

1997

William Anthony Kraatz v. Heritage Imports : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff/Appellant)	
and Cross-Appellee,)	HERITAGE IMPORTS'
)	PETITION
)	FOR REHEARING
vs.)	
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage)	
Honda, O. BRYAN WILKINSON,)	Case No. 970044-CA
and JEFF J. WILKINSON,)	
)	Priority No. 15
Defendants/Appellees)	
and Cross-Appellants.)	

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE J. DENNIS FREDERICK

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**UTAH COURT OF APPEALS
BRIEF**

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FILED

Utah Court of Appeals

APR 09 1999

Julia D'Alesandro
Clerk of the Court

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF FACTS.	2
ARGUMENT	7
I. THE INADMISSIBILITY OF EXTRINSIC EVIDENCE MAY NOT BE CHALLENGED FOR THE FIRST TIME ON APPEAL	7
II. THE AGREEMENT IS AMBIGUOUS	10
III. EVEN IF UNAMBIGUOUS, KRAATZ BREACHED THE AGREEMENT BY REFUSING "TO DEVOTE HIS FULL AND EXCLUSIVE TIME TO PERFORM HIS SERVICES" AND BY NOT FULFILING HIS "RESPONSIBILITY TO PROVIDE MANAGEMENT TRAINING"	13
IV. OTHER REASONS JUSTIFYING DISCHARGE	18
CONCLUSION.	19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Coulter & Smith, Ltd. v. Russell</u> , 966 P.2d 852, 858 (Utah 1998).	18
<u>Co-Vest Corp. v. Corbett</u> , 735 P.2d 1308, 1309 (Utah 1987).	7
<u>Fitzgerald v. Corbett</u> , 793 P.2d 356, 360 (Utah 1990) .	9
<u>Hansen v. Green River Group</u> , 748 P.2d 1102, 1104 (Utah Ct. App. 1988)	16
<u>In re Justheim</u> , 824 P.2d 432 (Utah Ct. App. 1991)	8, 9
<u>In re Hartman</u> , 443 N.E.2d 516, 5176 (Ohio 1993). . . .	11
<u>Jenkins v. Equipment Ctr., Inc.</u> , 869 P.2d 1000, 1003 (Utah Ct. App.), <u>cert. denied sub nom., Jenkins v. Hesston</u> , 879 P.2d 266 (Utah 1994)	17
<u>LDS Hospital v. Capitol Life Ins. Co.</u> , 765 P.2d 857, 859 (Utah 1988).	15
<u>Olympus Hills Shopping Ctr. Ltd. v. Smith's Food</u> , 889 P.2d 445, 458 n.16 (Utah Ct. App. 1994), <u>cert. denied</u> , 899 P.2d 1231 (Utah 1995).	15
<u>Rapp v. Mountain States Tel. & Tel. Co.</u> , 606 P.2d 1189, 1191 (Utah 1980)	13
<u>Russell v. Ogden Union R.R. & Depot Co.</u> , 247 P.2d 257 (Utah 1952).	18
<u>Shields v. Harris</u> , 934 P.2d 653 (Utah Ct. App. 1997) .	8
<u>Stevenett v. Wal-Mart Stores</u> , 365 Utah Adv. Rep. 10 (Utah Ct. App. 1999)	7
<u>Stanger v. Sentinel Sec. Life Ins. Co.</u> , 669 P.2d 1201, 1205 (Utah 1983)	10
<u>State v. Brown</u> , 948 P.2d 337, 343 (Utah Ct. App. 1993). .	7, 9
<u>State v. Bryan</u> , 709 P.2d 257, 260 (Utah 1985)	12
<u>State v. Ham</u> , 910 P.2d 433, 438 (Utah Ct. App. 1996) .	17

