

1997

William Anthony Kraatz v. Heritage Imports, Heritage Honda, O. Bryan Wilkinson, Jeffrey J. Wilkinson : Brief of Appellant

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 & 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 and Appellant,

vs.

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

Defendants and Appellees.

APPENDIX TO APPELLANT'S BRIEF

Volume 2 (Appendix C)

Case No. 970044-CA

Priority No. 15

Donald J. Winder, Esq.
Dennis V. Haslam, Esq.
Jennifer L. Falk, Esq.
Winder & Haslam
175 West 200 South
P.O. Box 2668
Salt Lake City, UT 84110
Telephone: (801) 322-2222

Kent B Linebaugh, Esq.
Michael N. Zundel, Esq.
Jennie B. Garner, Esq.
Jardine Linebaugh & Dunn
370 East South Temple, Suite 400
Salt Lake City, UT 84111
Telephone: (801) 532-7700

970044-CA

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COURT OF APPEALS

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Jardine Linebaugh & Dunn
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Salt Lake City, UT 84111
Telephone: (801) 532-7700

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KRAATZ DIRECT EXAMINATION
R.1746-48

1 corporate officer, that is true.

2 THE COURT: That's sufficient. Ms. Green, please
3 wait in the hallway.

4 Go ahead, Mr. Zundel, let's get on with it.

5 MR. ZUNDEL: Thank you, Judge.

6 DIRECT EXAMINATION

7 BY MR. ZUNDEL:

8 Q Mr. Kraatz, please state your name and address
9 for the record.

10 A William Anthony Kraatz, 6374 Hughes Canyon Drive.

11 Q Mr. Kraatz, where are you presently employed?

12 A I am presently employed with Warner Imports dba
13 Rick Warner Nissan.

14 Q What's your position?

15 A I'm a general manager.

16 Q And that's over the Nissan store here in downtown
17 Salt Lake?

18 A Yes, it is.

19 Q And this -- just prior to the time that you
20 accepted employment with Heritage, one of the defendants in
21 this case, where you were employed?

22 A I was employed by Anthony Wade, Inc., a dealership
23 in St. George, Utah.

24 Q And what was your position there?

25 A I was corporate officer and manager of the store.

1 Q Was that store successful under your management?
2 A Yes, it was.
3 Q Can you tell me, sir, what's your wife's name?
4 A Wendy.
5 Q Is she here?
6 A She is.
7 MR. ZUNDEL: And your Honor, Wendy Kraatz will
8 likely testify and she would be covered by the exclusionary
9 rule.
10 THE COURT: Who is Wendy Kraatz?
11 Ma'am, I'll ask you to wait out in the hallway,
12 too.
13 Now, are there any other persons in the courtroom
14 who expect to be called as witnesses who are not parties?
15 MR. ZUNDEL: Not that I see, Judge.
16 THE COURT: Well, one by one we're getting there.
17 Go ahead, counsel.
18 Q (By Mr. Zundel:) And your son Carson --
19 A Yeah?
20 Q -- he's here but not expected to testify.
21 A That's correct.
22 Q And you graduated from West High School?
23 A No, I graduated from Highland High School.
24 Q Okay, and you're 47 years old?
25 A I am 48 years old.

1 Q Had a birthday since I last talked to you?

2 A Yeah.

3 Q Can you tell the Court how long you've been in

4 the car business?

5 A I've been in the car business for about 25 or six

6 years.

7 Q Can you describe for the Court what experience

8 you've had in the car business?

9 A I was a salesman for approximately three years

10 for Wagstaff Toyota. I was a general manager for what was

11 Clark dealership in -- on 27th South and Main in Salt

12 Lake City for a while and became the general manager of

13 that store. As it moved to North Salt Lake, I was then the

14 general manager and dealer-owner of a dealership in St.

15 George, started out as B & K Financial Resources, Inc., which

16 was the corporate name for St. George Mazda Jeep. It late

17 became Anthony Wade. I was a general manager pretty much

18 all the time I was there in St. George.

19 Q Now, you were with Anthony Wade at the time you

20 say you decided to take this position with Heritage?

21 A Yes.

22 Q How long have you known Bryan Wilkinson?

23 A I think I met Bryan about 1982.

24 Q And what -- in what context did you meet Mr.

25 Wilkinson?

KRAATZ DIRECT EXAMINATION
R.1762-63

1 A Yes.

2 Q And who else was present?

3 A Mr. Wilkinson's attorney, Bill Prater.

4 THE COURT: Who?

5 THE WITNESS: Bill Prater.

6 MR. ZUNDEL: Prater, your Honor.

7 Q (By Mr. Zundel:) Will you describe for the Court
8 who said what about this issue?

9 A Well, the concerns that I had was that I was
10 going to leave something that I had worked to build for 13
11 years in St. George and I didn't want to come up to Salt
12 Lake and have --

13 MR. WINDER: I'm going to object, Judge, as being
14 nonresponsive. The question was who said what to whom.

15 THE COURT: Correct. The objection is sustained.

16 You have to answer the question, sir, Mr. Kraatz,
17 so listen carefully to the question.

18 Q (By Mr. Zundel:) Do you remember what you said
19 to Mr. Wilkinson and those present?

20 A Yes, I was concerned that I would have a --

21 Q What you said to them.

22 A Yes. I told them that I was concerned, that I
23 have a contract that basically couldn't be ended. A lot of
24 the things that were going on in Salt Lake I was not as
25 familiar with as they were. I had been working in St. George

1 for 13 years and trying to build a business down there and I
2 wanted to make sure that the reasons that he could let me
3 go or cancel the contract were very specific.

4 Q So you came up with this list?

5 A Yes.

6 Q Were there any other reasons discussed for which
7 Mr. Wilkinson said he could let you go other than those
8 set forth in this contract?

9 A These were the only ones.

10 Q Now, let me direct your attention to Exhibit B
11 of the contract. Do you have that? That's Bates number
12 54279.

13 THE COURT: It's called a schedule, counsel,
14 schedule B.

15 MR. ZUNDEL: That's right.

16 THE WITNESS: Could you tell me what page
17 that's on?

18 Q (By Mr. Zundel:) 54279 is the number.

19 Can you tell me what your understanding is of
20 what your stock appreciation rights were as defined here in
21 Exhibit Schedule B?

22 THE COURT: Is your anticipation that he will
23 testify to something other than what is contained in
24 Schedule B?

25 MR. ZUNDEL: No.

KRAATZ DIRECT EXAMINATION
R.1769

1 A That's correct.

2 Q Would you describe the home?

3 A It was a rambler style home in Bloomington. It
4 was on half an acre of land. It was about 5,000 square feet.
5 It was about -- I had built the home in 1979.

