

1997

William Anthony Kraatz v. Heritage Imports, a Utah corporation, dba Heritage Honda, O. Bryan Wilkinson and Jeffrey J. Wilkinson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,

Plaintiff and
Appellant,

vs.

HERITAGE IMPORTS, a Utah
corporation, dba HERITAGE
HONDA, O. BRYAN WILKINSON and
JEFFREY J. WILKINSON,

Defendants and
Appellees.

APPELLANT'S BRIEF

Case No. 970044-CA

Priority No. 15

APPEAL FROM JUDGMENT OF THE THIRD DISTRICT COURT,
JUDGE J. DENNIS FREDERICK

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UTAH COURT OF APPEALS
BRIEF

UTAH

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COURT OF APPEALS

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES

1. Whether the trial court erred by ruling that even when a contract of employment for a definite term is established an employer has no burden to show justification for discharge? *Ong Int'l (USA) v. 11th Ave. Corp.*, 850 P.2d 447, 452 (Utah 1993) (legal conclusions are reviewed for correctness and afforded no deference). Issue preserved in the trial court in Plaintiff's Trial Brief at R.984

2. Whether the trial court erred by ruling that "refusal" to perform in the context of the Agreement is synonymous with "failure" to perform? *Equitable Life & Casualty Insurance Co. v. Ross*, 849 P.2d 1187, 1192 (Utah App. 1992) (interpretation of unambiguous contract presents question of law and thus is reviewed for correctness and accorded no deference). Issue preserved in the trial court in the Joint Pretrial Order at R.1039.

3. Whether some of the trial court's written and oral Findings of Fact are clearly erroneous because (a) the Findings are supported only by unsubstantiated allegations; (b) the Findings are contrary to the great weight of the evidence; (c)

the Findings were induced by an erroneous view of the law; or (d) the Appellate Court is definitely and firmly convinced that a mistake has been made? *Western Capital & Securities, Inc. v. Knudsvig*, 768 P.2d 989 (Utah Ct. App. 1989) (factual findings reviewed under clearly erroneous standard).

4. Whether the trial court erred by ruling that the Heritage Employee Handbook was not part of the contractual employment relationship between the parties? *Ong Int'l, supra*, (question of law reviewed for correctness and accorded no deference). Issue preserved in trial court in Pretrial Order at R.1039.

5. Whether the trial court erred by failing to hold Heritage Imports liable to Kraatz for wrongful termination as a matter of law where Heritage Imports was required by the Heritage Employee Handbook to give Kraatz a written warning for unsatisfactory performance, but failed to do so prior to Kraatz's discharge? *Equitable Life, supra*, (question of law reviewed for correctness and accorded no deference). Issue preserved in trial court in Pretrial Order at R.1038.

6. Whether the trial court erred by failing to award Kraatz health benefits and stock appreciation rights which vested prior to his discharge? *Equitable Life, supra*, (question of law

reviewed for correctness and accorded no deference). Issue preserved in trial court in Pretrial Order at R.1037-38.

DETERMINATIVE STATUTES AND RULES

Rule 301, UTAH R. EVID.

STATEMENT OF THE CASE

This is a wrongful termination case based on a written Employment Agreement (the "**Agreement**") between William Anthony "Tony" Kraatz ("**Kraatz**"), as employee, and Heritage Imports, a Utah corporation ("**Heritage**"), as employer, for a five-year term, under which Heritage's right to discharge Kraatz was limited to the following causes: (1) fraud; (2) dishonesty; (3) refusal by Kraatz to fulfill his employment responsibilities; or (4) Kraatz's disability. (App. B-Exh. 38.)

After a bench trial, the Honorable J. Dennis Frederick entered a judgment of no cause of action (R.1718-20) concluding, *inter alia*, that "there is no burden upon Defendants to prove that the discharge of Plaintiff was justified" (R.1703) and that "failure" is the same as "refusal" in the context of the Agreement. (R.1710.) Kraatz timely commenced this appeal.

STATEMENT OF FACTS

Heritage was a family-owned corporation whose main asset was an automobile dealership located in Murray, Utah (the "**Dealership**"). (R.1683.) O. Bryan Wilkinson ("**B. Wilkinson**") was

the major shareholder of Heritage until April 1993, when he sold his stock to Larry H. Miller ("**Miller**"). *Id.* Miller took over operation of the Dealership as of December 9, 1992. (Management Agreement dated December 9, 1992, App. B-Exh. 53, R.2200.)

B. Wilkinson's children, J. Wilkinson, Lynlee Wilkinson, Wendy Gorringer and Matt Wilkinson, were all officers, directors and minority shareholders of Heritage. J. Wilkinson and Matt Wilkinson were also managers at the Dealership. (R.1683-84, 1783-84, 1793, 1811-12, 1824.) Jeff Gorringer, Wendy's husband, was also employed at the Dealership as a manager. (R.1784, 1950.)

Prior to accepting employment at Heritage Imports in the spring of 1990, Kraatz was an owner and the General Manager of Anthony Wade, Inc., a successful automobile dealership in St. George, Utah. Kraatz had 25 years experience in the automobile industry and enjoyed a good reputation as a general manager. (R.1748, 1746-47, 1923, 2091-92.)

In the spring of 1990, B. Wilkinson asked Kraatz whether he would be interested in becoming the General Manager of the Dealership. (R.1685, 1871.) B. Wilkinson knew Kraatz "quite well" and considered Kraatz to be a very good General Manager. (R.1871, 1922-23, App. B-Exh. 58.) B. Wilkinson told Kraatz that he wanted to remove himself from day-to-day involvement with the Dealership

and that the Dealership was not doing as well as he would like.

(R.1685.)

Before Kraatz accepted employment with Heritage, Kraatz was advised by Jeff Gorringer, and was otherwise made aware, that it would be difficult for him to control B. Wilkinson's exorbitant spending of dealership money (R.1686, 1864, 2456). But B. Wilkinson promised to limit his compensation from the Dealership to \$15,000.00 per month if Kraatz would agree to become General Manager. (R.1822-23, 1925.)

B. Wilkinson also warned Kraatz that B. Wilkinson's children would be resentful of Kraatz's position in the Dealership (R.1941) and that he expected that J. Wilkinson (also called "J.J.") "would be tough" to train, but thought that Kraatz could teach him and train him. (R.1820.) J. Wilkinson did in fact express disappointment that Kraatz had been hired as General Manager, but B. Wilkinson assured J. Wilkinson that Kraatz's employment would be for "a short time" and that J. Wilkinson would then become the general manager or dealer of the Dealership. (R.2349-50.)

The Agreement, prepared by Heritage's counsel and executed in May of 1990, provides that Heritage could terminate Kraatz's employment only for fraud, dishonesty, refusal by Kraatz to fulfill the employment responsibilities described in the

Agreement, or Kraatz's disability to the extent he was unable to perform his contractual duties. (App. B-Exh. 38.) The parties agreed upon these termination provisions after Kraatz explained to B. Wilkinson that he needed a contract that "basically couldn't be ended" and that he "wanted to make sure that the reasons that [he] could be let go or cancel the contract were very specific." (R.1762-63.)

Kraatz's testimony was uncontroverted that there were no reasons discussed for which Kraatz could be "let go" other than those set forth in the Agreement. B. Wilkinson did not dispute Kraatz's testimony, but testified that he did not remember discussing any specific profit level that Kraatz was expected to attain (R.2020), and that the Agreement was written as concisely as possible regarding the parties' respective duties. (R.2027.)

The Agreement required Kraatz to contribute "his best professional skill to perform the services at all times for the business and benefit of the company," to "devote his full and exclusive time to perform the services" required of him as General Manager, and to "[p]rovide management training" to persons selected by Heritage. (App. B-Exh. 38.) In return, the Agreement promised that Kraatz would have "authority over all aspects of the daily operations" of the Dealership and that Kraatz would be "consulted on all items of long-range planning

relating to the dealership." (App. B-Exh. 38; Management Chart, App. B-Exh. 324, showing relative authority of managerial staff.)

Kraatz's employment with Heritage Imports commenced on June 1, 1990, and continued until September 11, 1992. (R.1687.) The Dealership was not as profitable during Kraatz's tenure as he had hoped. (R.1690.) In 1990 it lost \$295,515.00; in 1991 it realized a profit of only \$5,169.00; and in 1992 it lost \$124,980.00. (R.1690.) However, it did not lose money in 1992 until after Kraatz was fired. (R.2220; Fin. Stats., App. B-Exh. 297, Bates Nos. 189, 193, 197, 201 and 205, item 63 of each Fin. Stat.)

While Kraatz and B. Wilkinson had many discussions concerning profitability, B. Wilkinson did not blame Kraatz for losses suffered by the Dealership. (R.1690, 1863, 2029.) B. Wilkinson admitted that the loss in 1990 "wasn't [all] Tony's fault," took some responsibility for losses suffered in 1992, and admitted that Kraatz had "tried to operate the store in a profitable fashion." (R.2000-01, 2031.)

At the time of Kraatz's employment, Heritage had various loans with Comerica Bank, including a \$3,000,000 flooring loan for new cars, and had guaranteed a loan to Goodworks, a partnership controlled by B. Wilkinson. (R.1691, 1885-86, 2000; App. B-Exh. 275 at pp. 1-2). These loans were secured in part by Heritage's used car inventory, and were cross-collateralized and

cross-defaulted. (R.1691, 1958, 2050.) In addition to its Comerica financing, Heritage had a used car flooring line with Key Bank, obtained in 1989, in the amount of \$800,000.00, which was also collateralized by Heritage's used car inventory. (R.1956-58, 1963.)

In late 1990, Kraatz and B. Wilkinson discussed increasing the used car flooring with Key Bank from \$800,000.00 to \$2,000,000.00. B. Wilkinson agreed with Kraatz's decision to increase the used car flooring with Key Bank and ultimately executed the documents effecting the change. (R.1960-65.)