	<u>Page</u>
<u>State v. Lee</u> , 633 P.2d 48, 53 (Utah), <u>cert. denied</u> , 454 U.S. 1057 (1981).	8
<u>State v. Real Property at 633 East 640 North</u> , 942 P.2d 925, 928 (Utah 1997).	16
<u>State v. Rodriquez</u> , 841 P.2d 1228, 1229 (Utah Ct. App. 1992)	8
<u>State v. South</u> , 885 P.2d 795, 798 (Utah Ct. App. 1994)	9
<u>Ted R. Brown & Assoc., Inc. v. Carnes Corp.</u> , 753 P.2d 964, 968 (Utah App. 1988)	13
<u>Utah County v. Brown</u> , 672 P.2d 83, 85 (Utah 1983) . . .	7
<u>Wade v. Stangl</u> , 869 P.2d 9, 12 (Utah Ct. App. 1994) . .	10
<u>Zeese v. Estate of Siegel</u> , 534 P.2d 85, 90 (Utah 1975)	13

Rules

Utah R. Evid. 103	7
-----------------------------	---

Other

<u>American Heritage Dictionary</u> , p. 913 (3d ed. 1992) . .	11
<u>Webster's Third New International Dictionary</u>	11, 16, 18

Pursuant to Utah R. App. P. 35, Heritage Imports ("Heritage"), respectfully requests that this Court reconsider its Memorandum Decision dated March 11, 1999. Heritage certifies this request is made in good faith and not for delay.

INTRODUCTION

William Anthony Kraatz ("Kraatz") presented extrinsic evidence on numerous occasions to the trial court in aid of his interpretations of the parties' Employment Agreement ("Agreement"). He repeatedly failed to object to similar evidence introduced at trial by Heritage. Kraatz never claimed at trial the Agreement was unambiguous, and even admitted on appeal it was ambiguous.

The case law is clear. In order to preserve this issue for appeal, Kraatz must have refrained from introducing extrinsic evidence and must have preserved the record by objecting to its introduction by Heritage. Having failed to do so, he cannot argue for the first time on appeal extrinsic evidence was improper.

The first time this issue was raised was at oral argument when Judge Bench asked counsel for Heritage where the Agreement was ambiguous. (Recording of oral argument.) This Court then issued its Memorandum Decision ("Decision"), ruling on page 2 "the trial court did not need to hear extrinsic evidence." In so doing, this Court for the first time on appeal and *sua sponte*, decided as outcome determinative an issue never

raised by either party, ever presented to the trial court, and never briefed or fully argued on appeal.¹

Case law provides such issues should not be raised by an appellate court *sua sponte*. Alleged errors must be raised at trial to allow correction during the course of proceedings. Otherwise, judicial resources are wasted.²

Further, due to the complexities of this case, it is submitted further consideration should be given to Heritage's claim the Agreement is ambiguous, especially as to the duties and responsibilities of the General Manager. Finally, assuming arguendo, parol evidence may be challenged for the first time on appeal and assuming the Agreement is then determined unambiguous, Kraatz breached it by refusing "to devote his full and exclusive time to perform" his services and by not fulfilling his "responsibility to provide management training."

STATEMENT OF FACTS

This Court found error "in considering extrinsic evidence because the language of the contract is unambiguous." (Decision, p.2.) However, when the issues were framed for trial, there was no claim in the Joint Pretrial Order that the

¹ What wasn't asked was "how" or "why" the lower court made its determination of ambiguity. The answer is ambiguity was never doubted. Both parties tried the case on that basis. For this reason, counsel for Heritage failed to get the "drift" of this Court's questioning and apologizes for not explaining the procedural history at oral argument.

² In the proceedings below, there were 27 depositions, hundreds of exhibits, and four days of trial, for which Kraatz' counsel asserted pretrial attorney fees exceeding \$200,000. (Joint Pretrial Order, p. 3.) Much of the time and resources expended were due to Kraatz' pursuit of parol evidence.

Agreement was unambiguous. (See Joint Pretrial Order.) Kraatz later admitted to this Court in his reply brief there is ambiguity.³ More importantly, not only did Kraatz fail to object to the introduction and consideration of extrinsic evidence, he introduced much of the extrinsic evidence himself.⁴

The following are examples of relevant extrinsic evidence introduced by Kraatz or by Heritage without his objection.

While Kraatz tries to distance himself from any responsibility or accountability for the profitability of the dealership, it is clear that, as found by Judge Frederick, the "thrust of the negotiations was that the dealership must return to profitability". (R. 2467.) This door was opened by Kraatz' counsel.