6 THE COURT: Is this helpful to me, counsel?

7 MR. ZUNDEL: Only -- only to understand why it
8 was taking so long to sell it and the parties' intent.

9 THE COURT: Well, I'm not sure it matters to me
10 why it took so long to sell it. What matters to me is the
11 agreement to pay and the continuation of the payment.

12 MR. ZUNDEL: Okay.

13 THE COURT: All right.

14 Q (By Mr. Zundel:) Now, let me show you what's
15 been marked as Exhibit 135. Do you recognize that document?

16 A This is the Heritage Honda employee policy manual.

17 Q Was a copy of this document given to you at the
18 time you became an employee at Heritage?

19 A Yes, it was.

20 THE COURT: Any objection to 135?

21 MR. WINDER: No.

22 THE COURT: It's received.

23 Q (By Mr. Zundel:) Did you read the document?

24 A I read through it, yes.

25 Q And were the policies in this manual in place,

KRAATZ DIRECT EXAMINATION
R.1770-72

1 to the best of your understanding?

2 A That was my understanding.

3 MR. WINDER: I'm going to object, Judge, to his
4 understanding without some foundation. Ask that the answer
5 be stricken.

6 THE COURT: Well, the exhibit's been received.
7 He's testified that he read it and I don't know what more
8 there is beyond that.

9 Q (By Mr. Zundel:) Let's talk for a minute. Can
10 you explain when you came to work for Heritage what your
11 normal work week was?

12 A I would typically get to the dealership between
13 7:30 and eight. I would walk through the service department,
14 parts department, generally see those employees that were
15 there earlier.

16 Q How long did you work in it during the week?

17 A How many days or --

18 Q How many days and hours.

19 A I would say 50 to 60 hours a week, sometimes more.
20 I would work typically five days, but sometimes I'd work
21 part of a Saturday or part of a Sunday at home or sometimes
22 I'd work at home after hours.

23 Q How often did you take work home?

24 A I'd say fairly often.

25 Q Can you just --

1 A Two or three days a week.

2 Q Two or three days a week? And did you carry a
3 cell phone with you?

4 A I did.

5 Q And were you able to be reached if needed when --
6 in your off hours?

7 A Yes.

8 Q Did you have employment anywhere else other than
9 Heritage?

10 A I did not.

11 Q Did you give your best professional skill to
12 Heritage?

13 A I did.

14 Q There came a time when you were terminated at
15 Heritage?

16 A Yes.

17 Q And that was on September 11, 1992?

18 A Yes.

19 Q And do you remember how you received notice of
20 your termination?

21 A Mr. Wilkinson asked me to come up and see him
22 that afternoon. I went up there, I think it was about four
23 o'clock, 4:30, something like that, and I went into his
24 office. Mr. Wilkinson and Helen Green were sitting at his
25 conference table. I sat down. It was a very short meeting.

1 Bry told me that he wanted to ask for my resignation, that
2 he could not continue to be between -- that he could not
3 continue to have me between he and his kids and that he was
4 giving me 60 days notice and he would continue to pay me
5 for 60 days and that was pretty much the meeting.

6 Q Did he level any criticism at you in the meeting
7 as to failure to do your duties at Heritage?

8 A No, other than just saying that he didn't want me
9 to be between he and his kids.

10 Q Did Helen Green say anything during the meeting?

11 A Not that I recall.

12 Q How did you respond?

13 A Mr. Wilkinson asked me several times for my
14 resignation. I declined to give that to him, told him if he
15 wanted me out of there, I would leave, but I wasn't going
16 to resign. We had an agreement, we had a contract.

17 Q And then you left the meeting?

18 A I did.

19 Q Did you then receive -- what was the next -- did
20 you thereafter receive written notification of termination?

21 A Yes, I did.

22 Q Let me show you what's been marked as Exhibit 64.
23 Is that a copy of the letter that you received?

24 A Yes, it is.

25 THE COURT: Any objection?

KRAATZ DIRECT EXAMINATION
R.1775-76

1 MR. ZUNDEL: Thank you, Judge.

2 THE WITNESS: Could you repeat the question,
3 please?

4 THE COURT: How did you feel when you got this
5 letter?

6 THE WITNESS: I was very upset, disturbed. I
7 didn't think it was true and I felt like I had done things
8 that were right by Bryan and by the dealership.

9 Q (by Mr. Zundel:) What did you -- did you do
10 anything in response to receiving this letter?

11 A I had talked to a number of people over the
12 weekend. It was a Friday when I was terminated and I had
13 talked to a number of people, was very concerned about his
14 saying that I had been dishonest.

15 Q Did you talk with Bry?

16 A Not over the weekend I didn't.

17 Q Did you call him after that?

18 A No, Bry and I in our September 11th meeting had
19 agreed to meet on the following Tuesday to -- because Bry
20 had promised me the use of two vehicles, the one that my
21 wife had been using and he was going to trade the one that
22 he was driving so that I could drive that one, and I was
23 going to come back on Tuesday to pick that up after he had
24 had a chance to clean it out and get his stuff out of there.

25 Q When you say you had agreed to meet, was it for

1 any other purpose other than just to trade vehicles?

2 A That was really the main purpose of the second
3 meeting.

4 Q And so did you go to Bry's office on Tuesday?

5 A Yes, I did.

6 Q And do you remember if anyone else was present
7 when you met with him?

8 A No, I don't recall that anybody was there.

9 Q Do you remember what you said, what he said?

10 A Yes, I -- my initial comments to Bry were, "I'm
11 really upset about this letter that I received from you.
12 You say that I'm dishonest and I didn't do my job, and I
13 just can't believe that you'd say that about me."
14 And he said, "That's not what I meant." He
15 referred to another section of the agreement.

16 Q What did he refer to?

17 A He referred to, I believe, page 2, items B and C,
18 and said that that's what he meant and that he would never
19 say that I was dishonest and he did not think I was dishonest.

20 Q Was anything more said in the -- between you in
21 this meeting?

22 A Yes, we talked about a number of things, the
23 continuation of my involvement with the Lariat or Ryan
24 Insurance that I was involved with him, and he he said that
25 he would continue that for at least a couple more years. He

KRAATZ DIRECT EXAMINATION
R.1780

1 Q Who was Helen Green?

2 A Helen Green was a controller that worked for Bry
3 and his father for many years.

4 Q And she was the general manager before you became
5 the general manager?

6 A That's right.

7 Q And you demoted her when you came?

8 A Well, I think Bry demoted her. I came in and
9 took over her position. When I started on a Sunday afternoon,
10 I went down there to the dealership to start moving my
11 things in, and Helen was there in the process of moving
12 her things out, so I helped her for a few minutes and we
13 talked a little bit.

