

1997

William Anthony Kraatz v. Heritage Imports, Bryan Wilkinson, Jeff Wilkinson : Brief of Appellee

Utah Court of Appeals

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Kent B. Linebaugh; Michael N. Zundel; Jennie B. Garner; Jardine Linebaugh and Dunn; Attorney for Plaintiff/Appellant and Cross-Appellee.

Donald J. Winder; Jennifer L. Falk; Winder and Haslam, P.C.; Attorneys for Defendants/Appellees and Cross-Appellants.

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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff/Appellant)	
and Cross-Appellee,)	BRIEF OF APPELLEES/
)	CROSS-APPELLANTS
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

Kent B. Linebaugh, Esq.
Michael N. Zundel, Esq.
Jennie B. Garner, Esq.
JARDINE LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, UT 84111
Telephone: (801) 532-7700
Attorneys for Plaintiff/
Appellant and Cross-Appellee.

Donald J. Winder (#3519)
Jennifer L. Falk (#4568)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, UT 84110-2668
Telephone: (801) 322-2222
Attorneys for Defendants/
Appellees and Cross-
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175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, UT 84110-2668
Telephone: (801) 322-2222
Attorneys for Defendants/
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-2(3)(k) (1996) and Rule 42 of the Utah Rules of Appellate Procedure.

IDENTIFICATION OF THE PARTIES

Appellant/Cross-Appellee is Plaintiff Anthony Kraatz, referred to as "Kraatz." Appellees and Cross-Appellants are Defendants Oral Bryan Wilkinson ("B. Wilkinson"), Jeffrey J. Wilkinson ("J. Wilkinson") and Heritage Imports, a Utah corporation, dba Heritage Honda ("Heritage"). Defendants are sometimes collectively referred to as "Heritage."

STATEMENT OF THE ISSUES

Heritage has reviewed the numerous issues on appeal raised by Kraatz, and believes the real issues are thus:¹

1. **Issue:** Whether this appeal should even be considered, as Kraatz has failed to marshal the evidence.

Standard of Review: This Court has stated in Saunders v. Sharp, 793 P.2d 927, 931 (Utah Ct. App. 1990):

¹ Kraatz's Brief, which lists six issues for appeal, and thirty-one separate headings in his Table of Contents under "Argument," calls to mind the following: "If you cannot win reversal with your six best points, then the 20th or 30th will probably be unsuccessful, too." Spears, Presenting an Effective Appeal, 21 Trial 95(6) (November 1985). See also Baskin, Wasted Words or Persuasive Prose: Connecting with the Appellate Court, 58 Fla. B. J. 69-72 (1985) (A scatter-gun weakens an argument).

Our standard for overturning factual findings is a rigorous one--we may not set aside such findings unless they are clearly erroneous. Sweeney Land Co. v. Kimball, 786 P.2d 760, 761 (Utah 1990); Utah R. Civ. P. 52(a). To establish clear error, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,'" In re Bartell, 776 P.2d 885, 886 (Utah 1989) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)). This burden "is a heavy one, reflective of the fact that we do not sit to retry cases submitted on disputed facts." Id. at 886. Accordingly, when an appellant fails to carry its burden of marshaling the evidence, "we refuse to consider the merits of challenges to the findings and accept the findings as valid." Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah Ct. App. 1989).

We are thus obliged to consider the findings from the standpoint of the supporting evidence and not from "appellant's view of the way he or she believes the facts should have been found." Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987).

2. **Issue:** Whether the trial court erred in its interpretation of the contract.²

Standard of Review: This is a mixed question of law and fact. "In interpreting a contract, "the intentions of the parties are controlling." Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991). Questions of intent from extrinsic evidence are questions of fact and are not set aside unless clearly erroneous. See Fitzgerald v. Corbett, 793 P.2d 356, 358 (Utah

² Appellant has characterized this as three issues with subparts. See Kraatz Brief "Statement of Issues," No. 2 (whether the trial court erred in its interpretation of refusal), and Nos. 4 and 5 (whether the court erred in finding the Agreement was integrated). In his Brief, these issues are addressed in the nine points under Point II. See Kraatz Brief, Table of Contents, pp. i-ii.

1990). "When an appellant is essentially challenging the legal sufficiency of the evidence, a clearly erroneous standard of appellate review applies." American Vending Services, Inc. v. Morse, 881 P.2d 917, 920 (Utah Ct. App. 1994). The question of substantial performance is a question of fact. Saunders v. Sharp, 793 P.2d 927, 931 (Utah Ct. App. 1990). Findings of fact of the trial court "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a); see also Sweeney Land Co. v. Kimball, 786 P.2d 760, 761 (Utah 1990); Copper State Leasing Co. v. Blacker Appl. and Furn. Co., 770 P.2d 88, 93 (Utah 1988); Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987).

CROSS-APPEAL

Heritage has filed a cross-appeal. Its sole issue is as follows:

Issue. Whether the trial court erred in denying Defendants' Motion to Amend their Answer and File a Counterclaim to recover attorney's fees pursuant to the express provisions of the Employment Agreement between Defendant Heritage Honda and Plaintiff William Anthony Kraatz ("Agreement").

Standard of Review: A motion to amend a pleading is within the trial court's sound discretion. See Pasker, Gould, Ames & Weaver, Inc. v. Morse, 887 P.2d 872, 875 (Utah Ct. App.

1994). Therefore, a ruling denying a motion for leave to amend will not be disturbed absent a showing of abuse of discretion. Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah Ct. App. 1994). However, leave to amend shall be freely given. See Utah R. Civ. P. 15(a). Also, the trial court "shall award reasonable fees in accordance with the terms of the parties' agreement." Saunders v. Sharp, 793 P.2d 927, 931 (Utah Ct. App. 1990).

DETERMINATIVE STATUTES AND RULES

Rule 15(a), Utah Rules of Civil Procedure.

Rule 52(a), Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

(Nature and Course of Proceeding, Disposition at Trial)

Kraatz's appeal is from the trial court's oral and written Findings of Fact ("FF") and Conclusions of Law ("CL") following a four-day bench trial, entered on Friday, September 20, 1996, and from its Judgment dated October 28, 1996, dismissing Kraatz's Complaint for no cause of action.

The cross-appeal of Heritage is from a Minute Entry, dated July 30, 1996, and subsequent formal Order dated August 29, 1996, of the Third District Court in and for Salt Lake County, State of Utah, entered before and during a four-day bench trial before the Honorable J. Dennis Frederick denying their request for leave to amend their answer and to assert a counterclaim.