B. Wilkinson and Kraatz also discussed obtaining new car flooring from local banks. (R.2039-40.) B. Wilkinson eventually executed the documents opening the new car flooring line with Key Bank. (R.1965-66.) By letter dated December 18, 1990, Kraatz officially advised Dan Hartmann ("**Hartmann**"), Comerica's banking officer in charge of the Heritage loans, of Heritage's decision to change its new car flooring line to Key Bank. (App. B-Exh. 501.) In response, Hartmann notified B. Wilkinson by letter dated January 11, 1991, that the Goodworks Partnership loan was contingent on the Dealership maintaining floor plan financing with Comerica. (R.2047; App. B-Exh. 504.) B. Wilkinson responded to Hartmann's threat by letter dated January 22, 1991, wherein B. Wilkinson referenced his previous conversations with Hartmann

regarding Heritage's decision to seek local financing and requested Comerica's cooperation. (App. B-Exh. 266.) The financing arrangements between Heritage and Comerica were ultimately modified, resulting in extra payment by Heritage to Comerica of over \$100,000.00. (R.2040, 2048; App. B-Exh. 275.) The Comerica flooring line was paid off in late 1991. (R.2060.)

Kraatz understood that he was to provide management training to B. Wilkinson's children as part of his responsibilities under the Agreement. Kraatz believed that J. Wilkinson was "most logically going to be the dealer," although Heritage never formally designated whom Kraatz was to train. (R.1782-84.) B. Wilkinson admitted that Kraatz tried to train the children, but "just didn't get the job done" and that the training "just did not happen." (R.1877, 2041.) Kraatz also testified that he tried to train B. Wilkinson's children. (R.1794-95.)

During Kraatz's employment, he worked 50-60 hours per week at the Dealership. He worked week days, and some Saturdays, and also at home after hours. He had no employment outside the Dealership. (R.1770-71.)

On or about September 7, 1992, B. Wilkinson asked J. Wilkinson to prepare a work schedule for Kraatz to include some, but not all, Saturdays and evenings. (R.1809-11, 1937-1938, 2362-63.) J. Wilkinson was Kraatz's subordinate; he had never prepared

a work schedule for Kraatz before, although he had prepared schedules for others under Kraatz's direction. (R.1809-11, 1937-39.)

J. Wilkinson prepared a work schedule which required Kraatz to work every Saturday between September 6 and October 17, 1992. (App. B-Exh. 1; R.2362.) When J. Wilkinson presented the schedule to Kraatz, Kraatz responded that he could not work all of the Saturday and evenings on the schedule and that he would prepare a schedule for J. Wilkinson and himself to work. (R.2363-69.) J. Wilkinson refused to accept the schedule prepared by Kraatz. (App. B-Exh. 2; R.1811.)

On September 11, 1992, B. Wilkinson asked for Kraatz's resignation. (R.1771-72, 1875-76.) B. Wilkinson testified that he very briefly told Kraatz he was terminating him for "[l]ack of profitability, inability to teach my children what he'd agreed to, and not always leveling with me on certain accounts, titles in, overage used cars and such." (R.1876-77.) B. Wilkinson admitted that no date, time or circumstance of any specific instance of "refusal" or "dishonesty" was described; in fact, very little detail was given. (R.1876.) B. Wilkinson did not follow the scheme of progressive discipline set forth in the Heritage Employee Handbook. It was uncontroverted at trial that there was no prior written reprimand or warning in Kraatz's

employee file. (R.1780, 1951.) Kraatz also testified that the September 11 meeting was very short and that the only reason B. Wilkinson gave for asking for Kraatz's resignation was that he didn't want Kraatz to be between him and his children. (R.1772.)

B. Wilkinson later came up with additional reasons for terminating Kraatz's employment, including allegedly "refusing" to work the schedule prepared by J. Wilkinson, and allegedly "unilaterally" changing the flooring. However, B. Wilkinson's reasons were simply pretexts for terminating Kraatz's employment. A few days after Kraatz was fired, J. Wilkinson became president and chief operating officer of the Dealership. (App. B-Exh. 5.)

In December 1992, B. Wilkinson concluded negotiations with Miller for the sale of his stock. (R.2186.) Miller immediately infused \$800,000.00 in new capital into the Dealership in the form of cash, implemented his own policies and procedures, and made and implemented decisions independent of B. Wilkinson. (R.2076, 2086-87, 2418-19.) Within a few months, Miller invested an additional \$600,000.00 to expand Heritage's used car lot. (R.2083-84.) Even so, the Dealership lost \$32,569.00 in 1993, but did realize net profits of \$323,002.00 and \$942,071.00 for the years 1994 and 1995, respectively. (App. B-Exhs. 208 and 333.)

After Kraatz was fired, he was hired by the Rick Warner Automobile Group ("Warner") and at the time of trial was General Manager of the Warner Nissan dealership. (R.1746.)

SUMMARY OF ARGUMENT

The trial court made several critical errors of law at trial. Initially, contrary to well-settled law, the court made the startling ruling that Heritage had no burden to establish that Kraatz's discharge was justified under the terms of the Agreement. Kraatz is entitled to a presumption that he is honest, competent and loyal to his employer. This presumption is outcome determinative unless rebutted by credible probative evidence of legally sufficient quantity and quality; conclusory allegations are insufficient to meet the burden. The trial court's failure properly to place the burden of proof is reversible error.

Compounding this error, the trial court eviscerated the Agreement by reducing the standard for termination from "refusal" to perform the duties set forth in the Agreement to simple "failure" to perform such duties. The plain language of the Agreement requires Heritage to justify Kraatz's discharge with proof of dishonesty or refusal to do his duty, as opposed to mere failure. This standard requires proof of a culpable mental state, a willful and substantial breach of the employment obligations. The trial court ignored the plain language of the Agreement and

essentially rewrote the Agreement to relieve Heritage of its obligations thereunder, rather than to enforce the terms of the Agreement as they stood.

Finally, the court ignored Utah law regarding incorporation of an Employee Handbook into an employment contract and in essence concluded that a handbook can **never** add to the terms of an integrated employment agreement.

In addition to the foregoing errors of law, the trial court made numerous clearly erroneous findings of fact. At the outset, the trial court failed to base its findings upon the appropriate standard of performance under the Agreement, which is Kraatz's "best professional skill." No other potentially applicable standards were ever established. The trial court further ignored Heritage's admissions that (1) Kraatz tried to operate the Dealership profitably; (2) Kraatz tried to train B. Wilkinson's children; and (3) Kraatz is an honest man who would never intentionally try to deceive.

The simple truth is that there is no evidence of willful and substantial wrongdoing by Kraatz. The testimony at trial consists of broad generalizations, conclusory statements, and unsubstantiated allegations. This testimony is not sufficient evidence to support the trial court's findings of fact, and it is

not sufficient to satisfy Heritage's legal burden to demonstrate that it terminated Kraatz for cause.

This Court should vacate the trial court's erroneous findings and substitute its own findings based upon the clear record below. See e.g., *Rasmussen v. Olsen*, 583 P.2d 50, 52 (Utah 1978).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONCLUDING THAT DEFENDANTS HAD NO BURDEN TO PROVE KRAATZ'S DISCHARGE WAS JUSTIFIED.

Kraatz's prima facie case for wrongful termination was established by the undisputed facts that (1) the Agreement was a contract of employment for a definite term, (2) Kraatz was employed as General Manager of the Dealership under the Agreement for 27 months, during which time he admittedly tried to run the Dealership profitably (R.2001) and tried to train B. Wilkinson's children (R.1877), and (3) Kraatz suffered damage because of his early termination, including loss of income and forfeiture of stock appreciation rights. (R.2232.)

After proving the existence of the Agreement for a definite term, Kraatz was entitled to a presumption that he satisfactorily served his employer. *Chiodo v. General Warehouse Corp.*, 17 Utah 2d 425, 413 P.2d 891, 893, fn.3 (1966) (citing *Russell v. Ogden*

Union Railroad, 122 Utah 107, 247 P.2d 257 (1952)); see also E. Kimball and R. Boyce, *Utah Evidence Law* 3-17 (1996) ("People are presumed to be sane, careful, honest, able-bodied, and so on."); 29 AM. JUR 2D *Evidence* § 270 (1994) (there is a "presumption that someone acted in accord with his contractual obligations"). The effect of such a presumption shifts the burden of proof, both of production and persuasion, to the employer. See Advisory Committee Note to UTAH R. EVID. 301.

The law in Utah is well-settled that under a contract of employment for a definite term the "employer has the burden of showing justification for discharge." *Chiodo*, 413 P.2d at 893; *Russell*, 247 P.2d at 260-61. Absent a contractual standard, the employer must prove a "willful and substantial failure" on the part of the employee to render honest, faithful and loyal service. *Chiodo*, 413 P.2d at 892. An employer's right to terminate an employee may be even further restricted by contract. *Fox v. MCI Communications Corp.*, 931 P.2d 857, 859 (Utah 1997); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55-56 (Utah 1991).

In this case there is an express written agreement that Kraatz's employment may be "terminated only for cause [and] upon satisfaction of [an] agreed upon condition," namely, for Kraatz's "refusal" to perform his responsibilities as General Manager or for "dishonesty." (App. B-Exh. 38.) Cf. *Fox*, 931 P.2d at 859.

Thus, the trial court's conclusion of law that "there is no burden upon Defendants to prove that the discharge of Plaintiff was justified" is incorrect. (R.1703.) Furthermore, since allocation of the burden of proof may be outcome determinative, the trial court could not make proper findings of fact without a proper view of the burden of proof. See UTAH R. EVID. 301 and Advisory Committee Note thereto. The court's decision must be reversed for failure properly to place upon Heritage the burden of proof, both of production and of persuasion, to justify Kraatz's discharge.