14 Q Going back to this September 11 meeting -- prior
15 to the September 11 meeting, had Bry -- had you received any
16 written reprimands on your job performance?

17 A No, I had not.

18 Q Had you received any indication that your job was
19 in jeopardy?

20 A No.

21 Q For any reason?

22 A No.

23 Q September 11 was the first you knew?

24 A Complete surprise.

25 Q Let me show you what's been marked as Exhibit 69.

KRAATZ DIRECT EXAMINATION
R.1782-84

1 them about Southtowne. That was the proposed dealership in
2 Sandy -- or Southtowne, so that I would have his authoriza-
3 tion to try to move that forward, and the third is a letter
4 stating that he did not want me to work at the dealership
5 during the 60-day period, that I would not just not show up
6 for work, but he was telling me that I was not expected to
7 show up for work during that 60-day period.

8 Q Did he tell you why he didn't want you to come to
9 work during the 60-day notice period?

10 A Just for the same reasons that he said that he
11 terminated me.

12 Q Let's look at the employment agreement on page 2,
13 B and C. B says, "The duties and responsibilities of the
14 employee shall include but not be limited to responsibility
15 to provide management training to persons selected by the
16 company."

17 Were persons selected by the company for you to
18 train during your employment?

19 A Yes.

20 Q And who were they?

21 A I think principally Bry's children along with --
22 there were certainly other employees to be trained, but that
23 was the specific -- one of the specifics.

24 Q Who are Bry's children?

25 A Jeffrey Wilkinson, Matthew Wilkinson, Lynlee

1 Wilkinson, and his son-in-law, Jeffrey Gorringer.

2 Q Now, when you arrived at the dealership, what
3 position did Jeff Wilkinson hold?

4 A I believe he was the general sales manager at
5 that time.

6 Q Okay. Let's just take a minute and go over
7 what's been marked as Exhibit Number 324.

8 I'd move for the admission of Exhibit 324, Judge,
9 and have the witness explain what it is. You don't have one
10 there, your Honor. I'll hand you this one. It's this
11 large schematic.

12 THE COURT: As illustrative of the -- this is the
13 authority chart or --

14 MR. ZUNDEL: Yes, your Honor.

15 THE COURT: Any objection, Mr. Winder?

16 MR. WINDER: For illustrative purposes, no. I'd
17 like a little foundation, though, about when it was prepared
18 and by whom and that sort of thing.

19 Q (By Mr. Zundel:) Okay. Looking at Exhibit 324,
20 did you help prepare this document?

21 A I gave the information that was relative to this,
22 yes.

23 Q You drew it out and my office put it together?

24 A Yes.

25 Q What does Exhibit 324 show?

1 A Just a basic organizational chart of Heritage
2 Honda.
3 Q At the time you arrived?
4 A Yes. Well, that's not all the way true. I'm
5 sorry. It was during my tenure there but not at the time
6 I arrived.
7 Q All right. We'll have you explain that. At the
8 time you arrived, who was the dealer?
9 A Bry Wilkinson.
10 Q Who was the general manager?
11 A I was.
12 Q And was there a general sales manager at the time
13 you arrived?
14 A Jeff Wilkinson was.
15 Q And did he stay in the general sales manager slot?
16 A No, he did not.
17 Q Did you demote him?
18 A Yes.
19 Q To what?
20 A Sales manager.
21 Q To new car sales manager or what?
22 A Well, we really had -- Jeff Gorringer was coming
23 up from St. George to become manager of the store and I felt
24 like it would be best if he and Jeff worked side by side with
25 equal authority in the dealership. There was a used car

KRAATZ DIRECT EXAMINATION
R.1786-89

1 Q Okay, and what was Helen Green making at the time
2 you arrived?

3 A At the time I arrived she was making \$100,000 a
4 year plus some additional benefits.

5 Q That was the general manager's pay?

6 A Yes.

7 Q Did she keep -- did she keep that when she moved on
8 to controller?

9 A She kept the same pay plan that she had before for
10 a year after I arrived there.

11 Q Why was that?

12 A Bry had promised her that concession.

13 Q And did you know that before you accepted
14 employment?

15 A No, I think it was one of the things that we
16 talked about when we came on there.

17 Q After you got there?

18 A Yes.

19 Q What would the normal pay of a general manager-
20 controller be?

21 MR. WINDER: I'd object, lack of foundation.

22 THE COURT: Sustained.

23 Q (By Mr. Zundel:) Let me show you while we're
24 on this point what's been marked as Exhibit 239. Do you
25 recognize that document?

1 A It appears to be a copy of some payroll records
2 on Helen Green.

3 Q Okay. Each employee at Heritage has an employee
4 file.

5 A Yes, Helen and the office would keep a file on
6 everyone.

7 Q And this is Helen's file?

8 A I believe so.

9 MR. ZUNDEL: Move the admission of 239.

10 MR. WINDER: I'd object, your Honor. I don't see
11 the relevancy. We have her salary at 100,000.

12 THE COURT: What do you claim for it?

13 MR. ZUNDEL: This document would actually show,
14 your Honor, that Helen Green was making \$60,000 a year as a
15 controller and then on 6-1-90 when Mr. Kraatz came to work,
16 her salary went back -- her base salary went back down to
17 \$60,000 a year.

18 MR. WINDER: But so --

19 MR. ZUNDEL: I'll explain where the other 40,000
20 comes from.

21 THE COURT: Well, what are you seeking here, to
22 impeach your own witness?

23 MR. ZUNDEL: No, no, no, no. I think -- I mean,
24 Helen Green made \$100,000 a year, but her base salary, the
25 normal salary of controller at this store was 60,000.

1 THE COURT: Well, if that's what the witness's
2 understanding was, fine, he can testify to that, but this
3 seems to me to confuse the issue. Either she was making
4 \$100,000 a year or she wasn't.

5 MR. ZUNDEL: Well, my question was, what was the
6 normal pay for a controller.

7 THE COURT: I'm not interested in what the normal
8 pay is. I'm interested in what Helen Green's pay was in the
9 positions that she held, okay?

10 MR. ZUNDEL: Okay.

11 THE COURT: And when you talk about normal, I
12 suppose that may be interpreted as industry-wide. I'm
13 concerned about this organization, what was her pay at the
14 time that she was general manager, and what was her pay after
15 she was reduced in importance, I suppose you might say.

16 MR. ZUNDEL: Okay. Perhaps I would ask more
17 questions.

18 Q (By Mr. Zundel:) Mr. Kraatz, as the general
19 manager, under your contract you were promised complete
20 control of the dealership, were you not?

