Heber Creeper, Inc. shareholders, was never consummated. Ex. 6; e.g., Ex. 48; tr. at 108-12, 207-08. 219-20, 455, 738.

23. On May 12, 1982, a Settlement Agreement (Ex. 2) was executed, of which both Mr. Mendenhall and Mr. Ritchie were aware, (a) which resolved certain litigation then pending, to which Heber Creeper, Inc. and TPS and others were signatories; (b) which expressly (except for claims asserted in Wasatch County Civil Nos. 5720 and 5722, none of which is pertinent hereto) did away with and laid to rest any and all past claims and disputes

between and among its signatories; and (c) which, among other things: (i) required Heber Creeper, Inc. to allow TPS to operate the train in operating seasons beginning in 1982; (ii) required TPS to pay to Heber Creeper, Inc. 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 \$10,000.00 per operating season, whichever figure was greater; (iii) 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 that audits and financial statements could be adequately prepared; and (iv) 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.

24. Both Mr. Mendenhall and Mr. Ritchie were present at the May 14, 1982 conclusion of Heber Creeper, Inc.'s 1982 annual shareholders meeting, during which those who were present and who were about to be named directors, including both Mr. Mendenhall and Mr. Ritchie, 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 23 hereof. Exs. 8, 9; tr. at 121-22, 162, 165.

25. On June 12, 1982, Heber Creeper, Inc.'s Board of Directors met, with Mr. Mendenhall present as director and secre-

tary and at that meeting there was discussed, among other things, the concern of one or more directors with respect to the competence and honesty, or lack thereof, of one Mr. Monte Bona, the then-manager of TPS, and at that meeting those present (all the directors of Heber Creeper, Inc. other than Mr. Ritchie) unanimously approved a policy of confidentiality with respect to the discussion of the corporation's affairs with other parties. Ex. 27; tr. at 195-200.

26. On June 14, 1982, Mr. Mendenhall related to the TPS Board some of the items that were discussed in the said Heber Creeper, Inc. meeting of two days earlier and made the motion that the said Mr. Monte Bona be appointed to the Board of TPS, which motion was seconded and approved. Ex. 38; tr. at 428-29.

27. From at least as early as July 1982 until at least September 1982 Mr. Mendenhall was paid \$400.00 per month by TPS for the rendering of accounting and related services to TPS. Ex. 40; tr. at 589.

28. At some time prior to June 22, 1982, Mr. Mendenhall became aware of the fact that TPS planned to assert a substantial claim against Heber Creeper, Inc. based on matters arising prior to the execution of the said Settlement Agreement referenced in paragraph 23 hereof; Mr. Mendenhall did not apprise Heber Creeper, Inc. of his said awareness or of the fact of such claim prior to June 22, 1982, and no TPS meeting occurred between June 22, 1982 and July 1, 1982. Tr. at 180, 487.

29. On or about June 22, 1982, Mr. Mendenhall submitted to Mr. Gene Moore, then-president of Heber Creeper, Inc. a letter

of resignation from Mr. Mendenhall's positions as director and secretary-treasurer of Heber Creeper, Inc. Ex. 14; tr. at 169.

30. On or about July 1, 1982, Mr. Mendenhall wrote Mr. Gene Moore a letter asserting a claim in favor of TPS and against Heber Creeper, Inc. in the amount of \$37,737.35, for alleged claims that arose, if at all, prior to the execution of the aforesaid Settlement Agreement which, on its face, extinguished all such prior claims. Ex. 2, pp. 11-12; Ex. 7; tr. at 169-70.

31. Mr. 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. Tr. at 358-61, 379, 382, 497.

32. In August 1982, Mr. Ritchie and Mr. Mendenhall took the position that the TPS claim against Heber Creeper, Inc. was a valid claim. E.g., exs. 41, 42; tr. at 171-74, 221-22, 235.

33. On September 17, 1982, at a meeting of Heber Creeper, Inc.'s Board of Directors, Mr. Ritchie was removed as Heber Creeper, Inc.'s vice president. Ex. 26; tr. at 194, 235.

34. Subsequent to May 14, 1982, and both prior to and subsequent to July 1, 1982, until at least November 30, 1982, neither neither Mr. Mendenhall nor Mr. Ritchie took action to assure that payments under the said Settlement Agreement would be made to Heber Creeper, Inc. Tr. at 220; See, e.g., Exs. 39, 40, 41, 42, 43, 45, 46.

35. The regular 1982 train operating season ended on or

about Labor Day of that year, the first Monday in September, 1982, and TPS operated the train throughout the 1982 season.

36. At all times subsequent to May 14, 1982 until at least November 30, 1982, TPS had the ability to pay to Heber Creeper, Inc. all sums due under the terms of the said Settlement Agreement; TPS, with the concurrence of both Mr. Mendenhall and Mr. Ritchie, in effect treated any such sums as an offset against the aforesaid pre-Settlement Agreement claims of TPS. E.g., Exs. 17, 39, 40, 41, 42, 43, 45, 46; tr. at 171-74, 456, 486.

37. No payment whatsoever has been made to Heber Creeper, Inc. by TPS since the time the said Settlement Agreement was executed. Tr. at 200.

38. Based on the reported 1982 total gross income from the operation of the Heber Creeper train and on the historic percentage relationship between total gross income and food and non-alcoholic beverage gross income experienced in the operation of the train, the food and non-alcoholic beverage gross income of TPS for 1982 was projected by Heber Creeper, Inc.'s expert to be \$173,850.00, that figure was not controverted by other evidence, and Heber Creeper, Inc.'s entitlement thereto, pursuant to the terms of the said Settlement Agreement, was thus fixed by the trial court to be \$17,385.00. Ex. 34; tr. at 360-66; Finding of Fact No. 49.

39. Sometime prior to June 22, 1982, a Harriman railroad coach belonging to Heber Creeper, Inc. 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. Tr. at 265-77, 297-307, 318-31.