POINT II

THE TRIAL COURT ERRED IN CONCLUDING THAT "CAUSE" FOR TERMINATION UNDER THE AGREEMENT INCLUDED "FAILURE"

The trial court's conclusion of law that "[c]ause, under the Agreement, includes Plaintiff's failure to perform the duties set forth in the Agreement" is patently incorrect. (Conclusion B.9.) The court's interpretation tortures the plain meaning of the terms used in Section 2.1 of the Agreement to reach an absurd result not contemplated by the parties. Such a result must be eschewed by this Court for the reasons set forth below.

Section 2.1 of the Agreement provides, in its entirety:

2.1 TERM. The term of Employee's employment pursuant to this Agreement shall commence on or before June 15, 1990, and shall continue thereafter on the terms and conditions provided herein for a term of five years and

thereafter shall continue on a year to year basis, until terminated upon sixty (60) days advance written notice by either party. Employee's employment may not be terminated except for cause as defined herein. For purposes of this paragraph, cause shall be deemed to include the following:

A: Fraud;

B: Dishonesty;

C: Refusal by Employee to fulfill his employment responsibilities described in Article I of this Agreement; or

D: Employee becomes disabled to the extent he is unable to perform his duties hereunder as specified in Article I of this Agreement and such disability continues for a period of time longer than six (6) consecutive months. (Emphasis added).

The court construed Section 2.1 of the Agreement as a matter of law, without reference to extrinsic evidence. (Conclusions 8.a. & 8.b.) The trial court's interpretation of the Agreement is therefore accorded no presumption of correctness, and this Court reviews the construction under a correction-of-error standard. *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187, 1192 (Utah App. 1993). This Court is thus free to make its "own independent interpretation of the contract terms." *Jones v. Hinkle*, 611 P.2d 733, 735 (Utah 1980).

A. THE TRIAL COURT FAILED PROPERLY TO EMPLOY STANDARD PRINCIPLES OF CONTRACT CONSTRUCTION.

A "cardinal rule" in construing contracts is "to give effect to the intentions of the parties, and if possible, these

intentions should be gleaned from an examination of the text of the contract itself." *Buehner Block Co. v. UWC Associates*, 752 P.2d 892, 895 (Utah 1988). "Each contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none." *Plateau Min. Co. v. Utah Div. Of State Lands & Forestry*, 820 P.2d 720, 725 (Utah 1990).

In interpreting contracts, "the ordinary and usual meaning of the words used is given effect." *Warburton v. Virginia Beach Federal Sav. & Loan Ass'n*, 899 P.2d 779, 783 (Utah App. 1995). "All words used by the parties *must*, if possible, be given their usual and ordinary meaning and effect." *Commercial Bldg. Corp. v. Blair*, 565 P.2d 776, 778 (Utah 1977) (emphasis added).

1. The Trial Court Erroneously Concluded That the Parties' Use of the Term "Include" in Section 2.1 Expanded the Definition of "Cause" Beyond the Circumstances Expressly Set Forth by the Parties.

The trial court's conclusion that the parties did not intend to limit the definition of "cause" to the four circumstances set forth in Section 2.1 (Conclusion 8.b.[1]) is based in part upon its faulty construction of the term "include" as a term of enlargement.

The Utah Supreme Court has noted that the word "'including' is susceptible of different shades of meaning." *State v. Montello Salt Co.*, 98 P. 549, 551 (Utah 1908). The Court explained that

[i]t may be used in the sense to comprise or embrace, as this volume includes all his works; to confine or to contain, as the shell of a nut includes the kernel; to express the idea that a thing in question constitutes a part only of the contents of some other thing; as a word of enlargement, and in ordinary signification implying that something else has been given beyond the general language which precedes it

Id. (citations omitted).

On appeal, the United States Supreme Court rejected the Utah court's construction of the term "including" as a word of enlargement, stating: "The [Utah Supreme] court also considered that the word 'including' was used as a word of enlargement, the learned court being of opinion that such was its ordinary sense. **With this we cannot concur.** It is its **exceptional** sense, as the dictionaries and cases indicate." *Montello Salt Co. v. State of Utah*, 221 U.S. 452, 464-65 (1911) (emphasis added).

In the context of the Agreement at issue, the construction the parties themselves placed upon the term "include" by their usage of the term in the Agreement is illuminating. Section 1.2(b) of the Agreement clearly demonstrates that when these parties intended that "include" should be a term of illustration or enlargement rather than a term of limitation, they used the phrase "**shall include, but not be limited to.**" If the parties had intended their use of the word "include" in Section 2.1 to be

non-exclusive or merely illustrative, they could have employed similar language—but they chose not to.

The parties plainly intended that "cause" for termination was limited to the four circumstances specifically set forth by the parties. Such a construction is entirely consistent with Kraatz's testimony that the four circumstances set forth in the Agreement were the **only** circumstances under which the parties agreed his employment could be terminated. (R.1762-63, 1772.)

The trial court's interpretation of the word "include" to expand the definition of "cause" ignores precedent, as well as the clear written intent of the parties and Kraatz's uncontroverted testimony.

2. The Trial Court Erroneously Concluded That the Term "Herein" as Employed in the Definitional Paragraph of Section 2.1 Expanded the Definition of "Cause."

The term "herein" is a locative adverb which may refer to "a **single paragraph**, to a section, or to the entire contract in which it is used." *Saulsberry v. Maddix*, 125 F.2d 430, 434 (6th Cir. 1942) (emphasis added). Again, its meaning is to be determined from the context in which it appears. *Id.*

The trial court's conclusion that the phrase "as defined herein" used in Section 2.1 refers to the entire Agreement (Conclusion B.8.b[2]) again impermissibly attempts to expand the

definition of the term "cause," blithely disregarding the context in which the phrase appears. In context, the phrase reads:

Employee's employment may not be terminated except for cause **as defined herein**. For purposes of **this paragraph**, cause shall be deemed to include the following . . . (Emphasis added.)

When the phrase is read in conjunction with the entire sentence in which it appears, together with the next following sentence, it is apparent that "as defined herein" refers to the specific definition set forth in Section 2.1, rather than some hypothetical definition to be gleaned somehow from the Agreement as a whole. The trial court's construction should be rejected.

3. The Trial Court Erroneously Concluded That the Parties Intended the Term "Refusal" as Used in Section 2.1 to be Synonymous With the Term "Failure."

The trial court's conclusion (Conclusion B.8.b.[3]) that these parties intended that any subjective "failure" by Kraatz under the Agreement could be cause for termination of his employment ignores the plain meaning of the term "refusal."

In common usage, "refusal" implies that a demand has been made and rejected.¹ Utah cases recognize and employ the common

¹ See e.g., RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1622 (2d ed. 1987) (refuse: 1. To decline to accept 2. To decline to give; deny (a request, demand, etc.) 3. To express a determination not to (do something) 4. To decline to submit to 9. To decline acceptance, consent or compliance.)

usage. See, e.g., *Brooks v. Scoville*, 17 P.2d 218, 220 (Utah 1932) (allegation of failure to perform not synonymous with allegation of refusal to perform nor of repudiation or denial of obligation to perform); *Green v. Palfreyman*, 166 P.2d 215, 220 (Utah 1946) (plaintiff did not willfully fail or refuse to complete work where no evidence of refusal to proceed with work nor evidence of demand, request or instruction to resume the work); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 165 (Utah 1965) (action for wrongful discharge where employee refused to comply with employer's extortionate demands); *Peterson v. Browning*, 832 P.2d 1280, 1281-82 (Utah 1992) (discharge for refusal to violate law at employer's request actionable under public policy limitation).

Even in the absence of an overt rejection of a specific demand or request, "refusal" implies a "positive intention to disobey," or at least "a mental determination not to comply." BLACK'S LAW DICTIONARY 1282 (6th ed. 1990). See *Cobabe v. Stanger*, 844 P.2d 298, 302-03 (Utah 1992) (party's refusal to make payment under personal services contract manifested "**a positive and unequivocal intent** not to render its promised performance," resulting in anticipatory breach of contract) (emphasis added).

'[R]efusal' implies something more than a mere passive failure. . . . '[R]efusal' is closely analogous to, if not synonymous with, a 'willful failure,' for a refusal

usually implies a previous demand or request, or the existence of circumstances equivalent thereto. It means more than mere inert default by neglect.

County Canvassing Board of Primary Elections of Hillsborough County v. Lester, 118 So. 201, 203 (Fla. 1928). "A 'willful failure' denotes a **conscious purpose to disobey**, a **culpable omission**, and not merely innocent neglect." *Id.* at 202 (emphasis added).

Clearly, "'[f]ail' is distinguished from 'refuse' in that 'refuse' involves an **act of the will**, while 'fail' may be an act of inevitable necessity." *House v. Campbell*, 628 So.2d 448, 450 (Ala. 1993) (emphasis added). See also *Taylor v. Mason*, 22 U.S. (9 Wheat.) 325, 344 (1824); *Maestas v. American Metal Co.*, 20 P.2d 924, 925 (N.M. 1933).

Interpreting "refusal" in the context of the Agreement to mean a manifestation by Kraatz of a **positive and unequivocal intent** not to render his promised performance is the only reasonable construction of the term. In contrast, to equate "refusal" with "failure" gives no effect to the provision of paragraph 1.2. of the Agreement which requires only that Kraatz use his "**best professional skill**" to "provide day-to-day management over the operations of the Dealership" and to "provide management training to persons selected by the Company." Kraatz

cannot be held to perform as though he had Larry Miller's financial strength and management team at his disposal.

The trial court's conclusions imply that Kraatz in effect guaranteed that he would make a profit, that he would never make a poor business decision, that he would never have unhappy employees, that he would work more than 60 hours per week, including every Saturday, and that he would successfully train B. Wilkinson's admittedly resentful children to be Honda dealers within 27 months. (Cf. Conclusions D.1. through D.7.) Such a construction flies in the face of the manifest intent of the parties.