STATEMENT OF FACTS

Kraatz objects to relatively few of the court's findings--certainly not enough to determine the outcome. In order to demonstrate how few of the findings of fact Kraatz opposes (which number over 100), Heritage has attached as Addendum "C" a copy of the court's written findings, and as Addendum "D" a copy of the trial court's oral findings, and in each has highlighted those findings to which Kraatz objects.³

A review of these facts is essential, not only to demonstrate the sheer number Kraatz did not challenge, but because they demonstrate 1) that Kraatz failed to marshal the evidence, and 2) that the trial court's findings are supported and are not clearly erroneous. Rather than recounting each fact, Heritage has chosen the following examples of the facts Kraatz has not challenged to demonstrate these points:

1. Heritage is a Utah corporation which for years operated an automobile dealership in Murray, Utah. It was essentially a family-owned automobile dealership in which B. Wilkinson was the owner and majority shareholder and his four children, including his son J. Wilkinson, were minority shareholders and officers and directors of the corporation. At least three of his four children and his son-in-law worked for the dealership. (R. 2467, FF Nos. A.1-3 (R. 1683-84).)

³ Other than the addition of highlighting, the only other change has been to replace the citations with the appropriate citation to the record.

2. Kraatz was a good friend of B. Wilkinson. He had several discussions with B. Wilkinson about the performance of the dealership, and was aware Heritage was not doing as well as B. Wilkinson wanted. Kraatz was dissatisfied with his job in St. George and was looking for a lucrative management position, even if it meant moving to Salt Lake City and managing a dealership in which the owner's children were stockholders, directors, and management personnel of the corporation. (R. 2467-68; FF Nos. B.1-3.)

3. The principal thrust of the negotiations was that the dealership must return to profitability. (R. 2467, FF Nos. B.1-3 (R. 1685).)

4. Kraatz told B. Wilkinson Heritage should make \$1 million a year with Kraatz as general manager. Kraatz also told him he could raise the gross margin per car if he were general manager. (FF Nos. B.5-6 (R. 1686).)

5. The parties agreed B. Wilkinson's children were to be trained in management duties to ultimately assume control, and Kraatz would be the day-to-day manager of Heritage and allow B. Wilkinson to semi-retire, in exchange for which Kraatz was to receive considerable remuneration. (R. 2467, FF No. B.5 (R. 1686).)

6. Kraatz had full access to the financial information of the dealership, and was aware of B. Wilkinson's spending habits before he ever signed the Agreement. During his tenure as general manager he continued to have full access, and had several

"accountability" meetings with Wilkinson and the comptroller in which his failure to make a profit was discussed. (FF No. B.4, 7 (R. 1685-86); FF No. E.24 (R. 1695).)

7. All of Kraatz's duties set forth in Section 1.2 from his Draft Agreement (Exhibit 589), were incorporated into the Employment Agreement (Exhibit 38). A new subparagraph c. was added to paragraph 2.1 of the Draft Agreement, providing termination for "Refusal by Employee to fulfill his employment responsibilities described in Article I of this Agreement." (FF No. B.10 (R. 1686); Exhibits 38 and 589.)⁴

8. Kraatz's duties also included responsibility for producing income for Heritage, the care and keeping of its assets, financial forecasting and budgeting, the hiring and firing of employees, advertising decisions, and management of cash flow. (FF Nos. D.1-5, 10 (R. 1688-90).)

9. Kraatz's conduct while in control created dissention with B. Wilkinson's children. Kraatz demoted J. Wilkinson twice and threatened him with termination. During the entire time he was general manager, Kraatz never trained J. Wilkinson by placing him in the parts department, service department or in accounting. At no time did Kraatz instruct J. Wilkinson on such general

⁴ Kraatz makes a material omission in his statement of facts when he claims, "The Agreement [was] prepared by Heritage's counsel" This is not accurate because it ignores the fact that the initial agreement, Exhibit 589, was drafted by counsel for Kraatz. There are differences in these two agreements which the trial court found material in determining the intent of the parties. See CL B.10 (R. 1710); FF Nos. B.11, 12 (R. 1687). A copy of Exhibit 589, the Draft Agreement, is attached as Addendum "B."

management skills and duties as the hiring and firing of personnel, management of assets, or employee interviews. (FF No. E.5 (R. 1689).)

10. Heritage had in place with Comerica Bank a \$3 million flooring line which was cross-collateralized and cross-defaulted with a mortgage loan. In December of 1990 Dan Hartmann, Vice President of Comerica Bank in charge of flooring for Heritage, was notified that Heritage was changing its flooring from Comerica to Key Bank. The decision to move the flooring caused Heritage to become in default, requiring it to pay penalties in the approximate amount of \$114,000. (FF Nos. E.19-13 (R. 1692-93).)

11. Both Kraatz and B. Wilkinson told Hartmann that Kraatz had complete control and responsibility of Heritage. Hartmann dealt exclusively with Kraatz from the time he was introduced to him until January 11, 1991, after Comerica had been notified that Heritage was moving the flooring. (FF Nos. D.8-9 (R. 1689-90), R. 2059; FF No. D.10 (R. 1689) R. 2052-53, 2059.)

12. Saturday is the highest volume sales day in the car business, and the best sales time of each day is from 4:00 p.m. until closing. (FF Nos. D.13, E.15 (R. 1690, 1693).)

13. Kraatz's own expert witness, Mark D. Schmitz, characterized a Honda franchise as a "license to steal." (FF No. B.8 (R. 1686) R. 2339.)⁵

⁵ He also stated that it was a better investment than a mutual fund. (R. 2339.)

14. Larry H. Miller persuasively testified that his examination of the financial statements indicated Heritage was not undercapitalized and that it should have made a profit in 1992. Miller testified his Toyota dealership, of a similar size, location, and with an equally popular import, was less capitalized than Heritage, yet made a profit for the years 1990, 1991, and 1992. (FF Nos. E.2-4, E.22 (R. 1690-91, 1695).)

15. Kraatz was employed with Heritage from May, 1990 through November 11, 1992. In 1990 Heritage lost \$295,515, in 1991, it realized a profit of only \$5,169, and in 1992 it lost \$124,980. (FF No. E.1 (R. 1690).)

16. Kraatz never saw a copy of the Employee Handbook ("Handbook") before signing the Agreement, did not have an acknowledgement that he had received a Handbook, and made the decision, after attending a seminar on employment, to have the employees turn in the Handbooks. (CL No. C.1-3 (R. 1711-12); FF Nos. F.1-6 (R. 1696-97).)

17. The evidence was hotly contested, leaving the trial court to assess the credibility of the witnesses' testimony in determining the more credible and persuasive evidence. (R. 2466.)

SUMMARY OF THE ARGUMENT

Kraatz has filed an appeal from a four-day bench trial in which the trial court ruled Kraatz's termination was justified under the Agreement between Kraatz and Heritage.⁶

Kraatz's appeal is procedurally defective and is lacking in merit. Procedurally, Kraatz's appeal is defective and should not be considered because he has failed to marshal the evidence in support of the trial court's findings, as the law requires him to do. The trial court's findings should thus be accepted as valid and its ruling affirmed on this basis alone.

Kraatz's Brief is also procedurally defective because he continually urges the wrong standard of review. He continually characterizes issues as questions of law when they are clearly issues of fact, or mixed issues of fact and law in which the legal issues go to the heart of the factual findings.