21 A I was.

22 Q And did you feel that Helen Green was overcompen-
23 sated at \$100,000 a year?

24 A Yes, I did.

25 Q And what was the compensation that you feel that

1 she should have had?

2 A Well, Helen was very experienced and after a
3 year, I changed her pay plan to \$5,000 a month and five per-
4 cent of the net profit of the dealership.

5 Q So you took her down to \$60,000 a year base?

6 A Plus a percentage of potential profits.

7 Q And why didn't you do that sooner?

8 A Because Bry told me --

9 MR. WINDER: Asked and answered.

10 THE COURT: Well, I'm not clear on why it was not
11 done sooner. I understand that there was a one-year period,
12 but I'm not sure.

13 Overruled. I'll allow him to answer that question.

14 THE WITNESS: Bry told me that he had promised her
15 that he would keep her at that level for a year.

16 Q (By Mr. Zundel:) So going back to the contract
17 then, we started off on B and C on page 2, we got off on a
18 little bit of a tangent.

19 Was Matt Wilkinson -- you explained to me where
20 Jeff Wilkinson was employed when you came, and did you
21 understand it was your duty to train him --

22 A I did.

23 Q -- to be a general manager?

24 A That's what I felt that Bry wanted, yes.

25 Q And what about Matt Wilkinson, where was he?

KRAATZ DIRECT EXAMINATION
R.1793-95

1 Q -- sales manager with Jeff Wilkinson.
2 A Yes.
3 Q And you did not have a general sales manager.
4 A No.
5 Q And where did you put Matt?
6 A Matt was initially a salesman at the dealership
7 and as we acquired a dealership, used car lot out in West
8 Valley, Matt became the finance manager in that location.
9 Q Okay, and you mentioned Lynlee. Was she employed
10 at Heritage?
11 A Yes, she was.
12 Q As what?
13 A She had several jobs while I was there. She was a
14 receptionist; she also worked after a time up in the office.
15 I think she worked in the customer relations department for a
16 while, as well.
17 Q Now, when you arrived, how old was Jeff Wilkinson;
18 do you know?
19 A I believe he was approximately 25 or 26 years old.
20 Q And how old is Matt Wilkinson?
21 A I think Matt was a year or two older than Jeff.
22 Q And Lynlee?
23 A Lynlee I believe was 15 -- or 20.
24 Q How old is Jeff Gorringer?
25 A I believe he was about 30 years old.

1 Q Now, did you ever receive any formal written
2 notice as to who the company was selecting for you to train
3 to enable said persons to become qualified dealers or
4 managers acceptable to American Honda?
5 A Not a specific list, no.
6 Q You had a general understanding that -- was there
7 a priority hierarchy among these children as to who was
8 most likely going to be the dealer?
9 A I believe that Jeff was the one that was probably
10 most logically going to be the dealer.
11 Q The second son?
12 A Yes.
13 Q Okay, and were you asked to focus on Jeff?
14 A No, I think that was just an understanding.
15 Q Okay. Did you attempt to train the children?
16 A I did.
17 Q During your employment was there ever any attempt
18 by Heritage to have Honda, American Honda, accept any of
19 the children as dealers?
20 A Not that I'm aware of.
21 Q So there's no attempt and a failure?
22 A No.
23 Q American Honda never rejected anybody?
24 A Not that I'm aware of.
25 Q All right. How about paragraph C, says, "Employee

1 shall contribute his best professional skill --" Let me back
2 up. With respect to B, was there ever a time when you
3 refused to train the children?

4 A No.

5 Q With respect to paragraph C, it says, "Employee
6 shall contribute his best professional skill to perform
7 services at all times for business and the benefit of the
8 company." Did you do that?

9 A I believe I did.

10 Q Did you ever refuse your best professional skill?

11 A No. I neglected my dealership in St. George for
12 the benefit of Heritage Honda in Murray.

13 Q It says, "Employee agrees to devote his full and
14 exclusive time to perform the services." Did you do that?

15 A Yes, I did.

16 Q With respect to Exhibit 69, this handwritten
17 note that you have here, this document, did you give this
18 document to Mr. Wilkinson before you left?

19 A Before I left on the 15th, yes.

20 Q You handed it to him?

21 A Yes.

22 Q Did he rewrite the termination letter?

23 A No, he didn't.

24 Q Did he send you a letter -- did he send a letter
25 to Honda approving you to talk to them about the Southtowne Mall?

R.1800

KRAATZ DIRECT EXAMINATION
R.1808-13

1 Q And when you were fired, Bry told you that he would
2 continue to have Heritage write policies under Ryan for
3 another two years?

4 MR. WINDER: Object, asked and answered.

5 Judge, as a way of a suggestion, all of these
6 pieces of paper -- and I just venture this because I think
7 it will save us some time -- this man's accountant, Wisan,
8 has put all of these pieces of paper together. They're in
9 his work files. He's produced his own spread sheet of the
10 damages from each of these contracts and I really don't
11 think that it's necessary at this point in time to go on and
12 on and on with this witness. As a matter of fact, I have
13 little or any objection on these two items, to the numbers
14 his accountant did, but I'd just submit, Judge, that we
15 ought to get to the accountant. If the witness needs to be
16 recalled, we could recall him.

17 MR. ZUNDEL: I appreciate that, Judge, and we'll
18 proceed accordingly if the Court will permit.

19 THE COURT: I'm more than happy to permit it.
20 It's my notion that that's why I referred earlier, Mr. Zundel,
21 to whether or not this was the best witness to use in terms
22 of damage claims. Certainly, he's identified categories
23 and that's fine, but he's not an accountant and he's not
24 here to tell me what projections are, et cetera, but the
25 underlying documentation, if it has been considered by an

1 expert, your financial expert, then by all means, let's
2 get him in here when the time comes and deal with it.

3 Now, insofar as the objection of record at this
4 point, I'm going to sustain the objection so we can move on.

5 MR. ZUNDEL: What was the objection?

6 MR. WINDER: Asked and answered.

7 MR. ZUNDEL: Oh, I see. Okay.

8 Q (By Mr. Zundel:) Let me -- let's talk for a
9 minute now about your relationship with J. J.

10 THE COURT: Who's J. J.?

11 MR. ZUNDEL: J. J. Wilkinson, Jeff Wilkinson.

12 THE COURT: I'm not familiar with their nicknames
13 here. If we're talking Jeff Wilkinson, a co-defendant in
14 the case, then that's fine.