These parties deliberately used the word "refusal" after careful consideration. They could have easily chosen the term "failure," if that was in fact what they intended. They did not. This Court should enforce the intent of the parties by according the term "refuse" its common, ordinary usage and restricting "cause" for termination under the Agreement to a willful or intentional dereliction of duty, rather than expanding "cause" to include subjective failure to achieve unrealistic expectations.

B. THE TRIAL COURT IMPROPERLY INTERPRETED THE AGREEMENT TO RELIEVE HERITAGE OF WHAT THE COURT PERCEIVED TO BE AN UNFAVORABLE BARGAIN.

The trial court equated "refusal" with "failure," concluding that "[t]o interpret refusal as requiring Plaintiff to remain

employed even in the face of the Dealership's losing money, losing its financing, and having to be sold or liquidated is an absurd result" (Conclusion B.8.b.(3)(c).) Further, the trial court opined that "[i]t would be inequitable in this case to interpret the Agreement such that Heritage would have to continue to employ Plaintiff and stand by and watch its business decline unless Plaintiff specifically rejected an outright request." (Conc. B.8.b.(3)(d).)

These conclusions reflect blatant judicial revision of the Agreement. It is axiomatic that a court "may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself." *Ted R. Brown & Assoc., Inc. v. Carnes Corp.*, 753 P.2d 964, 970 (Utah App. 1988).

By the plain language of Section 1.2, Heritage turned over operation of the Dealership to Kraatz, giving him "responsibility and authority over all aspects of the daily operations" and the "authority, as General Manager, to make and carry out management decisions relating to the operation of the Dealership." (§§ 1.2[a] & [b].) Heritage then agreed that Kraatz could be fired only under circumstances of fraud, dishonesty, refusal to perform, or disability. (Section 2.1). B. Wilkinson subsequently regretted the bargain. He was faced with sharing with Kraatz a

portion of the proceeds from the contemplated sale of Heritage to Larry Miller; he was under pressure from J. Wilkinson to make J. Wilkinson the general manager; and Heritage was not doing as well as he hoped. He was looking for a way out, which the trial court magnanimously supplied.

Notwithstanding B. Wilkinson's perceived hardship, "it cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts." *Ted R. Brown & Assoc.*, 753 P.2d at 970. It "is not the prerogative of this court to prevent the enforcement of contracts that a party subsequently regrets." *Tolman v. Winchester Hills Water Co., Inc.*, 912 P.2d 457, 462, n. 6. (Utah App. 1996). Neither the parties, nor the court "has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship," but the conditions must be enforced "in accordance with the intention as manifested by the language used by the parties to the contract." *Ephraim Theatre Co. v. Hawk*, 321 P.2d 221, 223 (Utah 1958).

"Refusal" means "refusal," not "failure." This Court should so rule.

C. THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT THE PROGRESSIVE DISCIPLINARY PROCEDURES OF THE EMPLOYEE HANDBOOK DID NOT APPLY TO KRAATZ'S TERMINATION.

The trial court's conclusions that Kraatz failed to demonstrate that he was entitled to progressive discipline pursuant to the Employee Handbook (App. B-Exh. 135, policy 314) and that any rights associated with the handbook were terminated by Kraatz's action in having the Handbooks turned in (Conclusion C.3.) are also erroneous.

The trial court's conclusion that the parties intended the Agreement to be integrated (Conclusion C.1.) is correct to the extent that the Agreement represents the final agreement concerning the subject matter contained therein. However, the court failed to recognize that the subject of termination procedures is not dealt with in the Agreement. While the Agreement specifies the circumstances under which Kraatz's employment could be terminated, it is silent on the method by which Kraatz was to be disciplined. Therefore, to the extent that the trial court concluded that the termination procedures set forth in the Handbook are inconsistent with, and contradictory of, the Agreement, its conclusion is also incorrect. (Conclusion C.2.)

Furthermore, the progressive discipline procedures in the Handbook are completely consistent with the interpretation of

"refusal" as denial of a demand in the context of the Agreement. The discipline procedures in the Handbook establish a process by which Heritage could give Kraatz notice of any perceived deficiencies in his performance and afford him the opportunity either to cure the deficiencies or to refuse compliance.

Utah law is clear that an employer's internally adopted policies and procedures concerning discharge can become part of the contractual relationship between an employer and his employee. See, e.g. *Berube v. Fashion Centre, Ltr.*, 771 P.2d 1033, 1044-46 (Utah 1989). See also *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 485 n.3 (Utah 1989) "[A]n employer may be bound to follow any discharge procedures outlined in an employee handbook." *Hodgson v. Bunzl Utah, Inc.*, 833 P.2d 331, 335 (Utah 1992). Such was the case here.

Kraatz received a copy of the handbook when he began employment. (R.1769.) The fact that Kraatz did not know of the Handbook at the time he signed the Agreement is irrelevant. As the Utah Supreme Court has acknowledged:

"[A]n employer's statements of policy, practice and procedures can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, . . . hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his [or her] job

description or compensation, and although no reference was made to the policy statement in preemployment interviews and the employee does not learn of its existence until after his [or her] hiring."

Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483, 485 n.3 (Utah 1989) (citation omitted.)

There is no evidence that the Handbook policies or disciplinary procedures were ever repudiated by Heritage. App. B-Exh. 23, relied upon by the trial court, is a notice to employees to turn in their Handbooks to Heritage, not a repudiation of any specific corporate policies. Whether Kraatz himself employed the procedures in disciplining is irrelevant (cf. Finding F13, R.1999), although the record shows that he did in fact use verbal warnings with J. Wilkinson, a form of progressive discipline under the Handbook. (R.1813, 1820-22.)

Kraatz was entitled to the benefit of the progressive discipline procedure set forth in the Handbook. Heritage breached the Agreement by terminating Kraatz's employment and failing to follow such procedures.

POINT III

THE TRIAL COURT'S FINDINGS OF FACT REGARDING ALLEGED MISCONDUCT BY KRAATZ ARE CLEARLY ERRONEOUS

It is Kraatz's burden to marshal all of the evidence in support of the trial court's Findings and then demonstrate why, even when viewed in the light most favorable to the trial court,

it is insufficient to support the Finding. *Saunders v. Sharp*, 793 P.2d 927 (Utah App. 1990). A finding is clearly erroneous if it is against the great weight of the evidence or if the appellate court is otherwise definitely and firmly convinced that a mistake has been made, because, for example, the finding was induced by an erroneous view of the law. *Western Capital & Securities, Inc. v. Knudsvig*, 768 P.2d 989 (Utah Ct. App. 1989).

In this case, Kraatz attacks the trial court's oral and written Findings which conclude or imply that Kraatz was in any way "dishonest" or that he "refused" to perform his responsibilities as General Manager of the Dealership to the best of his professional ability. Kraatz requests that the erroneous findings be stricken and that the Court substitute its own finding that Heritage did not meet its burden to justify Kraatz' discharge and is therefor liable to Kraatz.

A. THE TRIAL COURT'S FINDINGS OF FACT ARE BASED MERELY ON UNSUBSTANTIATED ALLEGATIONS OF WRONGDOING WITHOUT REFERENCE TO ANY SPECIFIC ACT OF MISCONDUCT.

B. Wilkinson's testimony on direct examination by his own counsel as to why he fired Kraatz is only nine pages long. (R.2033-41.) In his testimony B. Wilkinson makes many vague allegations of misconduct, but fails to substantiate any allegation by reference to date, circumstance, parties involved, documentation or quantification. His conclusory testimony was

devoid of any basic facts to support the allegations. Such unsubstantiated statements are of so little probative value that they are insufficient to raise a genuine issue of fact. See *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985); *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, fn. 7 (Utah Ct. App. 1991) (conclusory oral testimony insufficient to meet burden); *Milne Truck Lines v. Public Service Commission*, 720 P.2d 1373, 1379 (Utah 1986) (burden not met by conclusory oral testimony).

B. Wilkinson's direct examination was followed by fifty-six pages of cross examination. (R.1947-2002.) B. Wilkinson's testimony during cross examination revealed that: (1) the things he complained of were mistakes made by other employees, including members of B. Wilkinson's family (R.1949-50); (2) the standard for "overage used cars" was not well defined (R.1950, 1952-55); (3) no written reprimand was ever issued to Kraatz (R.1951); (4) B. Wilkinson's allegations were wholly unsupported by documentary evidence, were based on immaterial circumstances, and were arbitrary in nature (R.1952-55); (5) matters were improving at the time Kraatz was fired (R.1955); (6) Wilkinson had agreed with the business decision Kraatz made to switch the flooring line from Comerica to Key Bank at the time it was made, two years prior to Kraatz's dismissal (R.1956-73); (7) the "title problems" B. Wilkinson referred to were caused by the neglect of a "title

clerk" (R.1976) and a salesman (R.1979); (8) B. Wilkinson believed that Kraatz was an honest man (R.1977); (9) B. Wilkinson didn't believe that Kraatz would intentionally try to deceive him (R.1977); (10) B. Wilkinson could not point to a material decline in gross profit margin (R.1986); (11) no reason cited by B. Wilkinson was in and of itself sufficient, in B. Wilkinson's own opinion, to fire Kraatz (R.1988-89); (12) B. Wilkinson himself controlled important and expensive aspects of the Dealership and took some responsibility himself for the losses sustained (R.1998-2000); and (13) B. Wilkinson believed Kraatz tried to run the Dealership in a profitable fashion (R.2001).

B. THE TRIAL COURT'S FINDINGS REGARDING KRAATZ'S PURPORTED ACTS OF DISHONESTY ARE CLEARLY ERRONEOUS.

1. There Is Insufficient Evidence to Support the Trial Court's Oral Finding That Kraatz Manipulated the Balance Sheet or the Finding is Contrary to the Great Weight of Evidence.