In addition to these material procedural defects, Kraatz's appeal must be denied as there is no substantive merit to his appeal. The trial court made over one hundred detailed findings of fact and over fifty detailed conclusions of law, many of which were based on other detailed findings of fact. The trial court's ruling is well grounded in factual and legal support. There is

⁶ A copy of the complete Agreement is attached as Exhibit "A" in Addendum of Heritage. All citations to the record and to exhibits which are not included in the Appendices of Kraatz are included in the Addendum of Heritage as Exhibit "E." To avoid duplication, all other references may be found in Kraatz Appendices.

no basis for the ruling to be disturbed. The trial court's ruling as to Kraatz should thus be affirmed.

As to the cross-appeal by Heritage, the trial court's ruling should be reversed and the matter remanded to the trial court for a determination of a reasonable attorney's fee in favor of Heritage. The trial court abused its discretion when it denied Heritage's motion to amend its answer, based on its erroneous assumption that further discovery was necessary, and thus prejudice to Kraatz would result in the amendment.

ARGUMENT

POINT I

KRAATZ HAS FAILED TO MARSHAL THE EVIDENCE

Kraatz has the heavy burden of marshaling all of the evidence supporting the decision of the trial court, and he must demonstrate those findings to be "so lacking in support as to be 'against the clear weight of the evidence.'" Saunders v. Sharp, 793 P.2d at 931 (citations omitted).⁷

This Court has repeatedly held that to

successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling]

⁷ See also Marshall v. Marshall, 915 P.2d 508, 516 (Utah Ct. App. 1996) "[I]n order to challenge a trial court's findings of fact on appeal, the challenger must marshal all the evidence in support of the findings and then demonstrate that the evidence is insufficient to support the findings in question. We will uphold the trial court's findings of fact if a party fails to appropriately marshal all of the evidence." (Citations omitted.)

duty ..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists."

Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah Ct. App. 1994). But the duty does not end here:

Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings.

Id. If a party fails to appropriately marshal the evidence, the trial court's findings are upheld. See Macris & Assocs. v. Images & Attitude, 941 P.2d 636, 642 (Utah Ct. App. 1997). See also CellCom v. Systems Communication Corp., 939 P.2d 185, 189-90 (Utah Ct. App. 1997).

Kraatz has failed meet his burden of marshaling the evidence. In Marshall v. Marshall, the appellate court found the defendant had not properly marshaled the evidence because he "merely recited the findings on point and then highlighted the evidence which he deemed contrary to the findings." Marshall v. Marshall, 915 P.2d at 516. The appellate court thus refused to disturb the trial court's findings. See id.

As in Marshall, Kraatz has not marshaled the evidence; he merely recites findings on point, and then spends pages arguing for evidence he deems contrary to those findings. Although supposedly Kraatz has only raised six issues on appeal, his third point, challenging the court's factual findings, actually has twenty-five different sections--eleven subheadings, and fourteen

sub-sub headings. Heritage need not address every one of these challenged by Kraatz to demonstrate his failure to marshal. It is not the duty of Heritage to marshal the evidence. Below, however, are significant findings of the trial court which Kraatz seeks to challenge to which he has not marshaled the evidence. Having demonstrated Kraatz's failure to marshal all the evidence as to these significant findings, this Court need go no further; the trial court's rulings should be affirmed.

A. Control.

An example of Kraatz's failure to marshal the evidence is on his challenge to the finding that he had control over the finances of Heritage. This is a significant finding because he said he should make \$1 million a year for Heritage as general manager, and yet Heritage was not profitable under his management. Kraatz's attempts to challenge written findings B.13 and E.1 are insufficient. He lists the following evidence as supporting the trial court's findings regarding his control:

1) Kraatz and Wilkinson both told Hartmann, of Comerica, that Kraatz was in control of Heritage;

2) Hartmann testified he dealt only with Kraatz until after January 11, 1991, by which time the decision to move the flooring had been made (R. 2046-48);

3) As a general manager Kraatz was to make advertising decisions (R. 1851);

4) Miller testified a general manager managed cash flow and that Kraatz did not manage it well (R. 2081);

5) One of the reasons for the parties' entering into the Agreement was for Kraatz to manage Heritage and thus allow B. Wilkinson to semi-retire (R. 2467); and

6) The language of the Agreement gave Kraatz control. See Exhibit 38.

Kraatz Brief at 50-51.

Kraatz states he has "scoured the record," and the above--as if it were not enough--"is all the evidence adduced at trial to support Finding B13 or Conclusion E1." Kraatz Brief at 51, 52.

In fact, Kraatz did not marshal all the evidence. Missing from his facts (especially in light of the facts he claims require a setting aside of the trial court's findings) are further facts which were readily available to him in the court's written and oral findings; a "scouring" of the record would undoubtedly produce further support for the trial court's ruling. Examples of some of these additional facts are as follows:

1) Larry Miller testified that, in spite of B. Wilkinson's "significant" spending, Heritage was not undercapitalized and that Kraatz should have made a profit (R. 2222, 2078, 2085);

2) Kraatz asked B. Wilkinson to help him with advertising (R. 1932, 2261);

3) Kraatz had monthly accountability meetings at which the lack of profitability of Heritage was discussed (R. 2469);

4) Kraatz told Hartmann that he, Kraatz, had the power to fire B. Wilkinson's children (R. 2059);

5) Kraatz demoted J. Wilkinson twice and threatened to fire him (R. 2469);

6) Kraatz made and carried out the decision to turn in Employee Handbooks (Exhibit 23, R. 1846-47); and

7) Kraatz admitted it was his responsibility to produce income, maintain the assets for Heritage and to budget and forecast (R. 1851).

These findings demonstrate Kraatz did not marshal the evidence. These are facts Kraatz should have included because they support the trial court's finding. Kraatz then had the duty to demonstrate the findings of fact "are so lacking in support as to be against the clear weight of the evidence." Again, Kraatz does not do this, but simply tries to reargue what he argued at trial. This is not marshaling.

B. Kraatz's Refusal to Work Saturdays.

Kraatz seeks to challenge the trial court's oral and written findings that he refused to work Saturdays. (R. 2469; FF Nos. E.21(d), E.15.) See Kraatz Brief pp. 37-44. Kraatz challenges this finding in spite of the fact that even under his version of "refusal"⁸ there is sufficient support for the trial court's ruling Kraatz's termination was justified.

Kraatz does not marshal the evidence. His only attempt at doing so is not to list the actual facts which support the court's finding but simply to state the pages of transcript containing relevant testimony, the identity of exhibits and the schedule Kraatz refused to work.⁹

⁸ See Point III, *supra*.

⁹ E.g., "written Findings E15 and E21(d) ... are supported, by the eight pages of testimony Kraatz cites 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 (Kraatz Brief Exhibit 1), ostensibly pursuant to the authority given him by his father." Kraatz Brief at 37-38.

This is not marshaling. Kraatz does not list (nor does he challenge) the following facts which he should have marshaled, as they support the trial court's findings:

1) Saturdays are the biggest sales days in the car business and from 4:00 p.m. in the afternoon until closing is the best sales time of each day (R. 2006);

2) B. Wilkinson asked Kraatz to work Saturdays because he believed the general manager needed to be visible at the store at these crucial times (R. 2036);

3) B. Wilkinson had directed J. Wilkinson to prepare a schedule requiring Kraatz to work Saturdays (R. 2768); and

4) Kraatz did not work the schedule (R. 2364-65).