Q: [by Mr. Zundel] Okay. What did Bry tell you about his dealership?

A: [by Mr. Kraatz] That it was not doing as well as he had wanted it to, that Denny Boyle, who had been with Bry for a number of years, had left him, I believe, a year

³ "While the Agreement might be ambiguous about the scope of Kraatz' specific duties, it is unambiguous that Kraatz promised to contribute only his 'best professional skill' in performing them, he did not guarantee success." Kraatz' Reply Brief p. 4.)

⁴ There are also numerous other examples of extrinsic evidence relating to the duties of the General Manager set forth in the trial court's Findings of Fact ("FF") and Conclusions of Law ("CL"). See, e.g., during contract negotiations, Kraatz was allowed access to all financial records (FF B.4.; R. 2015); Kraatz' expert admitted the Honda dealership was a "license to steal," (FF. B.8.; R. 2339); Larry H. Miller testified that one of a general manager's responsibilities is to manage cash flow, (FF D.5.) and that the dealership was not undercapitalized and should have made a profit, (FF E.2-4 & 22; R. 2078, 2081); and B. Wilkinson told one of his bankers "He had given [Kraatz] complete control and responsibility for running the dealership." (FF D.8; R. 2059.)

before, that Helen Green had been the general manager more recently, and that he didn't like the direction it was going. (Tr. 1751.)

Without objection, Kraatz testified about further meetings he had with Bry Wilkinson before signing the Agreement. Kraatz represented, inter alia, the dealership "should be making a million dollars a year." (Tr. 1851-52.)

Extrinsic evidence came from Kraatz when he testified about his qualifications, management experience and skills, and association with other dealers and trade groups. (R. 1748-49.) When Judge Frederick asked about relevance, Kraatz' counsel responded: "This will have relevance, your Honor, to show Mr. Kraatz' management style and the relevance of some statistics we'll put in later on and his efficiency and experience." (R. 1748-1750.)

After the Agreement was signed (and again without objection), Bry Wilkinson testified to accountability meetings every 30 days with Kraatz concerning profitability.

- Q. [by Mr. Winder] Did you discuss profitability at these meetings?
- A. [by B. Wilkinson] Oh, yes.
- Q. Did you always discuss it?
- A. Well, that was pretty important to him and to me. I'd say we discussed it most every time, along with other things.
- . . .
- Q. What did you say and what did he say about profitability?
- A. Well, I mentioned that I had hoped our gross per car would have been better and our total gross had been better and that we'd have done a little better, and he said, "Well, you know, it takes a little while to get started. Put some people in

place and it's going to come, Bry, it's going to come." (R. 2027-2030.)⁵

Instead of objecting to the introduction of extrinsic evidence, Kraatz took the issue head-on. Kraatz' expert testified about whether profitability had in fact declined under his tenure. (See generally, R. 2425-30.) Kraatz took the approach the dealership was not as profitable as it should have been because he did not have enough control, or that profitability was improving. (See, e.g., Kraatz' counsel closing arguments, R. 2446, 2447 & 2449-50.)

Kraatz claimed under the Agreement he had a five-year no-cut contract.⁶

Q. [by Mr. Zundel] What did he [B. Wilkinson] say to the employees about you?

A. [by Mr. Kraatz] Basically . . . just introduced me as the new general manager, told the employees that I had a five-year no-cut contract, that I was going to be the general manager of the dealership and they would be responsible to me for their performance.

Q. Did he ever use the term no-cut contract with anyone else in your presence in describing your relationship with Heritage?

A. I believe he did. He had taken me up to the executive offices of Key Bank and introduced me to Mr. David Bronson and Richard Nelson and George Redd who I'd met on a previous occasion, I think.

Q. . . . Did he use the term no-cut in that conversation?

A. That is my recollection, yes. (R. 1832-1833.)

⁵ Lack of profitability was the first reason given by Bry Wilkinson for terminating Kraatz. (FF E.21.a; R. 2033.)

⁶ Bry Wilkinson denied such statements (R. 2006 & 2039), as did Pat Nichols, an employee of the dealership. (R. 2408.)