The trial court's oral finding that "[Kraatz] manipulated and/or modified the balance sheet by disguising the age of inventory units which should have been returned and/or sold but were not" (R.2469) is supported, if at all, only by B. Wilkinson's rambling testimony on direct examination that (1) Kraatz had not been "exactly honest . . . about the status of used car overaged inventory, and titles on hand, trade-ins and titles that had been remitted without payment" (R.2034-35); and

(2) that he fired Kraatz for "not always leveling with me on certain accounts, titles in, overaged used cars and such." (R.1877.) The only other "evidence" upon which the court might have erroneously relied to make its conclusion is that, by B. Wilkinson's own admission, the corporate operating statements for 1992 did not reflect a material overaged used car problem. (R.1952-55, App B, Exh. 297, bates no. 169.) The foregoing evidence is all that possibly supports the Finding. The evidence is insufficient, or contrary to the great weight of evidence, for the following reasons.

Neither B. Wilkinson nor anyone else ever accused Kraatz of "manipulating and/or modifying the balance sheet by disguising the age of inventory units" as found by the trial court. B. Wilkinson did say that Kraatz wasn't "exactly honest" and that he hadn't "leveled" with B. Wilkinson about overaged used cars, but B. Wilkinson never substantiated his allegation with any basic facts which would allow the court to understand what he meant or which would allow Kraatz to respond. It is quite a leap for the trial court to infer that what B. Wilkinson meant by his vague testimony was that Kraatz "manipulated and/or modified" the corporate records and was "disguising the age of inventory units" (R.2469), when B. Wilkinson himself clarified during cross examination that he didn't mean any such thing:

(M. Zundel) Q: Was it the fact that there were overaged cars or that Tony hadn't been honest with you about there being overaged cars; what is it?

(B. Wilkinson) A: The fact that there were overaged used cars and there were some title problems. I said that before. (R.1951.)

Later in B. Wilkinson's testimony he admitted he thought Kraatz to be an honest man and did not think Kraatz would intentionally try to deceive him. (R.1977.) B. Wilkinson admitted that the only documents he had to support his contention that there was an overaged car problem at all were the financial statements. (App. B-Exh. 297, line 250 of each Fin. Stat. in the Exhibit; R.1952) But upon examination of the exhibits, he admitted that the so-called overaged used car problem was not material when Kraatz was fired in 1992. (R.1952-55.) Further, B. Wilkinson was not able to identify any particular month in any year when he considered overaged used cars to be a material problem. (R.1947-52.)

B. Wilkinson never repudiated the accuracy of the financial documents to which he himself referred to support his position, even when examination showed they did not support him. When asked to admit, based upon the financial documents, that the used cars situation was improving when Kraatz was fired, he simply said, "It was about time." (R.1955.) Defendants' counsel did not

suggest in any of his arguments or proposed written findings that falsification of the records regarding used cars ever took place.

Heritage's written Finding E21(e) is as close as Heritage's counsel came. The Finding states, "B. Wilkinson testified he fired Plaintiff for . . . failure to accurately inform B. Wilkinson of the dealings and status of the dealership." (R.1694.) "Inaccuracy" and "dishonesty" are materially different things. Inaccuracy is a part of every life. Dishonesty necessarily involves moral turpitude. Webster's Ninth New Collegiate Dictionary (1985); *Research-Planning, Inc. v. Bank of Utah*, 690 P.2d 1130, 1132 (Utah 1984).

The court impermissibly inferred that the financial statements had been manipulated by Kraatz just because they did not support B. Wilkinson's allegations that there was an overaged inventory problem. The trial court's Finding is clearly erroneous and wholly unfounded and should be stricken.

2. There is Insufficient Evidence to Support The Trial Court's Oral Finding Regarding Improper Distribution of Vehicle Titles, or the Finding is Contrary to the Great Weight of Evidence or is Insufficient to Justify Kraatz's Discharge.

The trial court's oral Finding that "Plaintiff allowed on at least one occasion against company policy for a title to be distributed without payment" is also clearly erroneous. (R.2469.) The only support for this Finding is, again, the rambling,

unsubstantiated testimony of B. Wilkinson on direct examination that he fired Kraatz for "titles not collected, cars delivered to wholesalers without the collection of titles or without the collection of monies and already having given wholesalers the titles." (R.1877, 2034.)

On cross examination, B. Wilkinson admitted that his allegations regarding uncollected titles were based on (1) a mistake of "the used car title clerk" (R.1976), (2) the mistake of a salesman, Tim Rideout, (R.1979), and (3) B. Wilkinson's view that "it doesn't matter whose job it was" because it was Kraatz's job to "get a handle" (R.1978) and that B. Wilkinson was "mad" at Kraatz because he allegedly "didn't know what the hell was going on" (R.1976.)

When asked when the title clerk delivered the title before receiving payment, B. Wilkinson testified that he couldn't remember (R.1974, 1997), but admitted the money owed Heritage on the transaction was received "about two days later." (R.1976.) B. Wilkinson also couldn't remember when Tim Rideout accepted a trade-in without immediately obtaining its title (R.1978), but admitted that Kraatz "got Rideout to go to Nevada and get it resolved." (R.1979.) B. Wilkinson complained that when the trade-in was finally sold it didn't bring "the amount I was told that the deal would reflect" (R.1979-80) as justification for his

accusation that Kraatz had not been "exactly honest" (R.2034) or was guilty of "not always leveling." (R.1877.)

B. Wilkinson never described any situation where Kraatz knowingly gave him false information or willfully breached any policy regarding the collection of vehicle titles. Furthermore, B. Wilkinson failed to describe Heritage's policy regarding credit to wholesalers or courtesies to customers who sometimes left the titles to their trade-ins at home. The evidence that Heritage did produce failed to show that Kraatz willfully "allowed . . . a title to be distributed without payment" . . . "against company policy." (R.2469.)

Finally, B. Wilkinson did not explain why the "title problems," (R.1951) which were admittedly resolved, were material or substantial, as opposed to merely sporadic problems of ordinary variety and of little consequence to the Dealership.

The finding should be stricken as clearly erroneous or ruled insufficient to justify Kraatz's discharge.

C. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS THAT KRAATZ WRONGFULLY "REFUSED" TO WORK SATURDAYS AND EVENINGS OR THE FINDINGS ARE CONTRARY TO THE GREAT WEIGHT OF EVIDENCE OR ARE INSUFFICIENT TO JUSTIFY KRAATZ'S DISCHARGE.

The oral Finding of the trial court that Kraatz "refused to work Saturdays and evenings when his visibility was required as it interfered with his personal activities" (R.2469), and written

Findings E15 and E21(d) to the same effect, are supported, if at all, by eight pages of testimony from B. Wilkinson (R.2006, 2035-37, 1937-40), nine pages of testimony from J. Wilkinson (R.2058-62), and the work schedule prepared by J. Wilkinson (App. B-Exh. 1), ostensibly pursuant to authority given him by his father, which would have required Kraatz to work every Saturday between September 6 and October 17, 1992. Kraatz admitted that he was unable to work the schedule J. Wilkinson presented to him. (R.1809-11.)

The court's oral and written findings are contrary to the great weight of the evidence as demonstrated below. Kraatz challenges any finding that his discharge was based on "refusal" (as opposed to "inability") to accept a work schedule prepared by his subordinate, J. Wilkinson, or that he was "required" to work Saturdays and evenings as scheduled by J. Wilkinson.

1. Finding E21(d) Is Clearly Erroneous.

Finding E21(d) that "B. Wilkinson testified he fired plaintiff for the following reasons: . . . (d) refusal to work Saturdays when scheduled by B. Wilkinson" is clearly erroneous because B. Wilkinson did not so testify. When asked by Heritage's counsel why he fired Kraatz, B. Wilkinson said, "[Kraatz's] inability to be visible in the evening and on Saturdays." (R.2035

lines 7-8.) Finding E21(d) mischaracterizes this testimony and finds no support elsewhere in the record.

2. Finding E15 Is Clearly Erroneous

Finding E15 is the trial court's written Finding of what Kraatz did, as opposed to its mischaracterization of what B. Wilkinson said Kraatz did. The 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 the day is after 4:00 p.m.

Finding E15 is clearly erroneous because both B. Wilkinson and J. Wilkinson admitted that B. Wilkinson did not order J. Wilkinson to schedule Kraatz to work every Saturday. (R.1938, 2362-63.)

3. Heritage Failed To Show Kraatz Had A Culpable Or Intransigent Attitude In Declining To Work The Schedule Proposed By J. Wilkinson.

Kraatz testified that when J. Wilkinson presented the proposed work schedule to him, Kraatz explained to J. Wilkinson that it would be difficult for him to take a week day off and work every Saturday because he had to deal with the banks during the week when they were open. (R.1808-11.) Kraatz testified that he sometimes worked Saturdays anyway. (R.1770.) Kraatz also testified that he was available by cell phone on his off hours. (R.1771.) Kraatz's testimony was not rebutted except that J.

Wilkinson testified that Kraatz referred to religious responsibilities (as opposed to dealing with banks) which prevented him from working some of the Saturdays on J. Wilkinson's proposed schedule. (R.2367-70.) Kraatz did not insist that he work no Saturdays at all, but only rejected J. Wilkinson's demand that he work every Saturday between September 6 and October 17, 1992. (R.2367-70.)

B. Wilkinson's testimony that Kraatz was **unable** to be visible in the evenings and on Saturdays and that he felt like over a period of time Kraatz "slacked off" does not support a finding of refusal by Kraatz to do his duty. Kraatz's unrebutted testimony was that he worked 50-60 hours per week at the Dealership and that his days typically started at 7:30 in the morning. (R.1770-71.) There is nothing in the Agreement which would require Kraatz to work more than five days per week, eight hours per day and there was no evidence that industry standards require general managers to work ten hours per day, six days per week, or more. There was no testimony that Kraatz's contractual promise to devote his "full and exclusive time" to the Dealership meant something more than a 40 hour work week.