Kraatz did not cite or make any reference to Exhibit 2, the schedule Kraatz made after refusing to work the schedule prepared at B. Wilkinson's direction. See Exhibit 2, Appendices. This schedule is important because it demonstrates that Kraatz, even after being presented with a schedule demonstrating he was to work Saturdays, still refused to schedule himself for Saturdays.

Nor does Kraatz point out that B. Wilkinson was the owner and CEO of Heritage, and that J. Wilkinson was an officer and director of Heritage as well as an employee subordinate to Kraatz. Nor does he cite the testimony of J. Wilkinson that he frequently made schedules. (R. 2364.) This is important for it supports the court's finding that J. Wilkinson had the authority to schedule Kraatz to work Saturdays at his father's direction. Nor when challenging the Wilkinsons' authority to prepare a work schedule does Kraatz point out that B. Wilkinson was the owner and J. Wilkinson an officer and director of Heritage in his own

right. These are just a few examples of significant facts which Kraatz should have marshaled in support of the trial court's findings.

Kraatz also fails the second prong of his marshaling duty-- that of showing that the findings are clearly erroneous. Once he has scoured the record for all evidence in support of the trial court's finding, he is to demonstrate that the findings "are so lacking in support as to be against the clear weight of the evidence." CellCom v. Systems Communications Corp., 939 P.2d 185, 189 (Utah Ct. App. 1997). Kraatz does not do this. Instead, he simply attempts to reargue the evidence he believes supports his position. For example, it is uncontroverted that Kraatz did not work the schedule given him by J. Wilkinson, and that he did not schedule himself to work any Saturday in the schedule he subsequently prepared for the same time period. (Exhibits 1 and 2.) Kraatz spends pages of his brief arguing that Kraatz did not "refuse" but that it "would be difficult for him" to work Saturdays. Kraatz Brief at 40. This is simply arguing with the findings; even if what Kraatz said was true, it does not rise to the level of showing the finding to be "so lacking in support as against the clear weight of the evidence." Id.

C. Training.

Kraatz also failed to marshal the evidence in his challenge to the court's oral and written findings (R. 2469, FF Nos. E.6,

E.16 and E.21(h)) that he did not train B. Wilkinson's children, as required by the Agreement. Kraatz Brief pp. 44-50.

Again, rather than marshaling all the evidence, Kraatz lists some of the evidence in support of the findings only to then spend most of his brief arguing his version of the facts.

For example, Kraatz admits in his brief that the following facts support the trial court's finding:

1. Kraatz was required to train the children under the Agreement;

2. J. Wilkinson testified he did not receive any training in significant areas in the dealership--accounting, parts, service, and the interviewing, hiring and firing of employees (R. 2380-81);

3. B. Wilkinson testified that Kraatz did not train his children--Kraatz just did not get the job done, and that training "just did not happen" (R. 2041).

Kraatz Brief at 44. Given these facts, all Kraatz's parsing of language--about "training" meaning "training relative to American Honda," and "to be in F&I" meaning "while in F&I," etc.--is immaterial.

D. Medical Reimbursement.

Kraatz does not even attempt to marshal evidence in support of the trial court's findings that he was not entitled to reimbursable medical expenses or any damages relating to the value of the dealership. See Kraatz Brief Point IV, at 61-62. It is ironic that of the millions of dollars in alleged damages Kraatz

claimed in his Complaint that he now focuses on a claim for approximately \$8,000 and for the value of stock had the court found in his favor. In doing so, Kraatz ignores the fact that the court specifically found he breached the Agreement and was terminated for cause.¹⁰

E. Profitability.

Perhaps most important is Kraatz's failure to properly marshal the evidence in challenging the trial court's findings concerning profitability. Kraatz Brief at 57-59. Kraatz admits that the financial statements demonstrate Heritage lost \$295,515 in 1990, realized a profit of only \$5,169 in 1991, and lost \$124,980 in 1992. See Exhibits 295, 296, and 297.

But he fails to marshal other evidence supporting the trial court's findings. This evidence includes:

1. Kraatz's own expert, Mark Schmitz, said a Honda dealership is a "license to steal," and a better investment than a mutual fund (R. 2339);

2. Larry H. Miller testified Heritage had enough capital and its lack of profitability was due to Kraatz's failure to manage cash flow (R. 2081-82, 2095);

3. Kraatz admitted it was his responsibility to produce income and to maintain the assets for Heritage (R. 1851);

¹⁰ In Utah, it is well settled that in order to recover on a contract, one must first establish his own performance or a valid excuse for his failure to perform. See Nielsen v. Chin-Hsieng Wang, 613 P.2d 512, 514 (Utah 1980).

4. Dan Hartmann testified he dealt exclusively with Kraatz during the time the decision was made to move the flooring from Key Bank, a decision which cost Heritage approximately \$114,000 in penalties and interest (R. 2052-53, 2059); and

5. Kraatz admitted he was responsible for relationships with the banks (R. 1808-11); see also Kraatz Brief at 39.

Ironically it is the issue of profitability on which Kraatz makes his only real attempt to meet his burden of marshaling-- that of demonstrating the court's finding is so lacking in support as to be against the clear weight of the evidence. But in doing so, he mischaracterizes the evidence.

Kraatz claims the finding that 1992 was not profitable is immaterial, because the financial statements for August and September of 1992 show a profit. This is incorrect. While the profit line on these statements may technically show a profit, the amount in the "prepaids" portion of the financial statement for these months demonstrates that the company is not profitable. This is clear in viewing the thirteenth statement for 1992. See Exhibit No. 297.

Kraatz had a duty to marshal this evidence for the court in his brief. He also had a duty to marshal the testimony of his own expert, Mark Schmitz. Schmitz testified that the profit lines on the August and September financial statements on which Kraatz relies do not reflect the actual profit because several expenses, such as advertising, had been deferred until the end of the year, and it was not until December that they were placed in

the correct accounts. (R. 2313-14.) These expenses, if moved from prepaid to the correct accounts, would also show a significant loss as of August and September 1992. (R. 2313-14; Exhibit 295.)

F. Other Examples of Failure to Marshal.

Kraatz also failed to marshal any evidence supporting the trial court's finding regarding customer complaints. Rather than marshal the evidence as to customer complaints, Kraatz simply states the finding is "insufficient" because no specific examples were given. Kraatz Brief at 53-54.