Kraatz also failed to object to the introduction by Heritage of an initial contract draft, showing the parties' intent concerning causes for termination, in opposition to Kraatz' "no-cut" assertion.⁷ (R. 1848-49.)

At trial, Kraatz asserted he was entitled to retirement benefits and Christmas bonuses outlined in an employee handbook. (Ex. 135, introduced by Kraatz.) Although he claimed entitlement to benefits provided in the handbook, he denied he was subject to its limitations, such as the right of the dealership to discharge an employee for various kinds of inappropriate conduct.⁸ (See FF F.9.d.) The handbook also made profitability "the ultimate measure" of efficiency, and insubordination "cause for discharge." (Id. F.9.f.)

Finally, Kraatz admitted his duties included the care and keeping of dealership assets, financial forecasting and producing income for the dealership (or at least supervising the individuals who generate sales).⁹ (R. 1851; FF D.1.-4.)

⁷ The initial draft of the contract prepared by Kraatz (FF. B.9; R. 1849; Ex. 589, see Addendum "B" to Heritage's Brief) was closer to a "no-cut" contract since it did not provide for termination for "C. Refusal by Employee to fulfill his employment responsibilities described in Article I of this Agreement."

⁸ B. Wilkinson's reasons for termination related to such improper conduct. (FF E.21; Tr. 1694; see also FF E.17.)

⁹ This Court, on page 3 of the Decision, quoted this testimony in disagreement with the trial court's Findings Kraatz bore responsibility for profitability. Heritage respectfully submits this testimony coupled with all the other extrinsic evidence regarding profitability demonstrates the trial court's Findings are not clearly erroneous.

ARGUMENT

POINT I

THE INADMISSIBILITY OF EXTRINSIC EVIDENCE MAY NOT BE CHALLENGED FOR THE FIRST TIME ON APPEAL

At trial, Kraatz failed to object to the admission of extrinsic evidence. A party must make a specific objection to the admission of evidence and allow the trial judge the opportunity to correct the alleged error in order to preserve the issue for appeal. Utah R. Evid. 103; Utah County v. Brown, 672 P.2d 83, 85 (Utah 1983); State v. Brown, 856 P.2d 358, 359 (Utah Ct. App. 1993). Not only did Kraatz not object below,¹⁰ but nowhere in his briefs did he claim the trial court erroneously considered extrinsic evidence, and thus, the issue cannot now be considered on appeal. See Stevenett v. Wal-Mart Stores, 365 Utah Adv. Rep. 10, 14 (Utah Ct. App. 1999).

Even though the determination of ambiguity is one of law, that determination must yield to the well-settled rule that where a party introduces or fails to object to extrinsic evidence at trial, he cannot raise the issue to his benefit for the first time on appeal. In Co-Vest Corp. v. Corbett, 735 P.2d 1308 (Utah 1987), the Utah Supreme Court considered a similar case where parol evidence was admitted by both parties without objection at trial, with the losing party then objecting

¹⁰ Not until the third day of trial did Kraatz' counsel object. His objection then was to relevancy, not the consideration of extrinsic evidence. Only this one objection was made and it was never renewed. (Tr. 2036).

for the first time on appeal. The Utah Supreme Court held "Because defendants did not object to the extrinsic evidence at the trial level, they cannot claim on appeal that the document is clear and unambiguous and is not subject to interpretation with extrinsic evidence." Id. at 1309.

Similarly, in Shields v. Harris, 934 P.2d 653, 656-67 (Utah Ct. App. 1997), this Court held an appellant:

cannot argue the court was limited to the four corners of the document after his failure to object to the introduction of, and his ability to offer, parol evidence at trial. The trial court found the terms of the option agreement definite enough to be enforceable and allowed in extrinsic evidence to effectuate the terms of the agreement in accordance with the parties' intent. Id.

Additionally, in In re: Justheim, 824 P.2d 432 (Utah Ct. App. 1991), this court held the failure to object to parol evidence constitutes a waiver. This Court ruled "[a] party [is] not entitled to both the benefit of not objecting at trial and appellate review of issue." Id., 435 n.4.