If over an unspecified "period of time" Kraatz "slacked off" his aggressive work schedule, perhaps he was tired, or sick, or on vacation as his contract allows. Without a specific allegation

of misfeasance, including date and circumstance, Kraatz is unable to respond to the vague accusation that he "slacked off."

4. Heritage Failed To Produce Any Evidence At Trial That Kraatz's "Visibility" On Saturdays And Evenings Was "Required" By Industry Standards Or By The Terms Of His Agreement.

The testimony supporting the trial court's finding that Kraatz's "visibility" was "required" is cited by the court in its written Finding E15 (R.1693) and is derived from B. Wilkinson's testimony that "Saturdays are the biggest sales days and from 4:00 p.m. in the afternoon till closing is the best sales time of each day." (R.2006.)

B. Wilkinson testified that he fired Kraatz because of Kraatz's "inability to be visible in the store in the evenings and on Saturdays" and that "visibility was-important." (R.2035.) B. Wilkinson also testified that he "felt that the General Manager needed to be more visible in the store in the later hours" (R.1938) and that "the evening hours are the most productive hours. Visibility of, quote, unquote, the man whose responsible for the operation day-to-day, I felt that over a period of time Tony slacked off on his later in the evening and Saturday performances." (R.2036-37.)

B. Wilkinson testified that "I had asked Mr. Kraatz several times to work on Saturdays." (R.1938.) J. Wilkinson testified

that his father asked him to prepare a work schedule and that "he [B. Wilkinson] told me he wanted the General Manager to work nights and Saturdays." (R.2368.) Finally, there is Kraatz's own testimony that he worked fifty to sixty hours per week and sometimes part of a Saturday. (R.1700.)

The foregoing testimony is all of the evidence supporting the court's finding that Kraatz's "visibility" was "required" on the Saturdays and evenings scheduled by J. Wilkinson. The evidence is demonstrably insufficient for the following reasons.

B. Wilkinson admitted that "[f]irst of all, I don't remember asking him [J. Wilkinson] to schedule [Kraatz for] all Saturdays, but I asked him to do it [make a work schedule] because *I felt* that the General Manager needed to be more visible in the store in the later hours." (R.1938.) (Emphasis added.) J. Wilkinson quoted his father as saying "not necessarily every Saturday, but Saturdays" when authorizing J. Wilkinson to prepare a work schedule for Kraatz. (R.2363.)

Kraatz was responsible for every department in the Dealership, including "new and used car sales departments, service department, parts department and finance and insurance department." (App. B-Exh. 38.) Some of those departments are not open in the evenings or all day on Saturdays. Kraatz was

uncontrovertedly responsible for dealing with Heritage's banks, which were not open at all on Saturdays. (R.1937-39.)

The evidence that Saturdays and evenings are the most productive (R.2006), and B. Wilkinson's "feelings" that the "General Manager needed to be more visible . . . in the later hours" (R.1938) and that Kraatz "over a period of time slacked off on his later in the evening and Saturday performances" (R.2037) does not amount to a contractual or industry standard against which Kraatz's actual performance can be measured.

B. Wilkinson testified that he asked Kraatz to "work Saturdays," but admitted that he did not expect Kraatz to work "all Saturdays." (R.1938.) The question of how many Saturdays in September and October, 1992, Kraatz should have agreed to work to satisfy B. Wilkinson was left unanswered by the Defendants, except for J. Wilkinson's demand that Kraatz work **every** Saturday.

5. It Was Inappropriate For J. Wilkinson To Prepare Kraatz's Work Schedule.

Kraatz's Agreement clearly states that he was given "authority over all aspects of the day-to-day operations." (App. B-Exh. 38) J. Wilkinson testified that he had never prepared a work schedule for Kraatz as a General Manager before the September/October schedule. (R.2364.) Further, Kraatz testified that he did not request J. Wilkinson to prepare the schedule for

him. (R.1809-11.) Therefore, B. Wilkinson's authorization of his son, J. Wilkinson, to control Kraatz's work schedule was a wrongful contravention of Kraatz's contractual authority, and it was appropriate for Kraatz to question the schedule.

D. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS REGARDING KRAATZ'S PURPORTED REFUSAL OR FAILURE TO TRAIN B. WILKINSON'S CHILDREN OR THE FINDINGS ARE CONTRARY TO THE GREAT WEIGHT OF EVIDENCE.

There is no written or oral finding that Kraatz "refused" to train B. Wilkinson's children to be managers or dealers acceptable to American Honda, nor was there evidence from which such a finding could be made. The court's oral Finding was that Kraatz "failed to properly train" the children. (R.2469.)

1. Finding E21(h) Is Clearly Erroneous.

B. Wilkinson did not testify that Kraatz refused to train J. Wilkinson and did not mention his son-in-law Jeff Gorringer at all. B. Wilkinson admitted that Kraatz "tried" to teach and train B. Wilkinson's children, but complained that Kraatz "just didn't get the job done" or, alternatively, that, "It just did not happen." (R.1877, 2041.) B. Wilkinson twice stated that he fired Kraatz for Kraatz's alleged "inability"—not "refusal"—train B. Wilkinson's children. (R.1877, lines 6-7; 1978; 2035, line 6.) Finding E21(h) that B. Wilkinson testified that Kraatz "refused" to train his children is simply not supported by the very

testimony to which it refers and there is no other evidence in the record to support the Finding.

2. Heritage Failed To Produce Any Evidence At Trial Of Any Training Curriculum Required By American Honda Or That American Honda Ever Found Any Of The Children To Be Unacceptable As Managers or Dealers.

No specific training curriculum is described or referred to in the Agreement. (App. B-Exh. 38.) The standard set forth in the Agreement was that the training Kraatz provided would enable "persons selected by [Heritage Imports] . . . to become qualified dealers or managers acceptable to American Honda, Inc." (App. B-Exh. 38, ¶1.2(b).) (Emphasis added.) No minimum time within which this goal was to be accomplished was specified in the Agreement and no guarantee of success was made by Kraatz. (App. B-Exh. 38.)

During Kraatz's employment, B. Wilkinson's children and his son-in-law, Jeff Gorringer, were employed at the Dealership under Kraatz's supervision J. Wilkinson, Matt Wilkinson and Jeff Gorringer were all employed in managerial positions. (R.1783-84, 1793, 1811-12, 1824.) There was no allegation, let alone evidence, that any of B. Wilkinson's children were ever found to be unacceptable managers by American Honda.

During Kraatz's employment there was no attempt made to have American Honda accept any of the children as a dealer. (R.1794.) In fact, a few days after Kraatz was terminated as General

Manager, J. Wilkinson became president and chief operating officer of Heritage without objection by American Honda. (App. B-Exh. 5.) Heritage failed at trial to establish an American Honda standard or curriculum for training and compare the training Kraatz provided to that standard.

3. Finding E16 And The Trial Court's Oral Findings Are Clearly Erroneous And Insufficient As Cause For Kraatz's Discharge.

Finding E16, that "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," is clearly erroneous as an inaccurate observation of the witnesses' testimonies.

Neither B. Wilkinson nor J. Wilkinson even referred to an American Honda standard in their testimonies. J. Wilkinson testified that he never received any training from Kraatz "to be in the F & I Department" (R.2380) and that he was never moved to the position of office manager, parts manager or service manager and received "no training at any of those areas" (R.2381) during Kraatz's employment. There was, however, no testimony or evidence presented to establish any American Honda standard that would make it mandatory that J. Wilkinson be moved to all or any of those positions within the first 27 months of Kraatz's five year

contract, or that whatever training J. Wilkinson received was unacceptable to American Honda.

The Finding is also insufficient as cause for Kraatz's discharge because it recites merely that Kraatz "failed," not that he "refused." There could be many reasons for Kraatz's alleged failure, including his students' attitudes and aptitudes, which have nothing to do with the terms of Kraatz's employment.

The trial court's oral Finding that Kraatz "failed to properly train the owner's children" (R.2469) is also insufficient as cause for Kraatz's discharge and is clearly erroneous for lack of evidence pertaining to the applicable standards, i.e., "refusal" and American Honda's standards for proper training.

4. Finding E6 Is Clearly Erroneous And Insufficient As Cause For Kraatz's Discharge.

Finding E6 that "J. Wilkinson testified he received no training **while** in F & I" is clearly erroneous and a mischaracterization of J. Wilkinson's actual testimony, which was as follows:

Q. Did Mr. Kraatz ever train you **to be** in the F & I Department"?

A. No.

(R.2380.) (Emphasis added.)

J. Wilkinson was never asked if he received training **while** in the F & I Department or if he received training in the F & I Department from anyone besides Kraatz. He admitted, however, he was moved to the F & I Department by Kraatz for the purpose of "learning that department." (R.2358 lines 4-9.)

The Agreement did not require that Kraatz personally teach each aspect of the automobile dealership to the children, but only that he "provide management training to persons selected by Company to enable said persons to become qualified dealers or managers acceptable to American Honda, Inc." (App. B-Exh. 38.) There was no testimony that American Honda required J. Wilkinson to receive training to be in the F & I Department before he would be acceptable to it as a manager. He was already a "manager" and there was no evidence of any complaints from American Honda.

5. Finding E5 Is Clearly Erroneous And Insufficient As Cause for Kraatz's Discharge.

Finding E5 that "the only attempt during his 27-month tenure that Plaintiff made to train either J. Wilkinson or Jeff Gorringer was to place J. Wilkinson in financing and insurance (F & I)" is clearly erroneous based upon the clear weight of evidence.