As to the court's finding that the morale of Heritage was low while Kraatz was general manager, Kraatz does not challenge the testimony of Pat Nichols, who said the morale of Heritage was low; he simply states it was not the fault of Kraatz but that of B. Wilkinson's children. Kraatz Brief at 56-57. Had Kraatz marshaled the evidence, he would have cited the following facts in support of the trial court's findings:

1. Kraatz knew, before ever signing the Agreement, that Heritage "was essentially a family-run business with Bry Wilkinson functioning as the owner and at least three of his four children and son-in-law working for the corporation" (R. 2467);

2. Kraatz's duty was to train the children in management duties so that they could ultimately assume control (R. 2467);

3. "Kraatz was dissatisfied and was looking for a lucrative management position..., even if it entailed moving into a general manager position of authority over children of the owner who were

stockholders, directors and management personnel in their own right of the corporation" (R. 2468);

4. Kraatz demoted J. Wilkinson twice (R. 2468);

5. He threatened J. Wilkinson with termination (R. 2468);
and

6. He created severe resistance to his control (R. 2468).

All of these facts demonstrate that Kraatz did not marshal the evidence. A similar exercise as to each other fact he challenges would no doubt demonstrate the same.¹¹

All of these facts demonstrate Kraatz did not marshal the evidence. A similar exercise as to each of the remaining twenty-one facts he challenges would likely demonstrate the same.¹²

¹¹ See, e.g., Kraatz's challenge to the finding that Kraatz manipulated or modified the balance sheet. Support not mentioned is in lines 23-25 on p. 1 and p. 4 of the 1990 financial statement (Exhibit 295); lines 23-24 on p. 1 and line 24 on p. 4 for 1991 (Exhibit 296); and lines 23 and 24 on p. 1 and line 20 on p. 4 for 1992 (Exhibit 297).

¹² See, for example, his challenge to the court's finding that he manipulated the balance sheets. He does not cite to the balance sheets himself to support this, but argues on at least three different occasions that B. Wilkinson said Tony was an honest man. Kraatz Brief at 32, 34, 62. Testimony actually states as follows:

Q. You don't believe Tony was dishonest in any way in connection with the Snider transaction we just talked about do you?

A. I think I said in my deposition that I don't think Tony's basically a dishonest person.
(R. 1977-78, Wilkinson vol. 3, p. 3021 l. 10.)
Wilkinson is not testifying affirmatively to Tony's honesty, nor is he denying that Tony was dishonest in relation to the Snider transaction.

Because of this, this Court should not consider his challenges, and the trial court's findings should be accepted as valid.

POINT II

KRAATZ SETS FORTH THE WRONG STANDARD OF REVIEW

Kraatz continually sets forth the wrong standard of review as to the issues in his brief. Kraatz claims that five of the six issues he sets forth are questions of law, when in fact they are all either strictly issues of fact, or are mixed issues of fact and law.

For example, Kraatz claims his first issue is an issue of law. This is either a misunderstanding by Kraatz of the relevant law, or a misstatement of the trial court's ruling. Kraatz's first issue is as follows:

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.

The cases on which Kraatz relies which discuss employment for a definite term all concern cases in which there was no written agreement, but rather an employee seeking to establish an implied agreement based on the terms of the employee handbook. The establishment of employment of a definite term is not a contract provision, but simply the first step in overcoming the at-will presumption. See Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1045 (Utah 1989). In addition, an implied-in-fact promise cannot contradict a written contract term. Id. at 1044. In this case, there is a written contract, and the trial court

found that Kraatz's termination under the contract was justified.¹³ (CL No. 1 at R. 1703; R. 2470.)

Alternatively, Kraatz simply misunderstands the trial court's ruling. In his summary of argument he states "initially, contrary to well-settled law, the court made the startling ruling that [the dealership] had no burden to establish that Kraatz's discharge was justified under the terms of the Agreement."

Kraatz Brief at 12. What the trial court said, however, is as follows:

Plaintiff has the burden of establishing (1) he had a contract of employment with Heritage; (2) he performed his part of the Agreement; and (3) he has been damaged. Russell v. Ogden Union R.R. & Depot Co., 247 P.2d 257, 260-61 (Utah 1952). 2. Plaintiff has established he had a contract of employment with Heritage. The Agreement is the written agreement entered into evidence as Exhibit 38. A party must tender his own agreed to performance for the other party to be in default. Kelly v. Leucadia Financial Corp., 846 P.2d 1238, 1243 (Utah 1993). Plaintiff has failed to demonstrate he performed his part of the Agreement. (see infra). As a result, there is no burden upon Defendants to prove that the discharge of Plaintiff was justified. Id. at 260-61.

(R. 1703, CL Nos. 1, 2 (emphasis added).) Thus, the trial court did not impermissibly retain the burden on Kraatz as he argues. Contrary to Kraatz's claim, the court expressly found Kraatz had not established a prima facie case. Kraatz Brief at 14. Moreover, while the elements of proving a prima facie case are a

¹³ In addition, Utah law is clear that for an implied-in-fact contract to exist as were those referred to in the cases cited by Kraatz, it must meet the requirements for offer of unilateral contract. See Johnson v. Morton Thiokol, 818 P.2d 997, 1001-02 (Utah 1991). This simply does not fit with either the offer of evidence or argument by Kraatz at trial.

question of law, these are obviously not challenged by Kraatz, for the trial court relied on the very cases Kraatz cites. See Kraatz Brief at 15, citing Chiodo v. General Warehouse Corp., 17 Utah 2d 425, 413 P.2d 891, 893 n.3 (1966), and Russell v. Ogden Union Ry. & Depot Co., 122 Utah 197, 247 P.2d 257, 260 (1952). The only difference is that in both Chiodo and in Russell, the trial court found, as a matter of fact, that the employee had established a prima facie case, findings which the appellate court in each case affirmed.

The real issue raised as to each of the six issues of Kraatz is whether the trial court erred in its interpretation of the Agreement. This is a question of mixed law and fact. However, when the legal issues on review "strike at the trial court's determination of whether there was a material breach of contract, and if so, when, and by whom" the standard of review is not de novo or "no deference" but that of "clearly erroneous." Saunders v. Sharp, 793 P.2d at 931.

For example, Kraatz argues the interpretation of the terms "herein," "include," and "refusal" in section 2.1 of the Agreement is a question of law. Kraatz Brief at 2, 20 n.2. This is incorrect. The trial court's interpretation of "refusal" is a question of law and fact, as the court clearly relied on extrinsic evidence in its interpretation.¹⁴

As to Kraatz's fourth issue, whether the Handbook was part of the contract, Kraatz is really claiming the trial court erred

¹⁴ As did Kraatz. See, e.g., Kraatz Brief at 20.

in its finding the contract was integrated. Kraatz Brief at 3. This is a question of fact. See Hall v. Process Instruments and Control, Inc., 866 P.2d 604, 606 (Utah Ct. App. 1993), aff'd 890 P.2d 1024, 1026-27 (Utah 1995).

Kraatz's fifth issue, which claims the trial court erred in failing to hold Heritage liable for wrongful termination for not following the progressive discipline policy set forth in the Handbook, is also a factual issue. Before the trial court could determine whether Kraatz had breached the Agreement, it first had to determine whether the parties intended the Handbook to be part of the Agreement. This is a question of fact. See Johnson v. Morton Thiokol, 818 P.2d at 1001.

Issue No. 6, whether the trial court erred in finding Kraatz was not entitled to health benefits and stock appreciation, is also a question of fact because the evidence demonstrates Kraatz waived the right to health benefits and that he breached the contract by failing to substantially perform.