It is also improper under the case law for an appellate court to raise such an issue for the first time *sua sponte*. "[I]n the absence of special circumstances, an appellate court will not rule on grounds not addressed in the trial court." State v. Lee, 633 P.2d 48, 53 (Utah), cert. denied, 454 U.S. 1057 (1981). Moreover, "[i]n general, if a defendant has not raised an issue on appeal, we may not consider the issue *sua sponte*." State v. Rodriguez, 841 P.2d 1228, 1229 (Utah Ct. App. 1992).

Even though ambiguity is a question of law, it may not override the well-settled principle that an appellate court only

addresses issues raised to the trial court. State v. South, 885 P.2d 795, 798 (Utah Ct. App. 1994) (consistent with notions of fairness, parties are generally entitled to notice of the issues being appealed before briefing.)

In Fitzgerald v. Corbett, 793 P.2d 356, 360 (Utah 1990), the Utah Supreme Court refused to allow an appellant to object to the extrinsic evidence for the first time on appeal, holding:

At first blush, it may appear that the trial court erred in considering the foregoing extrinsic evidence to ascertain the intent of the parties without first concluding, as a matter of law, that the agreement was ambiguous. However, notwithstanding the lack of a specific finding of ambiguity, it is implicit in the record before us that the trial court viewed the settlement agreement as ambiguous. In addition, it is apparent that the parties themselves accepted as a foregone conclusion the ambiguity of the settlement agreement. This is to be seen in that although Fitzgeralds objected to the sufficiency of the evidence recited in the findings of fact, they did not object in any manner to the failure of the trial court to conclude that the settlement agreement was ambiguous. Id. at 360-61.

Furthermore, the Utah Supreme Court held in State v. Brown, 948 P.2d 337, 343 (Utah 1997), that "'[I]f a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, we will then decline to save that party from the error'" This holding includes claims under the plain error doctrine.¹¹

¹¹ Finally, the plain error doctrine is not applicable where the trial court was led into the alleged error through Kraatz introduction of extrinsic evidence. "One who has thus taken his chances of advantage has not, when he finds the testimony prejudicial, the legal right to exclude it." In re Justheim, supra, 824 P.2d at 435 n.4.

Kraatz should not be allowed to lead the trial court into error and then claim the same error for his benefit on appeal. The trial court's Findings of Fact are supported by the record, including extrinsic evidence offered by both parties, and the Conclusions of Law are founded upon credible evidence and correct law.

POINT II

THE AGREEMENT IS AMBIGUOUS

The Agreement is ambiguous as to the duties and responsibilities of the General Manager. As stated on page 1 of the Decision, "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" (Citations omitted.) Accordingly, parol evidence is admissible in order to ascertain the parties' intent concerning unexpressed issues. See Stanger v. Sentinal Sec. Life Ins. Co., 669 P.2d 1201, 1205 (Utah 1983); Wade v. Stangl, 869 P.2d 9, 12 (Utah Ct. App. 1994). In this case, there are many contested issues where the Agreement is silent, especially in defining the General Manager's duties.¹²

Article I, ¶ 1.2(a) of the Agreement employs Kraatz as the General Manager and defines his duties through a partial listing of examples:

Provide day-to-day management over the operations of the Dealership, including managing the new and used car sales

¹² The trial court found Kraatz' assertion of a no-cut contract was not supported by the evidence nor with a comparison of the draft agreement (Ex. 589) "[which] expands the reasons for termination under the Agreement." (CL B.10.)

departments, service department, parts department and financing and insurance departments. (Emphasis supplied).¹³

"Include" means "to take in as a part, an element, or a member." American Heritage Dictionary, p. 913 (3d ed. 1992); see also, In re Hartman, 443 N.E.2d 516, 5176 (Ohio 1993), citing Webster's Third New Int'l Dictionary:

In short, 'including' implies that that which follows is a partial, not exhaustive, listing of all which is subsumed within the stated category. 'Including' is a word of expansion rather than one of limitation or restriction").¹⁴

Based upon its interpretation as a matter of law, this Court concluded "The duties of a general manager, as specified in the contract, do not include making a profit." (Decision, p. 3.) Respectfully, how can that conclusion be reconciled with the remainder of paragraph 1.2(a), providing:

Employee [Kraatz] shall have responsibility and authority over all aspects of the daily operations (Emphasis added.)