The evidence in support of Finding E5 is Kraatz's testimony that J. Wilkinson's transfer to the F & I Department was an attempt to train him. (R.1811.) There was no testimony to support

the portion of Finding E5 that "at no time did Plaintiff give instruction to J. Wilkinson on the hiring, or firing of personnel, or management of assets, or employee interviewing or other aspects of general management." Furthermore, there was no testimony from any witness that these aspects of a hypothetical training program were either required by American Honda or not provided by Kraatz.

As a counterweight to the evidence supporting Finding E5, B. Wilkinson testified that "under the charge of teaching my kids to be dealers, that some of those things [scheduling of other employees] were delegated" to his children by Kraatz. (R.1940.) In this regard, Kraatz reviewed work schedules prepared by the managers, including J. Wilkinson, to ensure adequate coverage and otherwise approve the schedules. (R.1819-20.)

Kraatz conferred with B. Wilkinson about training the children and together they decided to hire Chuck Quinn, a "fairly proven performer," to teach the "kids how to get more involved in a sales operation." (R.1820.) On occasion, Kraatz disciplined J. Wilkinson for improper conduct on the job. (R.1813, 1820-22.)

Kraatz gave J. Wilkinson written instructions regarding management of dealership assets, which directed J. Wilkinson to "maintain a 45-day supply of vehicles" and "control overage inventory ensuring that no vehicle is in stock over 90 days."

(App. B-Exhs. 14 & 18, R.2375-76.) Finding E5 is inconsistent with the unrefuted evidence that J. Wilkinson was instructed regarding vehicle inventory levels and ages.

Kraatz also gave J. Wilkinson the opportunity to "conduct sales meetings," assist the General Sales Manager in "motivating and training sales people," "organize display for new vehicle lot and showroom," and "provide up-to-date inventory control to maintain adequate model mix." (App. B-Exhs. 14 & 18; R.2375-76.)

Finding E5 is clearly erroneous as contrary to the clear weight of the evidence and should be stricken.

E. THE TRIAL COURT'S FINDINGS REGARDING KRAATZ'S CONTROL OF THE DEALERSHIP ARE CLEARLY ERRONEOUS.

1. Finding B13 And Conclusion E1 Are Clearly Erroneous.

The trial court's finding B13 that "Plaintiff, as General Manager, had control over all aspects of the operation and function of the dealership" and Conclusion E1 that "Plaintiff had ultimate control over the financing of the dealership" (R.1713) are also clearly erroneous.

The only evidence possibly supporting the Finding and Conclusion is: (1) the testimony of D. Hartmann to the effect that, as the Comerica loan officer in charge of Heritage's loans, he had little contact with B. Wilkinson for the first six months of Kraatz's employment at Heritage, and that both Kraatz and B.

Wilkinson stated to him that Kraatz was in complete control (R.2044-45, 2052-53, 2059); (2) the testimony of Mark Schmitz, Ph.D. ("**Schmitz**") that General Managers make advertising decisions (Finding E, R.1690); (3) Miller's testimony that Kraatz could have managed cash flow better (R.1691, 2081-82); (4) B. Wilkinson's testimony that he stated to Kraatz before Kraatz was hired that B. Wilkinson intended to remove himself from day-to-day involvement with the Dealership (R.2010, 2024); and (5) Kraatz's Agreement, which promises Kraatz control. (App. B-Exh. 38.) The foregoing is all the evidence adduced at trial to support Finding B13 or Conclusion E1.

This evidence must be weighed against the evidence, including B. Wilkinson's admissions on cross examination, that B. Wilkinson retained control over important aspects of the Dealership's expenditures, such as the salary of Heritage's controller Helen Green, B. Wilkinson's own compensation, employee benefits, legal expenses, including personal legal expenses related to B. Wilkinson's divorce, B. Wilkinson's personal life insurance premiums, B. Wilkinson's country club, entertainment and travel expenses, and interest-free "loans" to B. Wilkinson. (R.1890, 1901-03, 1932-33, 1998-2000, 2164-71, 2182, 2255-58, 2261-62; App. B-Exhs. 235, & 329 at tab 2 and tab 3.)

B. Wilkinson further admitted that he retained control over advertising for the Dealership either because he had agreed to "help" Kraatz with advertising, or because he was the dealer and had "complete control over everything." (R.1932.) J. Wilkinson also testified that all advertising expenditures were directed by B. Wilkinson. (R.2375, App. B-Exhs. 14, 18.)

D. Hartmann's testimony does not speak to Kraatz's control in the months and years after Kraatz's first six months of employment. Neither do B. Wilkinson's statements of his early intent nor the general statements of Schmitz and Miller show that Kraatz actually controlled the specific and important aspects of the dealership B. Wilkinson admitted he controlled.

Consistent with the heavy burden placed upon Kraatz to show that Finding B13 is "clearly erroneous," Kraatz has scoured the record and marshaled all of the evidence both in favor of and against the Finding. Finding B13 and Conclusion E1 are clearly erroneous given the admissions of B. Wilkinson, the unrebutted testimony of Schmitz that B. Wilkinson's uncontrollable spending amounted to several hundred thousand dollars per year (R.2255-58, App. B-Exhs. 235 and 329 at tab 2 and tab 3 of the exhibit), and Miller's concession that B. Wilkinson's spending was "a significant amount of money on a monthly basis." (R.2071.)

F. THE TRIAL COURT'S FINDING REGARDING PURPORTED COMPLAINTS FROM CUSTOMERS IS CLEARLY ERRONEOUS AND IS INSUFFICIENT AS CAUSE FOR KRAATZ'S DISCHARGE.

1. Finding E21(k) Is Clearly Erroneous.

Finding E21(k) that B. Wilkinson testified he fired plaintiff for the following reasons: "(k) customers' complaints that they could not get customer satisfaction through customer relations and that the General Manager would not talk to them" is clearly erroneous. B. Wilkinson's actual testimony was that he fired Kraatz because of "claims from some customers that they couldn't get customer satisfaction through customer relations or that the General Manager wouldn't talk to them." (R.2034.)

There was no evidence (a) that Kraatz had ever actually refused to address a legitimate complaint from a customer; (b) that it was an industry standard for the General Manager to address and resolve all customer complaints (as opposed to the customer relations department, the General Sales Manager or a Sales Manager); (c) when any such complaint occurred; or (d) how many or how often such complaints occurred. Appropriately, the trial court made no finding that Kraatz had refused to perform a duty to respond appropriately to customer complaints.

B. Wilkinson's vague and conclusory testimony is insufficient to establish that Kraatz possessed a "positive and unequivocal intent" not to render a promised performance. B.

Wilkinson's testimony does not show a "willful and substantial" breach of the Agreement.

G. THE TRIAL COURT'S ORAL FINDING THAT KRAATZ "UNILATERALLY SWITCHED BANKS" IS CLEARLY ERRONEOUS AND IS INSUFFICIENT AS CAUSE FOR KRAATZ'S DISCHARGE.

The evidence regarding the switch from Comerica to Key Bank of Heritage's new and used flooring credit lines is comprised of B. Wilkinson's direct testimony (R.2035, 2037-40) and cross examination (R.1955-73), including B. Wilkinson's deposition testimony, which was read into the record (R.1960-65), Hartmann's direct and cross examination (R.2045-46, 2049-54, 2058-62), and App. B-Exh. 501. In all of this testimony, neither B. Wilkinson nor Hartmann ever accused Kraatz of "unilaterally switching banks." (R.2469.) B. Wilkinson did testify that Kraatz made the decision to change the flooring from Comerica to Key Bank (R.1972, 2035, 2040) and Hartmann testified that he had dealt mainly with Kraatz regarding the flooring. (R.2053.)

However, on cross-examination, B. Wilkinson admitted that he had started a substantial competing banking relationship with Key Bank prior to Kraatz's employment; that he "agreed with" Kraatz's desire to "get stronger in the used car business" and to "get a stronger used car line"; that "we asked from Key Bank two million instead of an \$800,000.00 used car line"; that he and Kraatz had discussed the need for used car flooring with Comerica; that he

did not foresee the difficulties that arose with Comerica because of the Key Bank flooring; that he himself communicated to Comerica Heritage's intention to obtain financing from other banks; and that only he could execute the documents required to switch the flooring lines from Comerica to Key Bank. (App. B-Exh. 266; R.1956-66.) Further, Hartmann testified that B. Wilkinson personally refused Comerica's offer to supply limited used car flooring and did most of the talking at a meeting regarding the flooring in January of 1991. (R.2051-53.)

There is no evidence that Kraatz "unilaterally" switched banks, nor that the "switch" was a "refusal" by Kraatz to perform his duties as General Manager or a "willful and substantial" breach of Kraatz's duties. The unforeseen negative consequences of the switch are irrelevant.

The great weight of the evidence is that Kraatz consulted B. Wilkinson regarding the "switch" from Comerica to Key Bank, that B. Wilkinson agreed with Kraatz's decision, and that it was B. Wilkinson who had final authority to implement the switch. By approving Kraatz's decision to change the flooring, B. Wilkinson waived any right he might have had to terminate Kraatz's employment based on that decision. See *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328, 331 (Minn. 1979) (employer's condonation of even wrongful conduct may cause employer to waive right to

discharge employee); *Denberg v. Loretto Heights College*, 649 P.2d 375, 377 (Colo. App. 1984).

H. THE TRIAL COURT'S FINDINGS E17 AND E21(c) REGARDING COMPANY MORALE ARE INSUFFICIENT CAUSE FOR TERMINATION OF KRAATZ'S EMPLOYMENT.

The trial court's written Findings E17 and E21(c) and the trial court's oral finding that "morale problems were created as the plaintiff was unable to bring together the so-called management team" (R.2469) are insufficient as cause for Kraatz's discharge under the standard of his Agreement.