Kraatz's only real issue is whether the court correctly interpreted the Agreement. As noted above, the standard of review as to this issue is whether the trial court's findings are clearly erroneous. As demonstrated in Points I and III herein, Kraatz fails to demonstrate that any of the trial court's significant rulings are clearly erroneous. Accordingly, the trial court's ruling should stand.

POINT III

THE TRIAL COURT'S FACTUAL FINDINGS ARE NOT CLEARLY ERRONEOUS

In its oral ruling the trial court stated:

This Court is of the view that plaintiff's termination was for cause contemplated by clauses B and C of paragraph 2.1 of Exhibit 38. The evidence fails to support plaintiff's claims and this Court finds no cause of action on his Complaint.

(R. 2470.) Kraatz argues this conclusion is incorrect. As demonstrated above, because Kraatz has failed to marshal all the evidence supporting the trial court's findings, this Court need not consider whether the findings on which this conclusion is based may stand. Assuming arguendo, however, this Court does not affirm on Kraatz's failure to marshal, the trial court's decision should still be affirmed.

In order to challenge the trial court's ruling, Kraatz must demonstrate the findings on which the court's ruling is based are clearly erroneous. For a finding to be "clearly erroneous," it must be without adequate evidentiary support. See State v. Walker, 743 P.2d at 193. In making its determination, it is not up to the appellate court to reweigh the evidence. See Butterfield v. Cook, 817 P.2d 333, 337 (Utah Ct. App. 1991). That Kraatz ignores this, and wants this Court to retry the case using his version of disputed facts, is clear from the following pleas (among others) in his brief:

The Court should vacate the trial court's erroneous findings and substitute its own findings....

Kraatz Brief at 14.

Kraatz requests that the erroneous findings be stricken and that the Court substitute its own finding....

Kraatz Brief at 14, 30.

As has been demonstrated in Point I, *supra*, there is adequate evidence to support the specific findings challenged by Kraatz. It is also important to note, however, that the trial court's findings number over 100. Kraatz challenges very few of these. There is more than adequate support for the trial court's ruling from these findings (let alone from elsewhere in the record); its ruling that Kraatz's termination was justified should be affirmed.

A. There is Adequate Evidence to Support the Court's Ruling.

The following are examples of undisputed facts supporting the trial court's ruling which Kraatz does not challenge.¹⁵

1. The purpose of the Agreement was to return Heritage to profitability, and for Kraatz to manage the dealership so B. Wilkinson could semi-retire, and to train B. Wilkinson's children in management duties so they could ultimately assume control.

2. As a general manager Kraatz was required to produce income for Heritage, protect its assets, manage its employees, make advertising decisions, deal with the banks, and manage cash flow. (R. 1851-52; R. 2222; R. 2314.)

These facts establish the duties of Kraatz under the Agreement. The facts below provide adequate support for the

¹⁵ These are examples only and there are undoubtedly others which would be more obvious had Kraatz marshaled the evidence.

trial court's ruling that Kraatz did not substantially perform these duties and that his termination of employment was justified.

1. Kraatz did not protect Heritage's assets. Dan Hartmann, Vice President of Comerica, testified he was told by both Kraatz and B. Wilkinson that Kraatz was in control. Furthermore, Kraatz was the only one Hartmann could contact during the time the decision was made to move the flooring. The decision cost Heritage approximately \$114,000 in penalties and interest. (R. 2052-53, 2059.)

2. Kraatz failed to make a profit. Kraatz admits he was responsible for producing income, but argues the lack of profitability was not his fault because the dealership was undercapitalized. The court found otherwise. It specifically stated that it found testimony of Larry H. Miller on this point persuasive. (R. 2469.) Miller testified the dealership was not undercapitalized and that Kraatz should have made a profit in 1992 had he managed cash flow properly. Miller also testified his own Toyota dealership, of a similar size, location, and import, had less capital, yet made a profit in 1990, 1991, and 1992.

Kraatz does not challenge the testimony of his own expert which also supports the court's ruling that Kraatz failed his duty to make a profit, when a profit should have been realized. Schmitz testified a Honda dealership has such potential to be lucrative that it is a "license to steal" and a better investment than a mutual fund. (R. 2339.) These facts are adequate support

for the trial court's ruling that Kraatz's failure to make a profit justified his termination.

The several facts in support of the trial court's findings as to training are set forth in the statement of facts and in Point I, herein. Facts that are not challenged that support the court's finding of Kraatz's breach as to this duty include the following: J. Wilkinson testified he was not trained in major areas of managing a dealership--parts, service, accounting, and human resources. Kraatz argues this is insufficient because, even though he did not train in these areas in the first twenty-seven months, he might have under the remaining months of the Agreement. Kraatz's scenario is highly unlikely given the unchallenged findings that he created severe resistance by the children to him as manager, including demoting J. Wilkinson twice and threatening to fire him, even though J. Wilkinson was part owner and an officer and director of Heritage. (R. 2469.)

That Kraatz breached his duties under the Agreement of returning the company to profitability and training the children is supported by adequate evidence. The trial court's ruling should thus be affirmed.

B. The Trial Court's Finding that the Employee Handbook Was Not a Part of the Agreement is Not Clearly Erroneous.

Kraatz mistakenly characterizes as a legal question the issue of whether the Handbook was part of the Agreement. Even the cases he cites in support of his argument, however, demonstrate he is in error: whether a provision of a manual was

intended to be a contract provision is a question of fact. See, e.g., Brehany v. Nordstrom, 812 P.2d 49, 56 (Utah 1991) ("If the terms of the manual do purport to limit [the employer's] power to discharge, the question of whether they become implied terms of the contract of employment is primarily a factual issue"); Caldwell v. Ford, Bacon & Davis, Utah, Inc., 777 P.2d 483, 485 (Utah 1989) ("The first question is whether the statements in the policy manual are sufficient to raise a factual question as to whether the presumption of at will employment has been rebutted.").

Facts that support the trial court's ruling are as follows:

1. Kraatz admits he never saw an Employee Handbook before signing the Agreement, and that the Agreement does not refer to any Handbook (R. 1843-44);

2. Kraatz admits he has no acknowledgement of ever receiving one, and admits he was the person who made the decision and issued the order for all employees to turn in their Handbooks (R. 1844-47); and

3. The Handbook states:

The contents of this Handbook are presented as a matter of information only. [T]hey are not conditions of employment....In particular, nothing in this handbook limits the Dealership's right to terminate the employment of any person at any time, with or without cause.

(Exhibit 135.)

These facts are adequate support for the trial court's finding that the Agreement was integrated and thus did not include the Handbook. Moreover, the language of the Handbook specifical-

ly states that it is not a contract. As stated in Berube, on which Kraatz relies, "An implied-in-fact promise cannot, of course, contradict a written contract term." 771 P.2d at 1044.