Isn't profit a "daily aspect" of any business. Doesn't the partial listing of services demonstrate clearly these are "missing terms" which need to be clarified through extrinsic evidence.

¹³ See also Paragraph 1.2(b) of the Agreement: "The duties and responsibilities of Employee [Kraatz] shall include, but not be limited to" (Emphasis added.)

¹⁴ The Decision (p. 2) held "The ordinary meaning of contract terms is often best determined through standard, non-legal dictionaries."

The trial court specifically found "Plaintiff's responsibilities under the Agreement included the production of income at the Dealership." (FF D.1; see also FF D.13; CL B.6 & E.1.) This Finding was based, not just on extrinsic evidence,¹⁵ but also the language of the Agreement itself. (CL.D.2.) The third Recital to the Agreement states:

WHEREAS, Employee [Kraatz] has skills, personality traits and management skills, which are conducive to development and maintenance of such interpersonal relations, management of personnel, financing and sales and operating an automobile dealership. (Emphasis added.)¹⁶

The trial court's Findings give prospective effect to the words "development and maintenance". If the parties agreed Kraatz had management skills "conducive to development and maintenance of" "financing and sales and operating an automobile dealership," such skills included making a profit.¹⁷

¹⁵ "The general manager is the glue that holds the Dealership together. Plaintiff breached the Employment Agreement by failing to supply the consideration intended by the parties in formulating the Agreement." (CL D.1)

¹⁶ From this language, this Court determined "the parties recognized that Kraatz already possessed all the necessary skills and traits to be a general manager," concluding there was no "need to hear extrinsic evidence." (Decision, p. 2.) The trial court, however, found these were the representations of Kraatz--not the agreement of the parties. (FF C.2.)

¹⁷ Words such as "development" and "maintenance" infer future action, not just a present representation. Webster's New Collegiate Dictionary (1961) defines "develop" at p. 226, as follows: "to evolve the possibilities of"; "to advance; further; to promote the growth of". "Maintain" is defined, at p. 507, as "to continue or preserve in or with; to carry on...to uphold and defend...support."

Finally, a trial court's decision should be affirmed on any proper basis, even if not expressly set forth below. See, e.g., State v. Bryan, 709 P.2d 257, 260 (Utah 1985). The testimony of B. Wilkinson after the execution of the Agreement concerning accountability meetings demonstrates the parties' subsequent intent that Kraatz was responsible for profitability. Either this was a subsequent oral modification to the Agreement¹⁸ or the best evidence of their intent under that Agreement under the doctrine of practical construction. See, e.g., Zeese v. Estate of Siegel, 534 P.2d 85, 90 (Utah 1975).

POINT III

**EVEN IF UNAMBIGUOUS, KRAATZ BREACHED THE AGREEMENT
BY REFUSING "TO DEVOTE HIS FULL AND
EXCLUSIVE TIME TO PERFORM
HIS SERVICES" AND BY NOT FULFILLING
HIS "RESPONSIBILITY TO PROVIDE
MANAGEMENT TRAINING"**

Admittedly, the Agreement gives Kraatz "authority over all aspects of the daily operations." (Agreement, ¶ 1.2(b).)

Based upon this provision, this Court concluded:

Nothing in the contract suggests that anyone other than Kraatz would have authority to set work schedules. Thus, Kraatz's refusal to work Saturdays is not cause for his termination.

(Decision, p. 3.)¹⁹ But the Agreement also expressly provides in paragraph 1.2(c), in relevant part:

¹⁸ It is fundamental that an Agreement may subsequently be modified, even where there is an express provision to the contrary (See ¶ 5.2 of the Agreement). Ted R. Brown & Assoc., Inc. v. Carnes Corp., 753 P.2d 964, 968 (Utah App. 1988); Rapp v. Mountain States Tel. & Tel. Co., 606 P.2d 1189, 1191 (Utah 1980).

(c) [Kraatz] shall contribute his best professional skill to perform the Services at all times for the business and benefit of the Company [Heritage]. Employee [Kraatz] agrees to devote his full and exclusive time to perform the Services(emphasis supplied.)