The "management team" referred to by the trial court was comprised of B. Wilkinson's children and in-law, who disliked Kraatz, resented Kraatz's position of authority in the dealership, and wanted Kraatz's employment terminated so that they could take over. (R.1927, 1940-41, 2157, 2160, 2352, 2372-73, App. B-Exh. 31.) While the testimony revealed that B. Wilkinson's children defied Kraatz's authority and went over Kraatz's head to B. Wilkinson (R.2351-54, 2357, 2362-63, 2365-66), there was no evidence of any attempt by B. Wilkinson to support Kraatz's authority in the Dealership in the eyes of his family. In fact, B. Wilkinson approved of his family's special access to him on business matters because of their status of "being family and all." (R.1936.)

The only other evidence regarding employee morale was the testimony of Pat Nichols, who testified that before Kraatz was hired, his morale was good and that while Kraatz was employed, his morale went down. (R.1693, 2407-11.) However, he did not attribute the decline in his morale to Kraatz, nor did he testify that any other employee's morale declined. (*Id.*)

There was no evidence presented by Defendants that the alleged morale problem was due to any "willful and substantial" breach by Kraatz of his Agreement, or any "refusal" by Kraatz to perform his obligations.

I. THE TRIAL COURT'S ORAL FINDING REGARDING NET WORTH AND PROFITABILITY AND WRITTEN FINDING E1 REGARDING PROFITABILITY ARE CLEARLY ERRONEOUS AND ARE INSUFFICIENT AS CAUSE FOR KRAATZ'S DISCHARGE.

The trial court's oral finding that "the corporate net worth declined to approximately one-half from June 1 of '90 to August of '92" (R.2470) is supported only by B. Wilkinson's testimony that "the net worth of the dealership in total, as I remember, was reduced almost in half from June first of '90 until August of '92." (R.2035-36.) The documentary evidence admitted at trial demonstrates that B. Wilkinson's memory was grossly inaccurate.

The financial statements, which both parties offered into evidence, show that on May 31, 1990, the Dealership's net worth was \$908,790.00 (R.2323-24; App. B-Exh. 295, bates number 000069

line 62). On August 31, 1992, the net worth was \$737,681.00 (App. B-Exh. 297, bates no. 000185 line 63), for a decline of only 18.83%—not “approximately one-half.” The entire \$171,109.00 decline was experienced in 1990, the first year of Kraatz’s employment. In that year, the Dealership lost \$295,515.00, \$251,222.00 of which was realized after Kraatz was employed. (App. B-Exh. 295 May and December financial statements, bates no. 000069 and 0000101.) From December 1990 until the time Kraatz was discharged, the Dealership’s financial condition slowly improved.

The trial court’s reliance on B. Wilkinson’s oral testimony, as opposed to the financial statements, was clear error, especially in light of the fact that the court relied on the financial statements to make other written findings. (See Findings E1 and J10.)

In Finding E1, the trial court found that: “The dealership was not profitable during the 27 months Plaintiff was general manager. (App. B-Exhs. 208 and 333) In 1990, it lost \$295,515.00; in 1991, it realized a profit of only \$5,169.00, and in 1992, it lost \$124,980.00.” The court made no finding of the profit or loss through August 1992, the last month of Kraatz’s employment; however, the financial statements show a cumulative net profit of \$74,542.00 for the year through August 1992. (App. B-Exh. 297, bates no. 185 line 62.) The trial court’s Finding E1 that the

Dealership was "not profitable" is therefore supportable only if taken as a subjective conclusion equivalent to "insufficiently profitable," since the court did find that the Dealership made a small profit in 1991 and the financial statements show a profit for 1992 prior to the time Kraatz was fired.

The findings regarding profitability are irrelevant because the definition of "cause" in Kraatz's Agreement does not include lack of profitability. Lack of profitability does not indicate a "willful and substantial" breach by Kraatz to do his duty, nor does it show a "refusal." B. Wilkinson admitted that Kraatz "tried to operate the store in a profitable fashion" (R.2001), that profitability was important to Kraatz while he was employed (R.2029), and that B. Wilkinson himself took some responsibility for the losses in 1990 and 1992. (R.2031, 2000.)

The trial court's findings regarding profitability should be stricken as clearly erroneous and irrelevant. If the losses sustained in 1990 ever were "cause" to discharge Kraatz, Heritage condoned the loss by not firing Kraatz at that time and thus waived its right to discharge Kraatz twenty months later in September 1992. *Denberg, supra*.

J. FINDING E25 REGARDING KRAATZ'S ALLEGED GENERAL FAILURE TO PERFORM IS CLEARLY ERRONEOUS AND INSUFFICIENT AS CAUSE FOR KRAATZ'S DISCHARGE.

The court's Finding E25 that "plaintiff failed to perform his duties and responsibilities as provided under the agreement" (R.1695) is a clearly erroneous ultimate conclusion of fact based upon the court's other clearly erroneous factual Findings. Alternatively, the Finding is legally insufficient to justify Kraatz's discharge since "failure" is not the same as "refusal."

K. THE TRIAL COURT'S FINDING E18 THAT KRAATZ AGREED TO RESIGN IS CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

The only testimony on this point was from Kraatz and B. Wilkinson. (R.1771-72, 1876.) Although B. Wilkinson testified that Kraatz agreed to leave the Dealership if B. Wilkinson wished him to leave (R.1772), the undisputed evidence is that B. Wilkinson sent Kraatz a letter of termination (App. B-Exh. 64) and that Kraatz did not submit a resignation.

There was no affirmative defense of resignation or waiver raised by the Defendants in their Answer, nor was there argument at trial that Kraatz had agreed to resign and had therefore waived his claims. The court seemed to recognize this in its oral findings wherein the court stated "Bryan Wilkinson sent a letter of termination, App. B-Exh. 64, at the plaintiff's request." (R.2470.) That portion of Finding E18 stating that "Plaintiff

agreed [to resign]," is beyond any allegation or defense asserted at trial and contrary to the great weight of evidence.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO AWARD KRAATZ AMOUNTS DUE HIM EVEN IF HE WAS PROPERLY TERMINATED

During Kraatz's employment he earned, but has not received, \$7,734.26 for unreimbursed medical expenses and 27 months of vesting of stock appreciation rights. Kraatz was entitled to be reimbursed \$5,000.00 per year in uncovered medical expenses (R.1837-38; App. B-Exh. 38, Schedule "A" ¶ [f]). Kraatz's accountant's uncontroverted testimony showed that Kraatz had expended \$7,734.26 in reimbursable medical expenses during his employment. (R.2118, App. B-Exh. 302.) The trial court ignored this evidence in denying Kraatz all relief.

Kraatz's vesting of stock appreciation rights is set forth in Schedule B of the Agreement, which provides:

If Employee terminates his employment or is terminated for cause, his stock appreciation rights shall vest pursuant to the following formula:

<u>Time</u>	<u>Amount Vested</u>
Prior to June 1, 1991	20%
6-2-91 to 6-1-92	40%
6-2-92 to 6-1-93	60%
6-2-93 to 6-1-94	80%
After 6-1-94	100%

Under the Agreement, Kraatz was entitled to receive at least 60% of 15% of the value of the Dealership over \$2,500,000, even if his discharge were for cause. Substantial evidence regarding the value of the Dealership was presented at trial (R.2205-06, R.2235-37), but the court failed to address the issue of such value. The trial court erred by failing to award Kraatz his reimbursable medical expenses of \$7,734.26, plus the value of his vested stock appreciation rights.

CONCLUSION AND REQUESTED RELIEF

The trial court's ruling that Kraatz has no cause of action for wrongful termination is fundamentally flawed because the court (1) failed to place on Heritage the burden to justify Kraatz's discharge by showing a "willful and substantial breach" or "refusal" by Kraatz to do his duty, (2) misinterpreted the terms of the parties contract by broadening the permissible causes for discharge, and (3) made many clearly erroneous findings of fact which were supported, if at all, only by vague and conclusory oral testimony which, as a matter of law, is insufficient to satisfy Heritage's burden to justify Kraatz's discharge.

Properly interpreted, the Agreement narrowly restricts Heritage's right to discharge Kraatz. Heritage failed to produce any evidence of "refusal" or "dishonesty" to justify Kraatz's discharge. Heritage further failed to produce evidence of

applicable Honda and industry standards of performance in support of the accusations against Kraatz and instead based their criticisms on B. Wilkinson's subjective beliefs and feelings. Heritage failed to follow its corporate policy of progressive discipline before discharging Kraatz. The great weight of the evidence, including B. Wilkinson's admissions that Kraatz (a) tried to operate the Dealership profitably, (b) was an honest man, (c) tried to teach B. Wilkinson's children, and (d) was not expected by B. Wilkinson to work every Saturday as scheduled by J. Wilkinson, demonstrates that Kraatz was not guilty of a willful and substantial breach of his Agreement.

The ulterior motives of Heritage and the Wilkinsons to invent a "cause" to discharge Kraatz in order to deprive him of stock appreciation rights and to promote J. Wilkinson as chief operating officer over the Dealership are clear. When properly interpreted, the Agreement protects Kraatz from such motives.

This Court should strike those findings which are clearly erroneous, make its own finding that Heritage failed to meet his burden to justify Kraatz's discharge and remand this case with instructions to the trial court to enter judgment for Kraatz and to enter findings and judgment determining the amount of damages and attorney's fees necessary to compensate Kraatz for Heritage's breach of the Agreement.

In the alternative, this case should be remanded with instructions to award Kraatz a money judgment for health benefits and stock appreciation rights vested prior to Kraatz's discharge.

DATED this 16th day of December, 1997.

JARDINE LINEBAUGH & DUNN
A Professional Corporation

By: 

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 1997, I served the foregoing **APPELLANT'S BRIEF** by causing a true and correct copy thereof to be mailed, via United States Mail, postage prepaid, addressed to the following parties:

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