The employment cases cited by Kraatz are not really on point, as in almost every case the appeal was from a summary judgment or a determination as a matter of law. See Brehany v. Nordstrom, Inc. 812 P.2d 49 (Utah 1991); Caldwell v. Ford Bacon & Davis, Utah, Inc., 777 P.2d 483 (Utah 1989); Berube v. Fashion Center, Ltd., 771 P.2d 1033 (Utah 1989). Here, the issue is not whether there are reasonable facts from which an implied contract could be found; here, after a four-day bench trial, the trial court found that the Handbook was not part of the Agreement. The trial court's ruling that the Handbook was not part of the Agreement should thus be affirmed.¹⁶

C. The Trial Court's Interpretation of the Agreement is Not Clearly Erroneous.

Kraatz also claims the trial court erred in ruling Kraatz was terminated for cause by incorrectly interpreting the words "herein," "refusal" and "include" in section 2.1 of the Agreement. Section 2.1 states in relevant part:

¹⁶ Furthermore, inclusion of the Handbook would not give Kraatz the right to progressive discipline, for it specifically gives Heritage the right to "carry out any disciplinary action, depending upon its judgment of the circumstances involved." Section 310. This, of course, includes termination. In addition, the Handbook fails to support Kraatz's overall claim that he was not terminated for cause. Under the Handbook, the dealership "may carry out any disciplinary action depending upon its judgment of the circumstances involved." (FF Nos. F.8.b and 9.b at R. 1697.)

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) (See Exhibit 38 (Addendum A); R. 1706, CL No. B.7); Kraatz Brief pp. 16-24. As discussed above, Kraatz's initial error was to set forth the wrong standard of review. The interpretation of the parties' intentions under the Agreement required resorting to extrinsic evidence. The evidence relied on by the court is consistent with its interpretation of "refusal."

Kraatz spends a large portion of his brief arguing that all he needed to do under the Agreement was to use his "best professional skill." This, according to Kraatz, was nothing more than "trying." According to Kraatz, he had to be specifically asked to perform a duty, and Kraatz in turn had to specifically and verbally tell Heritage he would not do the duty before he could be terminated.

This argument is not borne out by the facts. And even if Kraatz can find facts to support his argument, it is immaterial, for there is adequate evidence to support the trial court's findings and conclusions that Kraatz's version was not the intent of the parties.

The court specifically and unequivocally rejected Kraatz's interpretation of the Agreement:

Plaintiff's assertion he had a "no-cut" contract is not supported by the evidence. The Agreement lists reasons his employment can be terminated. Even if that was Plaintiff's initial intent, a comparison of the Draft Agreement (Exhibit 589) which the Agreement demonstrates that subparagraph 2.1(c) expands the reasons for termination under the Agreement. Other than Plaintiff's testimony, there is no extrinsic evidence of a "no-cut" contract. On the contrary, this assertion was specifically denied by B. Wilkinson, and by Pat Nichols, an employee present at the meeting where Plaintiff maintains the representation was made.

(R. 1710, CL B.10; R. 1687, FF Nos. B.11, 12.)¹⁷

Moreover, there is adequate support for the trial court's interpretation of "refusal" and "herein" to affirm the trial court's ruling.

Kraatz does not dispute the whole purpose of the Agreement was to return Heritage to profitability, to train B. Wilkinson's children to take over the dealership, to manage the dealership to allow B. Wilkinson to semi-retire. He does not dispute that under the Agreement he was required to manage cash flow, train the owner's children, produce income for Heritage, maintain its assets, conduct advertising, make financial forecasting decisions, and develop and maintain the dealership. (R. 1851-52.) Kraatz's own testimony and the unambiguous language of the Agreement that he "shall perform" these duties make it clear that

¹⁷ The court also found extrinsic evidence necessary to interpret the parties' intent as to the Agreement. See also R. 1705, CL No. 5 ("The Agreement remains ambiguous as to the skills and experience Plaintiff was to provide as general manager to the Dealership to develop and maintain the Dealership"); (R. 1705, CL No. 6, citing R. 1688-90, FF Nos. D.1-13).

these were requirements of Kraatz under the Agreement, and were not simply options he could exercise if his fancy struck him.¹⁸ In other words, Kraatz argues he could stand by and fiddle while Heritage went bankrupt.

Kraatz admits he has duties under the parties' Agreement. Section 1.2. of the Agreement places an affirmative duty on Kraatz ("shall contribute his best professional skill" and "shall maintain and develop" the dealership, and "shall perform" services for Heritage). The Agreement, through the use of "shall," unambiguously requires Kraatz to perform these services he agreed to do. Thus, the only rational interpretation of "refusal" which gives meaning to the Agreement and is consistent with the trial court's findings must encompass Kraatz's failure to act when action was required. (R. 1708-09, CL Nos. 8.B.3(a) and (b).)¹⁹

Given this, Kraatz's argument that he could not be terminated unless he manifested a "positive and unequivocal" intent not to comply makes no sense; Kraatz's best professional skill must be, at a minimum, affirmatively performing what he represented he would bring to the dealership. This included training

¹⁸ Thus, his testimony does not support his argument that he could not be fired unless he manifested

(1) "a positive and unequivocal intent not to render his promised performance," Kraatz Brief at 22, 23; or (2) "a wilful or intentional dereliction of duty...", Kraatz Brief at 24; or (3) a mental determination not to comply, Kraatz Brief at 22; or (4) a culpable omission, Kraatz Brief at 23; or (5) a "wilful failure."

¹⁹ Refusal is not only rejecting a request to do a specific act, but is also the failure to act when action is required. Reliford v. Eastern Oil Corp., 260 F.2d 447, 452 (6th Cir. 1958). (See also R. 1708, CL No. 8.A.3(a), n.2.)

J. Wilkinson, maintaining and developing Heritage, and managing cash flow. The trial court found he failed to substantially perform the duties the parties intended he perform. This interpretation is consistent with well-settled rules of contract construction and with the uncontroverted evidence.²⁰

Nor is the trial court's interpretation of "herein" incorrect. Kraatz urges the court to construe "herein" as referring to section 2.1 only. But this interpretation is inconsistent with the plain language of section 2.1 which refers to "refusal or inability to perform his duties set forth in **Article I of this Agreement**" (emphasis added). Kraatz's attempt to define "herein" is thus self-defeating: Section 2.1 incorporates Article D, and it is thus impossible to read it without referring to the document as a whole.²¹ In addition, the extrinsic evidence, including Kraatz's own testimony, controverts his interpretation. He admits that the management and the "skills" he was required to provide under Article I of the Agreement to "maintain and develop" Heritage included the duty to produce income, to manage advertising, to protect the assets of Heritage and to manage cash

²⁰ Kraatz's refusal to accept this interpretation requires him to ignore uncontroverted facts in support of the trial court's specific ruling. The court specifically found Kraatz's claim of a no-cut contract was controverted by the testimony of Pat Nichols, an employee present at the meeting where Kraatz maintains the representation was made. (R. 1710, CL No. B.10.)

²¹ "It is a basic rule of contract interpretation that the intent of the parties is to be determined from the writing itself, with each provision being considered in relation to all others." Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 889 P.2d 766, 770 (Utah 1995).

flow. (R. 1851-52.) Obviously his failure to do what he was required to do in Article I of the Agreement has to be included within the meaning of "herein."