In interpreting a contract, a more specific provision (relating to the time to be devoted to employment responsibilities such as ¶ 1.2(c)), governs over a more general one (like ¶ 1.2(b)). See Restatement (Second) of Contracts § 203(c)(1979). Kraatz was an employee of Heritage Honda, the majority shareholder was B. Wilkinson. (FF A.1.) B. Wilkinson, as the owner and dealer, instructed his son J. Wilkinson to prepare a work schedule to require Kraatz to work more evenings and Saturdays. (FF. E.21.d.) J. Wilkinson testified as follows:

Q. [by Mr. Zundel] Okay. Now, you prepared a schedule for Mr. Kraatz to work which has been marked previously in this case as Exhibit No. 1.

. . .
A. [by J. Wilkinson]. Yes.

Q. And you prepared this document at your father's request; is that right?

A. Correct. (Tr. 2362; see also Tr. 2368.)

Based upon this testimony, the trial court found:

Plaintiff refused to work the schedule B. Wilkinson had ordered J. Wilkinson to prepare, despite the fact that the busiest day of the week in car sales is Saturday, and the busiest sales time of a day is from 4:00 p.m. until closing. (Emphasis added.) (FF. D.12.)

¹⁹ Nothing in the Agreement, however, expressly says Kraatz has authority to set his own work schedule or that he didn't answer to a higher authority i.e., the Dealer. At a minimum, isn't this then a "missing term" for which consideration may be given to extrinsic evidence?

The Agreement in paragraph 2.1.c. states Kraatz may be terminated for "refusal . . . to fulfill his employment responsibilities." This Court, on page 3 of the Decision, defines "refuse" as "to show or express a positive unwillingness to do or comply with." The question thus arises, to whom could Kraatz direct any refusal to if not B. Wilkinson? Could the Agreement reasonably contemplate Kraatz was to express his unwillingness to fulfill his management responsibilities to himself. Such an interpretation is absurd and disfavored in the law. See LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988; Olympus Hills Shopping Ctr. Ltd. v. Smith's Food, 889 P.2d 445, 458 n.16 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).²⁰

The Agreement in paragraph 1.2(b) also required Kraatz to "provide management training to persons selected by Company to enable said persons to become qualified dealers or managers acceptable to American Honda, Incorporated." This Court stated on page 4 of its Decision "[a]lthough the record shows that J. Wilkinson may have been difficult to train, it does not reflect that Kraatz failed to train him during the contract term." Heritage respectfully points out the following Findings of Fact made by Judge Frederick:

²⁰ Kraatz claimed the dealer (B. Wilkinson) had overall responsibility to hire and fire employees. (Tr. 1851) How then can it be doubted B. Wilkinson has the authority to set the work schedules for any employees. Further, interpretation that Kraatz is subject to direction by the business owner is consistent with a provision in the same Article that Kraatz be "consulted on all items of long range planning relating to the dealership." (Agreement ¶ 1.2(a).)

5. The only attempt during his entire twenty-seven month tenure that Plaintiff made to train either J. Wilkinson or Jeff Gorringer was to place J. Wilkinson in financing and insurance ("F & I"). At no time did Plaintiff ever attempt to place J. Wilkinson in the Parts Department, Service Department, or in Accounting. At no time did Plaintiff give instruction to J. Wilkinson on the hiring and firing of personnel, on management of assets, on employee interviews, or other aspects of general management.

6. J. Wilkinson testified he received no training while in F&I.

16. The testimony of B. Wilkinson and J. Wilkinson is uncontroverted that Plaintiff failed to train J. Wilkinson to become a qualified dealer or manager acceptable to American Honda.

(FF E.5, 6, & 16)

Respectfully, this Court cannot disregard or overturn factual findings based on credible evidence. This Court may only overturn factual findings if they are clearly erroneous and not supported in the record after resolving all disputes in a light favorable to the trial court's determination. See State v. Real Property at 633 East 640 North, 942 P.2d 925, 928 (Utah 1997). Moreover, in Hansen v. Green River Group, 748 P.2d 1102, 1104 (Utah Ct. App. 1988), this Court ruled:

if the contract is ambiguous and the trial court makes factual findings about the intent of the parties based on extrinsic evidence, our review is strictly limited. If those findings are supported by substantial, competent evidence in the record, they are not clearly erroneous under Utah R. Civ. P. 52(a) and we will not disturb them on appeal.