15 MR. ZUNDEL: That's right.

16 Q (By Mr. Zundel:) Let me show you what's been
17 marked as Exhibit Number 1 and 2. Tell the Judge what
18 Exhibit 1 is.

19 A This is a work schedule that Jeff Wilkinson
20 prepared and presented to me around the 7th of September,
21 or a day or two before that.

22 Q And was it usual for Jeff Wilkinson as the new car
23 manager to present you as the general manager with a work
24 schedule?

25 A No, it wasn't.

1 Q Had he ever done so before?

2 A No, he had not.

3 Q And had you asked him to prepare this schedule?

4 A No, I didn't.

5 Q Do you remember when he presented to you this

6 schedule, where you were?

7 A I believe I was in my office.

8 Q And do you remember what was said between the two

9 of you?

10 A I just simply responded to him after looking at

11 the schedule that the schedule really didn't work for me

12 because it was difficult for me to take Saturdays off when

13 I had to deal with the banks during the week and the banks

14 were only open on a -- typical work days, Monday through

15 Friday, and so it would be hard for me to take a day off

16 during the week, and that's why I had been taking Saturdays

17 off as my typical day off for as long as I can remember.

18 Q Did you tell him that you would prepare a schedule?

19 A I told him that I would prepare a schedule, yes.

20 Q And what's Exhibit 2?

21 A That's the schedule that I prepared.

22 Q And did you give this schedule to Jeff Wilkinson?

23 A Yes, I did.

24 Q And did he refuse to work your schedule?

25 A Yes, he didn't like my schedule.

1 Q What did he do when you gave him the schedule?
2 A He just took the schedule and left my office.
3 Q And do you know if he spoke with anyone about it?
4 A I believe so, with his father about it.
5 Q And how soon after you were terminated did this
6 occurrence occur?
7 A Just a few days.
8 Q Now, can you describe for me, if you will, your
9 efforts to train J. J., Jeff Wilkinson, as a -- in the
10 dealership?
11 THE COURT: Now, counsel, while we're back on
12 this issue of nicknames, in looking at Exhibit 1, you're
13 telling me that J. J. stands for Jeff Wilkinson?
14 MR. ZUNDEL: Jeffrey J. Wilkinson.
15 THE COURT: Who's Jeff stand for here?
16 THE WITNESS: Jeff Gorringer, the son-in-law.
17 THE COURT: All right, that's fine.
18 Q (by Mr. Zundel:) Describe for me your efforts
19 with Jeff Wilkinson.
20 A Well, Jeff had had some experience in sales.
21 He had had some experience in working as a sales manager
22 on the sales desk. He had had no experience in the finance
23 department that I was aware of and one of the areas that I
24 thought he could use some additional training was in that
25 area. We often would look at sales managers and how they

1 would put a deal together or present a deal with the
2 finance managers and their ability to do that would generate
3 more or less profit for the dealership, and I just felt that
4 Jeff needed some help in that area and felt like working in
5 the finance department would be a good way for him to
6 realize that experience.

7 Q Did he resist your attempt to assign him to the
8 finance department?

9 A Yes, he wasn't very happy about it. I told him
10 that there was a period of time that I'd like him to work
11 in there and he basically went in there and began working
12 that area for a period of time and --

13 Q How long?

14 A I think I told him three to six months is what I
15 would expect to have him working in there.

16 Q Now, the finance department is down here, finance
17 and insurance, below the managers.

18 A Yes, it is.

19 Q So it's another demotion?

20 A Well, it was only a temporary situation that I
21 was trying to do. I was trying to put him in a position
22 where he could get additional experience in the dealership.

23 Q And did he eventually demand to be released from
24 the F and I department?

25 A Well, he had mentioned it to his father that he

1 wanted to get out of that. Bry and I talked about that on a
2 number of our meetings that we'd had that Jeff wasn't happy
3 there, didn't like the finance department.

4 Q Did you let him out of the finance department?

5 A We did, uh-huh (affirmative).

6 Q Put him into manager again?

7 A Back as a sales manager, yes.

8 Q Did you have any disciplinary problems with Jeff?

9 A He just -- I don't think Jeff liked me. Jeff
10 was resentful of my being there.

11 MR. WINDER: Judge, I'm going to object. The
12 question was did he have any disciplinary problems, not what
13 did he feel.

14 THE COURT: Objection is sustained.

15 Q (By Mr. Zundel:) Generally did you have any
16 problems with Jeff?

17 A Well, there was one time when Jeff was caught
18 playing video games on the sales desk in the normal day's
19 work and other business needed to be conducted and wasn't
20 doing that in a timely way, according to our general sales
21 manager at that time. That was one instance that I can
22 remember anyway.

23 Q You remember meeting Jeff at Heritage?

24 A Yes, I do.

25 Q And how did he react to you when you first met him?

KRAATZ DIRECT EXAMINATION
R.1819-24

1 or excuse me. You as the general manager, Chuck Quinn as
2 the general sales manager, and then J. J., Jeff, as the
3 sales manager, not the general.

4 A One of the sales managers, yes.

5 Q Okay. Now, before Chuck Quinn was terminated,
6 who prepared the schedules?

7 A Chuck Quinn did, I assume.

8 Q Now, that's the general sales manager's job is to
9 make sure the schedules are done; isn't that right?

10 A Well, either to do them himself or direct someone
11 to do them for him, that he would approve.

12 Q When Chuck Quinn was terminated, J. J. took over
13 this job of preparing schedules; is that right?

14 A Yes, he did.

15 Q This one time?

16 A Yes, he did.

17 Q And had you promoted J. J. to general sales
18 manager?

19 A No, I had not.

20 Q Before Chuck Quinn was hired to be general sales
21 manager, when you didn't have a general sales manager, it
22 was just you and the sales manager, who prepared the schedules?

23 A Well, the sales managers prepared the schedule
24 for their department. I would look at it, make sure that we
25 had adequate coverage, but they would prepare it.

1 Q And then you would approve it?

2 A Yes.

3 Q Okay. Did you and Bry have any discussions
4 regarding your attempts to train J. J., that you recall?

5 A Well, one of them was -- we had a few, I guess,
6 over a period of time. One of them was in regards to our
7 decision to hire Chuck Quinn. We had talked about hiring
8 Chuck, felt that Chuck would be a good influence to teach the
9 kids how to get more involved in a sales operation. Chuck
10 had been a fairly proven performer as far as the volume of
11 business that he had done before.