40. During the 1982 train 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. E.g., tr. at 297-304.

41. Both Mr. Mendenhall and Mr. Ritchie were on and about the terminal grounds on at least several occasions during the time periods that the Harriman coach seats were being removed and during the period that the metal scrap was being removed, and neither reported to the Heber Creeper, Inc. Board that such conduct was taking place. Tr. at 201; 247; 301-07; 499-50; 691-92; 739-40.

42. The trial court found, with respect to the failed purchase and debt-retirement arrangement (referenced in the foregoing facts numbered 18 through 22), that the evidence did not preponderate in favor of Heber Creeper Inc. on its claim that Mr. Mendenhall should be held liable to Heber Creeper, Inc. in the amount of \$246,900.00, or in any amount, by reason of his acts or omissions in connection with that matter. Finding of Fact No. 33.

43. The trial court found, with respect to the non-payment to Heber Creeper, Inc. of the monies it was entitled to receive under the 1982 Settlement Agreement (referenced in the foregoing facts numbered 23 through 38), by a fair preponderance of the evidence, that both Mr. Mendenhall and Mr. Ritchie had breached their duty of care and loyalty to Heber Creeper, Inc.,

and that Heber Creeper, Inc. had been damaged, as a direct and proximate result thereof, in the princioal amount of \$17,385.00. Findings of Fact Nos. 49 through 52.

44. The trial court found, with respect to the alienation and dissipation of Heber Creeper, Inc.'s assets during the 1982 train operating season ( referenced in the foregoing facts numbered 39 through 40), that the evidence did not preponderate in favor of Heber Creeper, Inc. on its claims that Mr. Mendenhall and Mr. Ritchie, or either of them, should be held liable to Heber Creeper, Inc. in the amount of \$35,090.00, or in any amount, by reason of their omission in connection with that matter. Finding of Fact No. 54.

#### SUMMARY OF ARGUMENT

Heber Creeper, Inc.'s position herein, based on the foregoing statement of indisputable facts and based on other facts discussed hereinbelow, in light of the case law of this Court and in light of other respected authorities, can be rather easily stated. It is (1) that the evidence adduced at trial clearly preponderated in its favor with respect to the trial court's determination that it was entitled to recover, from Mr. Mendenhall and Mr. Ritchie, the principal amount of \$17,385.00 under the 1982 Settlement Agreement; (2) that the trial court's application of relevant law to the evidence adduced in connection therewith was clearly correct; (3) that Appellants have advanced no cognizable grounds for reversal of the Judgment; (4) that the evidence clearly preponderated in favor of Heber Creeper, Inc. with respect both to its claim against Mr. Mendenhall in connec-

tion with the failed 1981 debt-retirement and stock purchase agreement and with respect to its claims against Mr. Mendenhall and Mr. Ritchie in connection with the 1982 disappearance and alienation of Heber Creeper, Inc.'s assets; (5) that the trial court found erroneously and against the clear weight of the evidence in connection with those items; and (5) application of the same principles of law to the facts concerning those items as to the non-payment of the Settlement Agreement monies dictates that this Court should modify the trial court's judgment to award Heber Creeper, Inc. additional damages against both gentlemen in the amounts proven at trial (against Mr. Mendenhall in the total additional principal amount of \$281,809.00, for a total principal amount of \$299,194.00; and against Mr. Ritchie in the total additional principal amount of \$35,090.00, for a total principal amount of \$52,475.00).

Heber Creeper, Inc. hereby respectfully announces that it will not further pursue its contention, indicated at pages 2 and 3 of its Supplemental Docketing Statement on file herein that the trial court found against the clear weight of the evidence in connection with Heber Creeper, Inc.'s claim that it should have been awarded additional damages against Mr. Mendenhall, in the principal amount of \$91,500.00, by reason of Mr. Mendenhall's alleged acts and omissions in connection with the 1980 grant of a section of the "Heber Creeper" right-of-way to TPS rather than to Heber Creeper, Inc. For it is Heber Creeper, Inc.'s view, on reconsideration, that, with respect to that claimed item of damage, the trial court could reasonably find, as it did, that Heber Creeper, Inc. had not proved its entitlement to recovery.

## ARGUMENT

### POINT I

THE CONDUCT OF BOTH MR. MENDENHALL AND MR. RITCHIE FELL FAR SHORT OF THE FIDUCIARY DUTIES OF CARE AND LOYALTY DEMANDED OF DIRECTORS OF UTAH CORPORATIONS.

#### A. The Duty of Care

In Warren v. Robison, 19 Utah 289, 57 P.287 (1899), this Court held that directors are bound to

exercise such a degree of care, skill, and diligence as is required by the situation and nature of the business. By taking such positions, although without compensation, directors invite confidence that they possess at least ordinary knowledge and skill, and that they will do all that men of reasonable prudence and caution ought to do to protect the interests of stockholders. . . .

57 P. at 290. In that seminal case, the Court ruled that the requisite degree of attention and judgment demanded of corporate directors is that which "an ordinarily discreet businessman would give to his own concerns under similar circumstances." Id. at 291. That degree of concern, according to the Warren Court, requires directors to "devote so much of their time to their trust as is necessary to familiarize them with the business of the institution, and to supervise and direct its operation." Id. Nor, ruled the Court, can directors' lack of due care and diligence be excused "on the ground that they did not know of the unfortunate transactions, and were ignorant of the business." Id. The standard set in Warren has stood the test of time and is still, some 87 years later, the law in Utah. It was expressly reaffirmed by the Utah Supreme Court as recently as 1979 in FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1334 (Utah

1979).

## B. The Duty of Loyalty

A companion duty owed by Utah business corporation directors to their corporations is the duty of loyalty. In Glen Allen Mining Co. v. Park Galena Mining Co., 77 Utah 362, 296 P. 231, (1931), the Court adopted the following rule of loyalty:

As long as the confidential relation lasts the trustee or other fiduciary owes an individual duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties or expose him to the temptation of acting contrary to the best interests of his original cestui que trust. The rule applies alike to . . . administrators directing and managing officers of corporations as well as to technical trustees.

. . .

The duty of the directors of a corporation is to further the interests and business of the association and to conserve its property. Any action on the part of directors looking to the impairment of corporate rights, the sacrifice of corporate interests, the retardation of the objects of the corporation, and more especially the destruction of the corporation itself, will be regarded as a flagrant breach of trust on the part of the directors engaged therein.