The trial court's Findings of Fact outlined above are supported in the Record (Tr. 2380-81.)

B. Wilkinson had semi-retired, leaving the day-to-day management of Heritage to Kraatz. (FF. B.5) The purpose of this

training was B. Wilkinson's plan to pass the business on to his family members. (Tr. 2041, 2467.)

Although Kraatz made a conclusory claim he attempted to train the children, (see Tr. 1794.), he provided no supporting details. When faced with contradictory testimony, the trial court, as fact finder, may weigh conflicting testimony, assess credibility and demeanor, and believe one witness over another. See State v. Ham, 910 P.2d 433, 438 (Utah Ct. App. 1996). In this case, the trial court believed the testimony from J. Wilkinson over Kraatz' unsupported claim. (See R. 2466.)

This Court's Decision (p. 4) also states the "Record contains no evidence suggesting that J. Wilkinson or Jeff Gorringer were unacceptable to American Honda, Incorporated." Since these individuals received no training, how could they have been submitted to American Honda. The law does not require a useless act. See Jenkins v. Equipment Ctr., Inc., 869 P.2d 1000, 1003 (Utah Ct. App.), cert. denied sub nom. 879 P.2d 266 (1994).

This Court finally found "even if Kraatz had, up to that point, failed to train the named individuals according to Honda's standards, he still had thirty-three months left on his contract to complete the training."²¹ The Agreement provides cause for termination for Kraatz' refusal "to fulfill" his management responsibilities. "Fulfill" means "to carry into effect, as an intention, to bring to pass, as a design...to

realize or manifest completely." Webster's Collegiate Dictionary, supra, p. 335. Kraatz should not be able to refuse to fulfill his responsibilities for the first twenty-seven months (45% of contract term) and claim immunity from termination.

Could Kraatz have been excused from 27 months of nonperformance under a construction contract or a promissory note? It is well settled where time of performance is not explicitly stated in a contract, performance will be required within a "reasonable time." See Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 858 (Utah 1998). Failing to perform for twenty-seven months of a sixty-month contract is not a "reasonable time."²²

POINT IV

OTHER REASONS JUSTIFYING DISCHARGE

The Agreement in ¶ 1.2(c) required Kraatz to use his best professional skill to perform services at all times for the business and benefit of Heritage. Besides the reasons set forth above, Kraatz failed to perform his responsibilities by making poor decisions on financing that cost the dealership \$114,000 (see FF E.13; Tr. 2040, 2034.), failed to control inventory,

²¹ The trial court made no such Finding of Fact. Respectfully, it is pure speculation that Kraatz would have made the attempt.

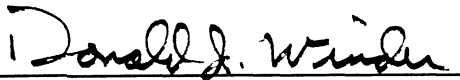
²² Kraatz introduced no evidence of acceptability to American Honda or that he could adequately train designated persons to take over all areas of the dealership (i.e., finance & insurance, parts, service, accounting, sales, and personnel) in thirty-three months. His failure to do so is fatal since he had the burden to prove performance under the Agreement. See Russell v. Ogden Union R.R. & Depot Co., 247 P.2d 257 (Utah 1952).

failed to provide customer service and failed to maintain company morale. (See FF E. 21; Tr. 2033-34, 2041, 2411.)

CONCLUSION

Heritage respectfully requests this Court reconsider its Decision issued March 11, 1999, because Kraatz never objected to extrinsic evidence, introduced much of it himself, and because the case was tried as if the Agreement was ambiguous. The extrinsic evidence supported the trial court's Findings which are entitled to deference from this Court. Heritage submits, for all the reasons set forth herein, the trial court's decision concerning termination should be affirmed and the issues raised on cross-appeal considered.

RESPECTFULLY SUBMITTED this 9 day of April,
1999.


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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the Petition for Rehearing and Addendum to be mailed, postage prepaid, this 9th day of April, 1999, to:

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