12 Q What was said about J. J.?

13 A In what regard?

14 Q Let me back you. Did you talk about J. J.
15 specifically with Bry before you accepted employment at
16 Heritage?

17 A Yes.

18 Q And what did Bry tell you about J. J. and what
19 you could expect when you accepted this job?

20 A He just told me that Jeff would be tough, but he
21 thought I could do it, teach him and train him.

22 Q Did you have any other conversations with Bry
23 about Jeff being tough after you took the employment?

24 A I think the ones that we mentioned with regard to
25 the computer situation, his dad was upset about that. He

1 imposed a fine on sales managers for playing with computers
2 on nonrelated business stuff.

3 Q Let me ask you, did you have any discipline
4 problems with J. J. respecting other employees' compensation
5 packages?

6 A Yes, I mean --

7 Q And are you referring about something specific?

8 A Well, there was a time when I was up on the sales
9 desk that I had left some documents up there that related
10 to pay, and Jeff went through those. I think that's when
11 his concerns came up about Chuck Quinn's pay and was worried
12 that Chuck Quinn was making more than he and Jeff were.

13 Q Did you call Jeff in and discipline him for
14 looking at the other employee's pay plan?

15 A Yes.

16 Q And did you tell J. J. at that time that you --
17 just tell me what you told J. J. at that time.

18 A I just said that I thought it was improper for
19 him to be looking through my stuff, that other people's pay
20 plans were not an issue, that was something that I had to
21 decide, and that Bry and I would talk about those things and
22 I didn't think it was his place to sift through the documents
23 that I had left there on the desk.

24 Q How did he respond?

25 A He was fairly defensive about it. He was upset

1 because I think at that time he found out that Chuck was
2 making more than he was.

3 Q Did you threaten his job at Heritage?

4 A Not that I recall, no.

5 Q Did you tell him that his dad didn't want him with
6 the dealership?

7 A No, not that I recall.

8 Q Did J. J. complain to his father about this
9 discipline, as far as you know?

10 A I can't remember if he did at that time or not.

11 Q Okay. Let's talk about Bry Wilkinson for a minute.
12 You have a claim against Bry Wilkinson in this case?

13 A Yes.

14 Q During your conversations with Bry Wilkinson
15 about coming to Heritage, did you speak with him about his
16 compensation?

17 A We did.

18 Q And what was your -- where was this conversation
19 had?

20 A It was there in Hidden Valley Country Club.

21 Q Just you and he?

22 A Just Bry and myself, yes.

23 Q And what did he say to you about what his compen-
24 sation would be after you became employed?

25 A He just said he was willing to reduce his compen-

1 sation to 15,000 a month from the 20,000 a month that he had
2 been making.

3 Q So \$180,000 a year?

4 A Yes.

5 Q And did his paycheck actually reduce to \$15,000 a
6 month while you were there?

7 A Yes, it did.

8 Q Did his compensation reduce to \$180,000 a year?

9 A No, it didn't.

10 Q So explain that to the Court then. His paycheck
11 was 15,000 a month, but his compensation was more. Why
12 do you say that?

13 A Well, he had a number of other items that he was
14 receiving benefit for. He had an accounts receivable with
15 the company that he used to purchase various items.

16 MR. WINDER: I'm going to object, Judge, for lack
17 of foundation, how this witness knows about accounts
18 receivable.

19 THE COURT: That's appropriate. Sustained.

20 Q (By Mr. Zundel:) We'll go through them. Let's
21 talk about them one at a time.

22 What's Banner Life?

23 A Banner Life was an insurance company that Bry
24 had purchased a policy for his benefit through the dealership.

25 Q What was the monthly cost to the dealership of

1 the Banner Life insurance policy?

2 MR. WINDER: Objection, no foundation.

3 THE COURT: Sustained.

4 Q (By Mr. Zundel:) Do you know what the monthly
5 cost to the dealership was?

6 A Yes.

7 Q How do you know?

8 A I saw that expense on the dealership records that
9 Helen Green prepared.

10 Q How much was it?

11 A It was approximately \$4,000 a month.

12 Q And do you know how many policies there were?

13 A I'm not sure.

14 Q Do you know if Bry Wilkinson's family was the
15 beneficiary on the majority of them and not Heritage?

16 A I'm not sure who the beneficiary was, no.

17 Q Okay. Let's talk about the St. George store for
18 a minute. When it was sold by Bry, there was some debt
19 remaining to Comerica Bank; is that right?

20 A Yes.

21 Q And how much was that debt approximately?

22 A Approximately \$200,000.

23 Q And did Heritage assume that debt of \$200,000 for
24 Bry Wilkinson?

25 A Yes.

KRAATZ DIRECT EXAMINATION
R.1834

1 A Well, I think it was -- as I recall, it was
2 either the last week in July or the first week of August
3 when we decided on that pay plan. There was some discussion
4 over it. I felt it was a little bit on the high side. It
5 was a little strong for the store.

6 Q Too much?

7 A I thought it was too much money.

8 Q Did you tell Bry that?

9 A I did, uh-huh (affirmative).

10 Q Are you seeking any damages in this case as a
11 result of that raise, continuing that raise?

12 A No, I'm not.

13 Q Did there ever come a time when Bry said to you
14 that he might give you his power of attorney?

15 A Yes. Just a couple of weeks before I was fired,
16 he was, I think, pretty frustrated. He had been in negotia-
17 tions with Mr. Larry Miller regarding the sale of the
18 dealership. I know he was frustrated with Heritage Honda and
19 to some extent with his kids and felt like I was -- he wanted
20 to just get away and just -- and not be involved in it.

21 Q What did he say to you?

22 A He just said that you're the only guy I can
23 trust, I don't feel like I should give it to my kids or to
24 Helen and you're the guy I think I can trust to take care
25 of the situation.

KRAATZ DIRECT EXAMINATION
R.1837-38

1 THE COURT: He's answered the question.

2 Q (By Mr. Zundel:) Okay. You had a country club
3 membership promised to you, right?

4 A Yes.

5 Q Did you ever get a country club membership?

6 A No.

7 Q Why not?

8 A Just felt like it was not necessary at the time.
9 I had the dealership, didn't need the additional expense
10 and I just didn't push it.

11 Q Okay, but going back to this Sports Mall for just
12 a second, were subsequent bills also paid by the dealership?

13 A Yes, they were.

14 Q Let's talk about health care costs. You were
15 entitled to \$5,000 a year in uninsured or unreimbursed from
16 insurance health care costs, right?

17 A Yes.

18 Q During your employment at Heritage, did you ever
19 recover \$5,000 per year?

20 A No, I didn't.

21 Q Or take any payments on it at all?

22 A No, I didn't.

23 Q Why not?

24 A I presented some bills to Bry for payment, and he
25 said that he didn't feel the dealership could afford them

1 at that time.