296 P. at 240-241.

In Hoggan & Hall & Higgins, Inc. v. Hall, 414 P.2d 89 (Utah 1966), this Court affirmed that this duty of loyalty is especially profound when the corporation is in financial difficulty:

This court has been dedicated to the principle that when a corporation is in difficulty financially, a director

is duty-bound to render succor, not secession, even as a parent would its child.

Id. at 91. As recently as 1982, the Court reaffirmed the holdings of both Glen Allen Mining Co. and Hoggan & Hall & Higgins, Inc. And in that most recent case, Nicholson v. Evans, 642 P.2d 627 (Utah 1982), the Court added these observations:

[Directors] are obligated to use their ingenuity, influence, and energy, and to employ all the resources of the corporation, to preserve and enhance the property and earning power of the corporation. . . . This duty extends to all of the corporations assets. . . .

Id. at 629.

#### C. Appellants' Breaches

It should perhaps here be recalled that Heber Creeper, Inc.'s claims against Mr. Mendenhall deal with three separate matters and the acts and/or omissions of Mr. Mendenhall with respect to each: (1) the failure of consummation of the 1981 arrangement, in connection with which TPS was to acquire the stock of Heber Creeper, Inc. and retire Heber Creeper, Inc.'s debt; (2) the failure or refusal of TPS to pay Heber Creeper, Inc. monies in connection with the 1982 Settlement Agreement; and (3) the alienation and dissipation of certain of Heber Creeper, Inc. assets during the 1982 operating season. And it is also here to be pointed out that Heber Creeper, Inc. claims against Mr. Ritchie deal only with the latter two such matters.

Heber Creeper, Inc. submits that both gentlemen breached their duties of loyalty and of care to Heber Creeper, Inc. Neither exercised any effort whatsoever on behalf of Heber

Creeper, Inc. with respect to the factual matters relevant hereto. If they had been diligent, they would have acted to advance Heber Creeper, Inc.'s interests. But they did not. If they had been loyal, they would have acted on its behalf. But they did not.

Mr. Mendenhall's entire course of conduct, as well as even his testimony at trial, appears to evidence a belief that he apparently held prior to institution of this litigation and that he claimed at trial still to hold, that there is nothing wrong with a person's being on the boards of two competing or conflicting corporations. Mr. Mendenhall's expressed attitude that he was merely carrying out the wishes of TPS, in connection with various incidents, that he was merely being, in essence, a good soldier, does not comport with the requirements set forth by the Utah Supreme Court regarding the solemn duties of corporate directors. Nor does Mr. Ritchie desire to "keep the wheels rolling." That TPS may have demanded certain loyalty and care of appellants is surely no defense to the fact that, time and time again, their actions and omissions which helped TPS seriously damaged Heber Creeper, Inc. that Mr. Mendenhall was suggested for initial TPS Board membership for the purpose of looking after Heber Creeper, Inc.'s interests.

1. The Failure to Consummate the Purchase of Assets and Debt-Retirement Agreement

Heber Creeper, Inc.'s largest single claim is its claim for \$246,719.00 against Mr. Mendenhall in connection with the failed 1981 purchase and debt-retirement agreement. As indicated

by the testimony of Lowe Ashton and as seen on the face of Exhibit 3 (minutes of plaintiff's annual stockholders' meeting, held April 4, 1981) and Exhibit 36 (handwritten minutes, from Bona journal, of TPS February 19, 1981 meeting), a deal was in principal reached in early 1981 and in connection with the Heber Creeper, Inc.-TPS Lease agreement (Exhibit 4), according to which TPS was, among other things, to satisfy at least \$130,000.00 of Heber Creeper, Inc.'s debt to Ashton Oil and Transportation Co. and to pay to Heber Creeper, Inc. one dollar for each of the then-outstanding shares of Heber Creeper, Inc. stock (the \$116,719.00 figure is based on the Heber Creeper, Inc. 1981 Annual report (Exhibit 1)). Mr. Mendenhall not only failed to exert any effort, as the then-sole member of both corporations' boards, and he not only failed to cause the even more advantageous and TPS board-approval proposal of August 18, 1981 (Exhibit 48) to be passed on to Heber Creeper, Inc. for acceptance and consummation; he, one day later, along with one other, Richard Buys, the then-president of TPS, with no intervening TPS Board action, submitted the August 19, 1981 "Proposal" (Exhibit 6) to Heber Creeper, Inc., a "Proposal" that was, in short, \$246,719.00 less advantageous to plaintiff than was the deal that Mr. Mendenhall was supposed to cause to be effected.

Mr. Mendenhall clearly breached his duty of loyalty to Heber Creeper, Inc. in connection with these events of 1981. Mr. Mendenhall, who testified at trial that he "didn't favor one board over the other," also testified that the reason that he made the August 19, 1981 Proposal, rather than the one adopted by



the TPS Board the day earlier, was that TPS the earlier one was not in TPS's financial interest. Tr. at 738. He expressed, even at trial, no concern over the fact that Heber Creeper, Inc. lost the opportunity, because of his concern for TPS, to acquire a most substantial benefit. One of the most telling statements made by Mr. Mendenhall in the course of this litigation is his statement, made in his deposition and acknowledged at trial (tr. at 473-74) in response to Heber Creeper, Inc.'s counsel's observation that the August 19, 1981 Proposal differed substantially from the early 1981 arrangement and the proposal adopted by the TPS Board on August 18: "So what? It was still a proposal."

Heber Creeper, Inc. submits that Mr. Mendenhall failed abysmally, in connection with the events of 1981, to discharge his duty of care and his duty of loyalty, as defined by this Court in the cases cited hereinabove.