Kraatz also alleges the court erred in its interpretation of "include." At trial, Kraatz urged the court to interpret "include" as limiting the reasons he could be terminated to those set forth in 2.1 A-D, whereas Heritage urged the more expansive interpretation of "include, but not limited to," in which A-D were examples of termination for cause. As the court specifically ruled Kraatz's termination was "for cause contemplated by clauses B and C of paragraph 2.1 of Exhibit 38," an interpretation of the word "include" is not relevant. Again, however, given that paragraph 2.1 specifically refers to Article I, and given the uncontroverted evidence by Kraatz and others that his duties as general manager included duties not specifically set forth in the Agreement, there is adequate evidence to support the trial court's finding that "include" was to be used expansively, and was not meant to be read as "is limited to" as Kraatz reargues.

Thus the court's interpretation is not clearly erroneous, and its ruling dismissing Kraatz's claim should be affirmed.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION BY ERRONEOUSLY IGNORING THE PLAIN MANDATE OF RULE 15(a) OF THE UTAH RULES OF CIVIL PROCEDURE

On March 22, 1993, Heritage, while represented by previous counsel, filed an Answer to Plaintiff's Complaint. In their Answer, Heritage asserted their entitlement to recover reasonable attorney's fees pursuant to Utah Code Ann. § 78-27-56. On April 9, 1996, nearly two months before the scheduled discovery cutoff, Heritage sought to amend their Answer to assert a counterclaim to recover attorney's fees pursuant to the express provisions of the Employment Agreement between Defendant Heritage Honda and Plaintiff William Anthony Kraatz. On May 6, 1996, Heritage filed an Amended Motion for Leave to Amend their Answer and Assert a Counterclaim for attorney's fees. A trial date had not been set at the time of Heritage's Motion for Leave to Amend their Answer, nor prior to Heritage's amended motion. Clearly no further discovery was necessary, other than the production of the billing statements by Winder and Haslam, counsel for Heritage, to counsel for Kraatz.²² However, in order to ensure Kraatz would not be prejudiced, Heritage made an offer to Kraatz to fully cooperate in discovery and to make available any witness Kraatz felt was needed.

In spite of this offer, Kraatz did not respond, and did not seek any further discovery. Over two months later, on July 30,

²² Indeed, as Kraatz had already taken 27 volumes of depositions, it is difficult to imagine what further discovery he could envision as even being possible.

1996, the trial court denied Heritage's Motion for Leave to Amend Answer in a minute entry. See Addendum "F."²³ The trial court's ruling was based on its erroneous perception that the amendment would create a need for additional discovery and result in delaying the trial when, in fact, the trial date had already been continued. Finally, on August 29, 1996, two days after the trial began, the court entered its formal Order Denying Defendants' Motion for Leave to Amend Answer and to Assert Counterclaim and Amended Motion for Leave to Amend Answer and to Assert Counterclaim, because Judge Frederick was not persuaded he should change his earlier ruling. (R. 2386-87.)

Rule 15(a) of the Utah Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires." Kraatz's Complaint sought attorney's fees, and he was aware from the commencement of this lawsuit that the non-defaulting party would be entitled to recover attorney's fees. The Employment Agreement provides, at Paragraph 5.6:

In addition to any other rights contained herein, in the event either party defaults in the performance of any term or condition hereunder, the defaulting party shall pay all expenses and costs incurred by the other party in enforcing the terms hereof, including but not limited to, costs, reasonable attorney's fees, expert witness fees, and/or deposition costs whether incurred through legal action or otherwise and whether incurred before or after judgment. [Emphasis supplied.]

Kraatz simply would not have been prejudiced had the trial court allowed Heritage to amend its Answer to assert a counterclaim for

²³ Copies of all relevant pleadings relating to Heritage's Motion to Amend are attached as Addendum "F."

attorney's fees under the Agreement. Heritage's request created no burden for Kraatz: he knew Heritage had a right to attorney's fees, and he had already conducted discovery regarding the issue of his default under the Employment Agreement. As pointed out to the trial court, the only further discovery which would have been required was the review of billing statements. The trial court was informed of this at trial and was asked to reconsider. Without stating further reasons, the court denied the motion for reconsideration.

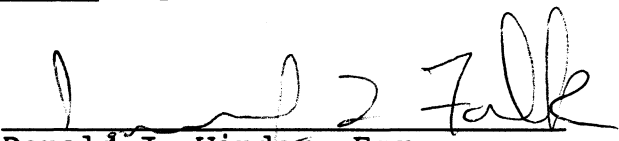
The trial court's denial was an abuse of discretion. Kraatz would not have been prejudiced. Its error is material for Heritage, because Heritage should be allowed its fees under the Agreement. Kraatz raised an objection, stating further unspecified discovery may be necessary. This objection was without merit. As pointed out to the trial court, the only further discovery which would have been reasonably required was the production of the billing statements of Winder and Haslam, counsel for Heritage, for Kraatz to review. In the spirit of accommodation, however, Heritage agreed to make available and cooperate fully with any further discovery Kraatz believed he needed. The trial court apparently misunderstood this offer, and took it as an admission by Heritage that further discovery was necessary. As was clear through the evidence presented in pleadings and at trial, however, no further discovery was necessary, and the court should have granted the motion to reconsider in order to conform with the evidence. (R. 2386-87.)

Provision 5.6 providing for attorney's fees is unambiguous. When an unambiguous contractual term provides for an award of attorney's fees, the fees "are to be 'awarded as a matter of legal right.'" Saunders v. Sharp, 793 P.2d at 931 (citations omitted). In this case, had Heritage been allowed to amend its Answer, it would have been entitled to an award of "costs, reasonable attorney's fees, expert witness fees, and deposition costs pursuant to the Agreement."

CONCLUSION

The trial court, at the conclusion of a four-day trial, made extensive and detailed findings of fact and conclusions of law. Kraatz has failed to marshal the evidence or to demonstrate any legal or factual error on the part of the trial court. Its ruling as to no cause of action and dismissal of Kraatz's Complaint should be affirmed. However, as to the issue of attorney's fees, the trial court's denial of Heritage's Motion to Amend its Complaint should be reversed by reason of an abuse of discretion. The matter should be remanded to the trial court for a determination of the amount of reasonable attorney's fees and costs to be awarded to Heritage pursuant to the parties' Agreement.

RESPECTFULLY SUBMITTED this 16th day of March, 1998.


Donald J. Winder, Esq.,
Jennifer L. Falk, Esq.
WINDER & HASLAM, P.C.
Attorneys for Defendants/
Appellees and Cross-
Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the Brief of Appellees/Cross-Appellants and Addendum to Brief of Appellees/Cross-Appellants to be mailed, postage prepaid, this 16th day of March, 1998, to:

Kent B. Linebaugh, Esq.
Michael N. Zundel, Esq.
Jennie B. Garner, Esq.
JARDINE LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, UT 84111