2 Q So you agreed to postpone it?

3 A I did.

4 Q Did you agree to just waive it, not ask for it?

5 A No.

6 Q And you're asking for those now?

7 A Yes.

8 MR. ZUNDEL: No further questions, Judge.

9 THE COURT: Very well. You may cross-examine.

10 MR. WINDER: Thank you, Judge.

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KRAATZ CROSS EXAMINATION
R.1854-55

1 Q Did you tell the kids that a Honda dealership
2 can survive anything?

3 A I don't remember saying that.

4 Q Did you say that to Bry Wilkinson?

5 A I don't remember saying that to Bry.

6 Q Did you tell Bry that the gross margin he had on
7 automobiles was low?

8 A I could have.

9 Q And told him that as GM you could raise that gross
10 margin?

11 A Well, my experience in St. George was greater than
12 what he had told me that theirs was, and so I felt that that
13 was a reasonable possibility.

14 Q Didn't you tell Bry before signing the employment
15 agreement that you were dissatisfied at Stephen Wade?

16 A I think I did. I think I told him I was
17 frustrated.

18 Q And Bry told you that he wanted to step back from
19 day-to-day involvement as a dealer at Heritage?

20 A I think he said that, yes.

21 Q Now, when you went into this dealership, Bry told
22 his accountant Clark Christian that you could have any
23 financial statements, any financial records you wanted,
24 right?

25 A He may have done. I mean, I don't know if he

1 told -- what he told Clark.

2 Q You don't remember him telling that to Clark
3 at the American Grill with you present?

4 A I don't remember that, no.

5 Q You weren't denied access to any financial
6 information, were you?

7 A Not after I started there, no.

8 Q I'm talking about before.

9 A Well, Bry only had limited financial statements
10 available to him when we went up to the dealership. He and
11 I went through and he was only able to find some of the
12 financial statements and he gave me what he could find.

13 Q He gave you 1989 financial statements, Exhibit 295,
14 right?

15 A I think '89 was one of the years he gave me.

16 Q Right, and he gave you some partial months in '90?

17 A I think he gave me, yeah, I think he gave me April
18 of '90 and I think he gave me some '88 statements.

19 Q All right. Do you recall receiving the letter of
20 intent on the sale of the St. George store?

21 A Not specifically, I don't.

22 Q So you're not saying you didn't, you're saying
23 you don't recall?

24 A That's correct.

25 Q All right. Do you recall receiving any lists of

KRAATZ CROSS EXAMINATION
R.1863-64

1 Q (By Mr. Zundel:) Was there any memo sent out that
2 said the policies in the handbook are no longer applicable?

3 A No.

4 Q Was there ever an attempt to communicate with the
5 employees that the policies in the handbook were no longer
6 applicable?

7 A No.

8 Q Had there been, to your knowledge, revisions to
9 the handbook in years past?

10 A Not to my knowledge.

11 Q With respect to profitability, you had discussions
12 with Bryan Wilkinson about -- from time to time about the
13 dealership being unprofitable.

14 A I did.

15 Q And did Bry Wilkinson ever blame you for the
16 dealership's unprofitability?

17 A No.

18 Q What did the discussions regarding unprofitability --
19 what were they?

20 A Well, they were just -- I mean, that -- the
21 discussions were very much like some of the 20-groups I
22 attended. We discussed what was working and what wasn't
23 working, what things we should change, what things we should
24 leave alone, and what people we should change, if any, and
25 the solution as to some of the problems.

1 Q You were asked about a dinner in Mesquite, Nevada,
2 that you had with Jeff Gorringer and Wendy.

3 A Yes.

4 Q Did you recall telling Jeff and those present
5 that Bry had given you complete control of the store?

6 A I think what I discussed with them is that Bry was --
7 Bry had decided that he wanted me to be the GM and that's why
8 we were having the meeting, so I could get to know them a
9 little better and they could get to know me better, so my
10 assumption is -- I don't recall exactly that we had cut a
11 deal either verbally or written, I'm not sure which, between
12 Bryan and I.

13 Q Jeff was the GM at the St. George store at that
14 time?

15 A He was, yes.

16 Q Did he warn you about any propensities of Bry
17 Wilkinson?

18 A I just -- I think I made the statement that I
19 thought I could control the spending and to budget the
20 store, and his response to me was, "Good luck. Nobody else
21 has been able to."

22 Q Nobody else has been able to control it?

23 A Yeah.

24 Q Did he tell you why he said that?

25 A He said Bry does it his way. That was the gist of

B. WILKINSON DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.1869-71

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

1
2)
3 WILLIAM ANTHONY KRAATZ,) Case No. CIV 930900312 CN
4 Plaintiff,)
5 vs.) REPORTER'S PARTIAL TRANSCRIPT
6 HERITAGE IMPORTS et al,) OF PROCEEDINGS
7 Defendants.) (Examination of BRYAN
WILKINSON)
Third Judicial District

8
9 REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
10 BEFORE THE HONORABLE J. DENNIS FREDERICK

11 on Tuesday, August 27, 1996
12 and
Wednesday, August 28, 1996

13 APPEARANCES:

14 For the Plaintiff: MICHAEL N. ZUNDEL
15 Attorney at Law
16 JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
532-7700

17 For the Defendants: DONALD J. WINDER
18 JENNIFER L. FALK
19 Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
20 Salt Lake City, Utah 84110
322-2222

21
22
23 ANNA M. BENNETT, CSR
24 240 East 400 South
Salt Lake City, Utah 84111
25 535-5203

OCT 2 1 1996
By SALT LAKE COUNTY
Deputy Clerk

* * *

O R V I L L E B R Y A N W I L K I N S O N ,
having been duly summoned and sworn as a witness by and
on behalf of the Plaintiff, took the stand and testified
as follows:

DIRECT EXAMINATION

BY MR. ZUNDEL:

Q Mr. Wilkinson, will you state your name for the
record, please, and spell it?

A Orville Bryan Wilkinson and I go by Bryan.

Q And where do you live, sir?

A I live at 2393 East Berry Hill Drive in Draper,
Utah.

Q Are you presently employed?

A By consultation.

Q When you say by consultation, you're talking
about the -- what are you talking about when you say by
consultation?

A From time to time I visit with Mr. Miller, Larry
H. Miller.

Q This has to do with the buyout agreement that you
had with Mr. Miller?

A Yes.

Q But other than that, you're not employed?

A That's correct.