With respect to the matter of whether the events of 1981 and Mr. Mendenhall's role therein are properly before the Court (see page 5 of Appellants' Brief), Heber Creeper, Inc. offers the following analysis. Under Rule 8(a) of the Utah Rules of Civil Procedure, a pleader is required only to make a short and plain statement of his claim. This was expressly recognized by the Utah Supreme Court in Blackham v. Snelgrove, 3 Utah 2d 157, 280 P.2d 453, 454 (1955), as was the role played by the deposition-discovery process in preparation for trial. 280 P.2d at 455. A review of the Complaint on file herein indicates that Heber Creeper, Inc. framed that pleading broadly enough to render it unnecessary for it to seek to amend prior to trial. The

Complaint (record, pp. 1-5) specified certain items of concern with regard to the allegedly unlawful acts of the defendants but, by use of the phrase "inter alia [among other things]," made it clear that there might eventuate, in the course of discovery and trial preparation, other specific concerns. Mr. Mendenhall contended at trial that he was surprised by Heber Creeper, Inc.'s pursuit of the 1981 purchase and debt-retirement arrangement claim and unfairly prejudiced by Heber Creeper, Inc.'s purported springing on him of this claim for the first time at trial. Heber Creeper, Inc.'s response is that there is no foundation whatsoever for Mr. Mendenhall's protestation of surprise and prejudice. No fewer than 15 pages (pp. 135-150) of the transcript of his deposition are occupied by questions and answers dealing with the events of 1981 and his role therein. At no point in the course of that questioning did Mr. Mendenhall interpose an objection as to relevancy. Tr. at 469-70. He must have, in short, realized that Heber Creeper, Inc. had considerable concern in connection with his acts and omissions in connection therewith. Then, in what is denominated answer 1(e) in its Response, (record, pp. 211-218) dated February 4, 1985 to Defendant Gordon Mendenhall's Interrogatories Heber Creeper, Inc. expressed its position that Mr. Mendenhall had breached his fiduciary obligation to Heber Creeper, Inc. with respect to "all litigation and pre-litigation disputes between. . . plaintiff and. . . Timpanogos Preservation Society...." As Lowe Ashton testified at trial, it was when he received, as Heber Creeper, Inc.'s president, the August 19, 1981 Proposal signed by

TPS that he knew Heber Creeper, Inc. had been "took." Tr. at 108.

Heber Creeper, Inc. submits that, if Mr. Mendenhall was not satisfied with the generality of the aforesaid answer 1(e), he should have filed a motion to compel a more specific response. Furthermore, in its Amended Response to Defendant Mendenhall's Interrogatories (record, pp. 269-77) and in its final proposed Pre-Trial Order (record, pp. 359-76), Heber Creeper, Inc. expressly and specifically indicated, on pages, respectively, 2 and 11, its intent to pursue the 1981 purchase and debt-retirement arrangement aspect of its claims against Mr. Mendenhall.

Also, Heber Creeper, Inc. calls to the Court's attention the requirement of Rule 54(c)(1) of the Utah Rules of Civil Procedure, which requires that

every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Finally, the trial court appears to have resolved, in Heber Creeper, Inc.'s favor, the question of whether the 1981 debt-retirement and purchase aspect of Heber Creeper, Inc.'s claim was properly before it for trial. For its Findings of Fact, nos. 27 through 33 (see Appellants' Brief at pp. 36-37) dealt with the facts surrounding this aspect of Heber Creeper, Inc.'s claim. Mr. Mendenhall is and ought to be held no more free from the imposition of liability for his role in the 1981 events than for his other proven misdeeds and, for his 1981 acts and conduct, he

is liable to Heber Creeper, Inc. in damages in the amount of \$246,719.00.

2. The Failure to Cause Payments to  
be Made Under the 1982 Settlement  
Agreement

May 12, 1982, the day the Settlement Agreement (Exhibit 2) was executed, was supposed to herald a new day of peace, harmony, and fairness for all concerned in the operation of the train. The steady erosion, however, of Heber Creeper, Inc.'s vitality continued apace. This time Mr. Mendenhall had help, however unwitting it may have been, from Mr. Ritchie. Both gentlemen resumed their positions as directors of Heber Creeper, Inc. on May 14, 1982, minutes after being apprised by former Governor of Utah Calvin Rampton of their fiduciary duty to look after the interest of Heber Creeper, Inc. and its shareholders (Exhibit 9, Minutes of Annual Shareholders' Meeting, page 13). On June 12, 1982, the Heber Creeper, Inc. Board adopted a policy of confidentiality in the course of a meeting at which, among other things, serious questions were raised concerning TPS and its manager, Monte Bona. Ex. 27. On June 14, 1982, two days later, Mr. Mendenhall, at a TPS Board meeting, not only breached plaintiff's policy of confidentiality; he also nominated Monte Bona to a position on the TPS Board. Ex. 38. Eight days later Mr. Mendenhall resigned as a director and officer of Heber Creeper, Inc. Ex. 14. Nine days after writing his letter of resignation, defendant Mendenhall wrote Heber Creeper, Inc.'s president a letter (Exhibit 17) setting forth a debt supposedly owing from Heber Creeper, Inc. to TPS which, if it ever existed,

had clearly been extinguished by the express terms of the Settlement Agreement. (It is undeniably clear, that any and all pre-Settlement Agreement claims of TPS against Heber Creeper, Inc. were wiped out when that document was executed. Exhibit 2, pp. 11-12)). It is indicative of Mr. Mendenhall's attitude that he testified, at his deposition and admitted at trial (tr. at 493) that he would have written such a letter, if the TPS Board had requested him to do so, even if he had still been a member of Heber Creeper, Inc.'s board. The fact that Mr. Mendenhall had resigned 9 days prior to his bringing the bogus claim to Heber Creeper, Inc.'s attention as an excuse not to pay the food sales payments due under the Settlement Agreement does not, in any event, render him immune from liability for his post-resignation misconduct with respect to acts and policies which were adverse to his corporation's interests and which were planned, decided, or agreed upon prior to his resignation but which are manifested only after resignation.

In the aforementioned case of Glen Allen Mining Co. v. Park Galena Mining Co., 77 Utah 362, 296 P. 231 (1931), this Court rejected the argument of the defendants, former director-officers of the plaintiff corporation, that they were shielded from liability because certain acts harmful to the corporation did not come to fruition until the defendants had resigned their posts. In that case the evidence was that the defendants had developed and put into motion their nefarious plans prior to the formal termination of their fiduciary positions. The Glen Allen Mining Co. Court quoted with approval, 296 P. at 231, the following observation from an earlier non-Utah case:

'Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of an agent to be true to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term.'

And in the recent case of Microbiological Research Corporation v. Muna, 625 P.2d 690 (Utah 1981), the Court reaffirmed the Glen Allen Mining Co. rule and restated it as follows:

[W]here a transaction has its inception while the fiduciary relationship is in existence, an employee cannot by resigning and not disclosing all he knows about the [transaction] subsequently continue and consummate the transaction in a manner in violation of his fiduciary duties.

Id. at 695.

The inference clearly to be drawn, as the trial court apparently did, is that Mr. Mendenhall had knowledge, prior to the time of his resignation as a director and officer of Heber Creeper, Inc., of the TPS plan, which he, as a TPS board member, in all likelihood helped formulate, to pursue the false claim for monies due. There is, simply, no record of the occurrence of a TPS board meeting between June 22, 1982, the date of Mr. Mendenhall's letter of resignation, and July 1, 1982, the date of the letter setting forth the phony claim. Nor could Mr. Mendenhall or TPS operative Monte Bona recall, during the trial, the holding of any such meeting. Nor could Mr. Mendenhall recall having informed Heber Creeper, Inc.'s president, Gene Moore, prior to July 1, 1982, of TPS's intent to pursue that

claim. Also, Gene Moore testified that the first time he had knowledge of TPS's intention to pursue that claim was when he received Mr. Mendenhall's July 1, 1982 letter. The law as applied to the reasonably inferable facts of this case thus leads inexorably, as the trial court appears to have recognized, to the conclusion that Mr. Mendenhall cannot, by virtue of his June 22, 1982 resignation, escape liability in connection with non-payment of the Settlement Agreement-mandated amounts.

Subsequent to July 1, 1982, Mr. Ritchie and Mr. Mendenhall participated in and carried out the TPS policy of utter non-payment, with the bogus debt used as a continuing reason not to pay. The two comprised half of the TPS Board through at least November 30, 1982 (see Exhibit 56 - Minutes of TPS Board meeting of that date). During the TPS Board meeting of July 7, 1982 (Exhibit 39), Mr. Mendenhall seconded a motion (which, like all the many motions that are memorialized in the various TPS minutes that are part of the record in this case, was unanimously passed by those trustees present) that, rather than cash payment of food sales percentages, due, "credit" be given on the bogus debt. No money was ever paid, despite the clear ability of TPS to make the payments as they fell due.

Mr. Ritchie's defense of his role in the non-payment and of his role in attempting to thwart Heber Creeper, Inc.'s obtaining of legal services to pursue the debt that was so clearly owed (tr. at 235-36) and that was so clearly not about to be paid can be distilled to his professed desire to keep the wheels a-rollin' and to give TPS as good a chance and apparently

as long a chance (10 years or so) as Heber Creeper, Inc. had had to make a return to Heber Creeper, Inc.'s shareholders on their investments. Tr. 237-38, 519-27. Despite Mr. Ritchie's trial counsel's valiant efforts, it has clearly been established that Mr. Ritchie was indeed both a director of Heber Creeper, Inc. and a trustee of TPS throughout the 1982 season. (See, e.g. exs. 9, 5, 56). Mr. Ritchie's virtual carte-blanche trust in TPS and Monte Bona and unwavering disinterest in and hostility for Heber Creeper, Inc.'s aggressive pursuit of its Settlement Agreement claim against TPS clearly establish his failure to live up to the duty of the highest good faith that the law required of him while he was a member of Heber Creeper, Inc.'s Board of Directors. He was, like Mr. Mendenhall, disloyal to Heber Creeper, Inc. He too breached confidentiality by reporting to the TPS board, on September 28, 1982 (Exhibit 46), on the goings-on of Heber Creeper, Inc.'s Board meeting of September 17, 1982 (Exhibit 26) and retention of legal counsel. Mr. Ritchie was not only disloyal. He also clearly breached his duty of care as defined, hereinabove, by this Court. He acknowledged, at trial (tr. at 523) the admission, made in his deposition, that he didn't check the facts, though "maybe" he should have. Unfortunately for Mr. Ritchie, the law of the State of Utah does not recognize figure-head directors. He undertook a solemn duty to concern himself with the protection of Heber Creeper, Inc.'s interests and he, like defendant Mendenhall, abjectly failed adequately to discharge that duty.

The uncontroverted testimony of Heber Creeper, Inc.'s



expert, C.P.A. Ron King, not only thoroughly debunked the notion presented to the trial court that virtually anything (i.e., unfettered TPS control) was worth a try after the supposedly horrendous financial failure of the train operation while it was under Heber Creeper, Inc.'s control. Mr. King also offered credible and similarly uncontroverted testimony (see Exhibit 34 and tr. at 357-66, that \$17,385.00, rather than the \$10,000.00 minimum, is the amount for which Mr. Mendenhall and Mr. Ritchie should be held liable to Heber Creeper, Inc. in connection with non-payment under the Settlement Agreement.

3. The Allowance of the Dissipation and  
Alienation of Heber Creeper, Inc.'s  
Assets During 1982

Mr. Craig Drury, former operations manager for the train, testified that in or about February of 1982 he brought to Mr. Mendenhall's attention certain concerns he had with the 1981 train operation and particularly the practices of operations manager Monte Bona. Tr. at 257-65. The credible testimony was that Mr. Mendenhall told Mr. Drury in that conversation, that he, Mr. Mendenhall, did not trust Monte Bona. Nonetheless, the 1982 operating season again found Monte Bona at the helm. According to the uncontroverted testimony of William Schultz, by the time Mr. Mendenhall (who never has decided exactly what story to tell about why he resigned from Heber Creeper, Inc.'s Board; (see, e.g., tr. at 399-406; 727-28) quit his Heber Creeper, Inc. posts on June 22, 1982, the historic Harriman coach had been gutted and the valuable scrap metal pile had been substantially depleted. Tr. at 295-307. The work was done in daylight, as part of regu-

lar TPS operations. Tr. at 303. Both Mr. Mendenhall and Mr. Ritchie, according to the testimony of both Mr. Schultz and former TPS president Richard Buys, spent considerable time during the 1982 season, before and after June 22 of that year, on and around the train terminal grounds where the pilferage occurred. Neither gentleman lifted a finger to stop the alienation and dissipation of Heber Creeper, Inc.'s assets. Maybe they knew what was happening. Maybe they did not. The point is that they should have known, they should have cared, and they should have done something to stop it. Even if they did not have the visceral wherewithal to stand up to Monte Bona or whoever else was destroying what were then some of the most valuable of Heber Creeper, Inc.'s remaining assets, they should have alerted the Heber Creeper, Inc. Board to what was going on. As the trial court observed, it is obvious what Heber Creeper, Inc.'s president, Gene Moore, would have done if he had been informed of what was happening to his corporation's assets under the auspices of the TPS operation. He would have taken steps to stop it. Tr. at 202. Both Mr. Mendenhall and Mr. Ritchie, perhaps even more particularly Mr. Mendenhall because of the warning he had been given by Mr. Drury, either were aware or should have been aware of what was happening. And both, if they had cared, would have known what was happening and would have taken steps to halt it. But nothing was done to stop the continued erosion of Heber Creeper, Inc.'s assets. Whether it was a simple lack of care or further acts of disloyalty will probably never be known. But the former possibility is obvious, and the latter may fairly be inferred.

Again both Appellants acted, or failed to act, in a manner that clearly fell short of the requirements established by this Court. The damages suffered by Heber Creeper, Inc. as a result of Appellants' misconduct in this regard, according to the credible testimony - that Mr. Murl Rawlins - is \$35,090.00, said total representing the estimated total cost of restoration of the Harriman coach to its pre-gutting condition (\$24,590.00) plus the estimated value (\$10,500.00) of the scrap metal that disappeared. Exhibit 32; tr. at 310-30, 343-49).

#### POINT II

#### BOTH APPELLANTS ARE LEGALLY CHARGEABLE WITH DAMAGES VISITED UPON HEBER CREEPER, INC.

In Warren v. Robison, 19 Utah 289, 57 P.287 (1899), discussed hereinabove, some of the defendants, directors and officers of a banking corporation, were also directors of other corporate entities to which loans were made on questionable and suspicious terms and which failed to repay and defaulted on the loans. This Court, in the course of reversing the trial court's nonsuit against several of the directors, did not concern itself with precisely what role any of the directors played in the defaulting entities' non-payment of the loans. The focus of the Court's concern in that case was not on the defaulting entities at all. It was on the attitude and conduct of the banking corporation's directors. Heber Creeper, Inc. commends the entire case to the Court's attention and suggests that the teachings of the case include the notion that, where a corporation's director's conduct and attitude are shoddy enough, in connection with

his delegation of authority and his dealings with third parties, an inference, if not, indeed, a legal presumption, may arise to the effect that that director is legally answerable to his corporation for damages suffered in connection with his questionable acts. Some of the facts of the Warren Court's observations seem to almost foretell things that happened in the instant case.

Those observations include the following:

It is certainly quite startling to notice that a bank in the hands of honest business men, as the directors and officers were reputed to be, should in so short a space of time meet with so many heavy losses as to actually wreck the institution.

57 P. at 287.

The directors were not intended to be mere figureheads without duty or responsibility.

Id. at 289.

The duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of the affairs of the institution, incompetency, or gratuitous service, or that the management of banking business was in the hands of the cashier or other executive officer.

Id. at 290.

In Francis v. United Jersey Bank, 432 A.2d 814, 826-829 (N.J. 1981), the unanimous New Jersey Supreme Court offered the most thorough and compelling analysis Heber Creeper, Inc.'s counsel has been able to locate on the question of proximate causa-

tion of damages in a setting analogous to that now before the Court. Plaintiff commends that entire analysis to the Court's attention and here offers the following excerpt:

In assessing whether Mrs. Pritchard's conduct was a legal or proximate cause of the conversion, "[l]egal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." Prosser, supra, § 41 at 237. Such a judicial determination involves not only considerations of causation-in-fact and matters of policy, but also common sense and logic. Caputzal v. The Lindsay Co., 48 N.J. 69, 77-78, 222 A.2d 513 (1966). The act or the failure to act must be a substantial factor in producing the harm. Prosser, supra, § 41 at 240; Restatement (Second) of Torts, §§ 431, 432 (1965).

Within Pritchard and Baird, several factors contributed to the loss of the funds: commingling of corporate and client monies, conversion of funds by Charles, Jr. and William and dereliction of her duties by Mrs. Pritchard. The wrongdoing of her sons, although the immediate cause of the loss, should not excuse Mrs. Pritchard from her negligence which also was a substantial factor contributing to the loss. Restatement (Second) of Torts, supra, § 442B, comment b. Her sons knew tht she, the only other director, was not reviewing their conduct; they spawned their fraud in the backwater of her neglect. Her neglect of duty contributed to the climate of corruption; her failure to act contributed to the continuation of that corruption. Consequently, her conduct was a substantial factor contributing to the loss.

Analysis of proximate cause is especially difficult in a corporate context where the allegation is that nonfeasance of a director is a proximate cause of damage to a third party.... Where a case involves nonfeasance, no one can say, "with absolute certainty what would have occurred if the defendant had acted otherwise." Prosser, supra, § 41 at 242. Nonetheless, where it is reasonable to conclude that the failure

to act would produce a particular result and that result has followed, causation may be inferred. Ibid. We conclude that even if Mrs. Pritchard's mere objection had not stopped the depredations of her sons, her consultation with an attorney and the threat of suit would have deterred them. That conclusion flows as a matter of common sense and logic from the record. Whether in other situations a director has a duty to do more than protest and resign is best left to case-by-case determinations. In this case, we are satisfied that there was a duty to do more than object and resign. Consequently, we find that Mrs. Pritchard's negligence was a proximate cause of the misappropriations.

To conclude, by virtue of her office, Mrs. Pritchard had the power to prevent the losses sustained by the clients of Pritchard & Baird. With power comes responsibility. She had a duty to deter the depredation of the other insiders, her sons. She breached that duty and caused plaintiffs to sustain damages.

432 A.2d at 828-829. For the Court's information, Pritchard and Baird was the corporation. The estate of Mrs. Pritchard was a defendant. Plaintiffs included the corporation's trustee in bankruptcy. In analogizing the facts of that case to the facts of the instant case, the Court should, Heber Creeper, Inc. suggests, focus on the equities of the instant case, the Francis court's application of the Prosser and Restatement rules referenced therein, and the conduct of Messrs. Mendenhall and Ritchie herein. If the Court determines that it is not egregiously disloyal or nefarious acts of the Appellants that have damaged Heber Creeper, Inc., but rather that it was TPS as an entity or Monte Bona, or some combination of actors or factors that have worked, in whole or in part, directly to visit the subject damages upon Heber Creeper, Inc., the Court should at least

conclude that the subject damages were suffered as a result of acts and conduct, in the words of the Francis Court, "spawned in the backwater of [Appellants'] neglect." Id. at 829.

At the conclusion of trial the trial court queried as to the significance of the role played by one director with respect to corporate action taken by a board of 14 or 15 members that damages another corporation of which such a director is also a board member. Tr. at 790-91. Heber Creeper, Inc. concedes that if TPS had been a corporation with such a large number of trustees, Heber Creeper, Inc.'s case against Appellants might be much more difficult. The point, however, is that, as with the Francis case, the TPS Board was a small board. The corporation in Francis had a 3-member board. The TPS Board never had, it appears, more than 4 or 5 members. Throughout 1982 it had, apparently, but 4: Mr. Mendenhall, Mr. Ritchie, Richard Buys, and, for part of the year, Monte Bona. Heber Creeper, Inc. submits that it is not only logical but in accordance with the foregoing legal analysis to conclude (1) that the smaller the governing body is the greater is the influence, for good or for ill, that a director or trustee wields and can be expected to wield; and (2) that, on the facts of this case, there is no impediment to the Court's holding both Appellants liable for acts and conduct that damaged Heber Creeper, Inc. and that were the product of what appears to be TPS Board-approved action.

Finally, of further guidance may be a very recent Utah Supreme Court case, one that is more general in its reach than what is required here, but one that appears to have considerable

bearing on the issue of liability of both Appellants to the extent that they have tried to paint themselves as mere agents of TPS. In Pentecost v. Harward, 699 P.2d 696, (Utah 1985), this Court adopted the following standard:

If an agent commits a tort while acting on behalf of his principal, the fact that he is an agent does not insulate him from liability to the injured party. The agent's liability is determined solely

upon the common-law obligation that every person must so act or use that which he controls as not to injure another. . . . [W]hether he is acting on his own behalf or for another, an agent who violates a duty which he owes to a third person is answerable to the injured party for the consequences. It is no excuse to an agent that his principal is also liable for a tort . . . Nor is an agent who is guilty of tortious conduct relieved from liability merely because he acted at the request, or even at the command or direction, of the principal, unless he is exercising a privilege of the principal to commit the act.

Id. at 699 (quoting from 3 Am. Jur. 2d Agency § 300). Neither Mr. Mendenhall nor Mr. Ritchie can find sanctuary in his contention that it was TPS, not he, that damaged Heber Creeper, Inc. And Heber Creeper, Inc. contends, the trial court correctly applied the rule of personal liability to the acts and omissions of both Appellants in connection with the non-payment of the 1982



Settlement Agreement entitlements and incorrectly applied it in finding no liability against Mr. Mendenhall in connection with the failed 1981 purchase and debt-retirement arrangement and against both Mr. Mendenhall and Mr. Ritchie in connection with the 1982 dissipation and alienation of Heber Creeper, Inc. assets.

### POINT III

THE ARGUMENTS ADVANCED BY APPELLANTS ARE NOT SUPPORTED BY UTAH LAW, ARE BASED ON INACCURATE OR INCOMPLETE RECORD EVIDENCE, AND MUST FAIL.

#### A. The Duration of Directors' Fiduciary Duty

At pages 8 and 9 of their Brief, Appellants have brought to the Court's attention a number of encyclopedic references and cases from Florida, Kansas, and Wyoming which appear to stand for the general proposition that a director's fiduciary duty to his corporation terminates as of the time of termination of his directorship. Application of this argument is apparently intended to be limited to Mr. Mendenhall, inasmuch as Mr. Ritchie was unquestionably a director of Heber Creeper, Inc. from May 14, 1982 until February 1983 and (Ex. 27) was removed only as Heber Creeper, Inc.'s Vice President on September 17, 1982. (It should here be recalled that the Judgment from which Appellants have appealed is limited to the non-payment of funds to which Heber Creeper, Inc. was entitled for the 1982 season and is founded on the May 12, 1982 Settlement Agreement (Ex. 2)). As to Mr. Mendenhall, Appellants' argument fails to address the ongoing nature of a director's duties spelled out, as quoted on p. 15

hereof, by this Court in Glen Allen Mining Co. v. Park Galena Mining Co., 77 Utah 362, 296 P. 231 (1931). Nor does Appellants' argument seek to apply the relevant language of this Court in Microbiological Research Corp. v. Muna, 625 P.2d 690 (Utah 1981), to the facts of this case. Heber Creeper, Inc. respectfully submits its analysis of the facts of this case, set forth at pp. 24-25 hereof, in light of the relevant language of Muna quoted at p. 24 hereof. It appears quite clear, as the trial court herein found, that Mr. Mendenhall cannot escape liability merely because he resigned his Heber Creeper, Inc. position nine days before he made written demand for payment to TPS of a debt which, if it ever existed, had clearly been extinguished by the Settlement Agreement.

B. The Supposed Efforts to Cause the 1982  
Settlement Agreement Monies to Be Paid

At pages 10 and 11 of their Brief, Appellants have apparently sought to characterize themselves as having been consistently desirous that the monies due Heber Creeper, Inc. from TPS be paid. As is pointed out hereinbelow, the record simply does not support such a position. Nor, incidentally, and contrary to the statement made thrice at those pages of Appellants' Brief, was Mr. Monte Bona ever president of TPS. And to the extent that the Court is inclined to give weight, with respect to any of the issues presented on appeal, to any of Mr. Bona's testimony contrary to Heber Creeper, Inc.'s position, the Court is respectfully directed to review the lengthy impeachment Exhibit 62, referenced at pp. 784-86 of the transcript, as well as the

transcript at 652-663 and 679-70, to acquire a feel for Mr. Bona's apparent lack of respect for the judicial process.

Mr. Mendenhall himself testified (tr. at 445) that he had TPS authority to cut checks. And even if Mr. Bona told Mr. Mendenhall not to make the payments, Mr. Bona had no authority to do so. Mr. Bona was, as of September 7, 1982, merely, like Mr. Mendenhall and Mr. Ritchie, one of a handful of TPS Board members. The record does not appear to indicate that Mr. Bona held any corporate office. Furthermore, the record is replete with references to the fact that, prior to the TPS meeting of September 7, 1982, the supposed debt owed TPS by Heber Creeper, Inc. was used as a reason not to pay any part of Heber Creeper, Inc.'s Settlement Agreement entitlement.

With respect to concessionaire Gordon Wheeler's supposed failure to give an accounting to TPS of food sales, that would certainly not excuse the TPS trustees, including Mr. Mendenhall and Mr. Ritchie, from making at least substantial payment on the \$10,000.00 minimum due Heber Creeper, Inc. Furthermore, Mr. Wheeler was not required to give an accounting to Heber Creeper, Inc. Tr. at 125.

With respect to Mr. Ritchie's role in the non-payment, the record is clear, as indicated at pp. 25-26 hereof, that he was concerned not with causing Heber Creeper, Inc. to be paid the monies it was clearly entitled to receive, but rather to keep the wheels of the train rolling and to give TPS as much time, apparently, as TPS wanted before payment was to be forthcoming.

C. The Sufficient Basis for the Award of  
The Amount Ordered by the Trial Court

At pages 11 to 14 of their Brief, Appellants have contended that the evidence on which the trial court determined the amount due Heber Creeper, Inc. (\$17,385.00) under the terms of the 1982 Settlement Agreement was insufficient to support that determination and the concomitant award of judgment against Messrs. Mendenhall and Ritchie in that amount. The trial court's determination that that was the appropriate amount, rather than the \$10,000.00 minimum mandated by the Settlement Agreement, or any other amount, was apparently based on the testimony of Heber Creeper, Inc.'s expert, C.P.A. Ronald K. King, exhibit 34, and the failure of TPS and its paid accountant, Mr. Mendenhall, to provide Mr. King any records other than those (proffered Exhibit 33, which was not received) presented him by Mr. John Roberts, an agent of TPS. Appellants have cited no authority for their proposition (Appellants' Brief, p. 11) that Exhibit 34 should not have been received. Heber Creeper, Inc.'s position is that Mr. King's methodology (tr at 361-66), of comparing the historical percentage relationship of ridership dollars to food sales dollars to the ridership figures presented to him by Mr. Roberts, was sound, and that the trial court did not err in receiving Mr. King's testimony or Exhibit 34.

With respect to the reduction of monies due under the Settlement Agreement apparently claimed by Appellants (Appellants' Brief at 13) by virtue of the supposed "unavailability" of the NARFAM coaches, Heber Creeper, Inc.'s response is simple: there is no record evidence whatsoever that

those coaches, or any of them, were ever in fact "unavailable" to TPS. They were, regardless of any misgivings which anyone may have had, in fact used by TPS throughout the 1982 operating season. Even Mr. Monte Bona has admitted this fact. Tr. at 698.

The trial court's determination that \$17,385.00 was the amount that Heber Creeper, Inc. should have received under the Settlement Agreement was and remains, based on the record herein, unassailable.

D. The Insufficiency of Mr. Ritchie's  
Claim That He Acted as "Peacemaker"


At page 14 of their Brief, Appellants have sought, as was attempted at trial, to exonerate Mr. Ritchie from liability on the claimed basis that he acted, in all respects material hereto, as a "peacemaker"; that he sought to act "in the interest of the train"; that he "represented both parties fairly and was interested in running a railroad"; and that his object in serving as a director of Heber Creeper, Inc. was to "stop the lawsuits." It is perhaps of note that no such claim of neutrality is made on behalf of Mr. Mendenhall. With respect to Mr. Ritchie, Heber Creeper, Inc.'s position has been made, it is confident, abundantly clear: the law of this State, as set forth in the decisions of this Court cited hereinabove, demands, of directors of Utah for-profit corporations, vigilance and aggressive pursuit of the corporation's interests. Mr. Ritchie's acts and omissions, as discussed hereinabove and even, Heber Creeper, Inc. suggests, as characterized on page 14 of Appellants' Brief, fall far short of that standard.

IV

CONCLUSION

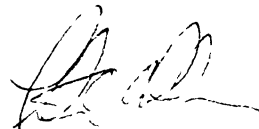
Appellants should not have done what they did to damage Heber Creeper, Inc., and should have done things that they did not do to protect Heber Creeper, Inc. They let their corporation down, and they broke the promise that the law required of them to work with the highest good faith to advance their corporation's interest. Liability of both was clearly established at trial, and Heber Creeper, Inc. urges the Court to sustain the trial court's awards in connection with the non-payment of 1982 Settlement Agreement entitlements and to modify the Judgment to provide that Heber Creeper, Inc. is entitled to recover the principal amount of \$299,194.00 against Gordon Mendenhall and to recover the principal amount of \$52,475.00 against Leon Ritchie.

Respectfully submitted this 4<sup>th</sup> day of April, 1986.

  
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PETER C. COLLINS  
Attorney for Respondent and  
Cross-Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 4<sup>th</sup> day of April, 1986,  
I mailed four copies of the foregoing Respondent's Brief to  
J. Harold Call, Esq., 30 North Main Street, Suite 3, Heber City,  
Utah 84032.

  
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