1 Q It was your intent to retire from the automobile
2 dealership at the time that you decided to sell out to
3 Mr. Miller, isn't it?
4 A That's correct.
5 Q Now, with respect to Tony Kraatz, you've known
6 Mr. Kraatz since 1982 approximately?
7 A That's correct.
8 Q And you were friends?
9 A Yes.
10 Q And you knew him quite well?
11 A Yes.
12 Q And there came a time when you asked him to
13 become an employee of Heritage; is that right?
14 A Yes.
15 Q And did you initiate the discussion, or did he?
16 A I think it was me.
17 Q You called him and suggested that it might be
18 nice for him to be your employee; is that right?
19 A Yes.
20 Q Did you tell him about the dealership and its
21 financial condition?
22 A I did.
23 Q Did you tell him that you'd lost Mr. Boyer -- or
24 is it Boyle?
25 A Mr. Boyle.

B. WILKINSON DIRECT EXAMINATION
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R.1875-78

1 time he was terminated?

2 A My understanding was that he knew of those
3 consequences before he was terminated.

4 Q Okay. Mr. Kraatz testified that on September 15
5 or 16 he met with you, you talked about the Ryan program
6 and you said you would continue it for two years; is that
7 what you're disputing?

8 A Not really.

9 Q You don't dispute that?

10 A No.

11 Q He also testified that he met with you on September
12 15 or 16.

13 A That's correct.

14 Q And you told him that he would continue his
15 participation in the Universal -- I'll call them over-
16 rides rather than kickbacks -- for a period of 60 days; is
17 that what you told him?

18 A I think that's correct.

19 Q All right. Now, he also testified that -- let me
20 ask you to think back in time to when you fired Mr.
21 Kraatz on September 11, 1992. Do you remember that
22 meeting?

23 A Yes, sir.

24 Q You were there and Helen Green was there?

25 A Yes, sir, and Mr. Kraatz.

1 Q And Mr. Kraatz, and did you -- was it a short
2 meeting as Mr. Kraatz testified to?

3 A Yes.

4 Q And in that meeting did you tell him that you
5 were terminating him because you could no longer be between
6 he and your children?

7 A No.

8 Q Did not, sir. Do you remember what you did tell
9 him?

10 A I asked for his resignation.

11 Q Did you -- did he refuse?

12 A No.

13 Q What did he say?

14 A I recall Mr. Kraatz said that, "If you want me to
15 go away, I will. I can get a job somewhere else."

16 Q Did you tell him why you asked for his resignation?

17 A I told him of a certified letter coming to him
18 citing the reasons.

19 Q But you did not tell him in the meeting?

20 A I believe I cited the articles expressed in the
21 letter. I don't know that there was a lot of detail given.

22 Q You did not give him any detail, you did not give
23 him any specific wrong that he had committed that had
24 offended you?

25 A Well, this is --

1 Q I'm just asking that question. Did you give him
2 a specific example or criticism that had caused you to
3 terminate him?

4 A Yes.

5 Q What was that?

6 A Lack of profitability, inability to teach my
7 children what he'd agreed to, and not always leveling with
8 me on certain accounts, titles in, overage used cars and
9 such.

10 Q And it's your testimony you talked about all of
11 that?

12 A Very briefly just like that.

13 Q All right. Let me leave that for a moment, and
14 you would admit, would you not, that Tony Kraatz tried to
15 teach your children, train your children?

16 A Tony's a friend and it was painful, real painful
17 deal for me, and I would say yes, that he tried.

18 Q And that's different than refusing to teach your
19 children.

20 A I would have to answer that that he just didn't
21 get the job done.

22 Q He had five years under your contract to get the
23 job done, didn't he?

24 A If he performed, yes.

25 Q And you terminated him 27 months into the contract?

1 A That's correct.

2 Q All right. Before you hired Tony, you had entered
3 into negotiations with Larry Miller about perhaps selling
4 out to him, had you not?

5 A I sold the Chrysler Plymouth sales agreement to
6 Larry in 1984 and a part of that specified that Mr. Miller
7 would be allowed first right of refusal at such time I
8 would sell the Honda sales agreement.

9 Q Did you talk with Larry Miller in the early part
10 of 1990 before Tony Kraatz came to work about possibly
11 selling out to him?

12 A Larry and I were friends and I talked to him
13 often, but I can't remember specifics that early.

14 Q All right. Do you remember the negotiations you
15 had with Larry Miller about selling out?

16 A As to what specific time and what franchise?

17 Q The Heritage, your interest in Heritage, the 60
18 percent. You started those negotiations in March or so of
19 1992 again with Miller.

20 A It could have been later than that, but it was in
21 1992.

22 Q All right, and his initial offer to you was for
23 the franchise, one million dollars asset value and two
24 million dollars blue sky; is that right?

25 A I don't recollect exactly what his -- whether he

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R.1881-82

1 we determine what the components of this purchase price
2 are, that one or more of them have some particular
3 relevance we need to inquire into, then I'll revisit the
4 issue, but at this point, that's what I'll say.

5 MR. ZUNDEL: All right.

6 THE COURT: All right.

7 Q (By Mr. Zundel:) Let's get the purchase documents
8 out. It's -- just generally speaking, it's my under-
9 standing that in August of 1992, just before Mr. Kraatz
10 was fired, you owned 68 percent of the stock and your
11 children owned eight percent; is that right?

12 A That's right.

13 Q All right. Mr. Miller told you that he couldn't
14 buy, for whatever reason. We'll go into it later if it
15 appears relevant, and you decided then to sell to your
16 children; isn't that right?

17 A Not really before having given Mr. Kraatz a chance
18 to involve Mr. Norda on an offer.

19 Q So you were in August, after Mr. Miller said, "I
20 can't buy it," this is August 29, you said, "Tony, go see
21 if you can get Mr. Norda involved," is that right?

22 A Well, Mr. Kraatz had pitched me previous to
23 August 29 on speaking with Mr. Norda and he was to try
24 and get us an appointment.

25 Q And you were willing to have Mr. Kraatz continue

1 on as an employee of the dealership if Mr. Norda were to
2 get involved; is that what you're saying?

3 A I would suppose that would be up to Mr. Norda.

4 Q Okay. At any rate, the Norda deal didn't come
5 down and you wanted to sell to your children, right?

6 A I wanted to sell, yes.

7 Q All right, and your children, the primary parties
8 to that negotiation to sell to your children were J. J.
9 Wilkinson, Jeff Wilkinson and Jeff Gorringer; isn't that
10 right?

11 THE COURT: Who? J. J. and who else?

12 MR. ZUNDEL: Jeff Gorringer.

13 THE COURT: And that's the son-in-law?

14 MR. ZUNDEL: Yes.

15 THE WITNESS: Yes. There are two Jeffs there, so
16 it would be J. J. Wilkinson and Jeff Gorringer, but my other
17 children, I was pitched by them, would be involved.

18 Q (By Mr. Zundel:) Okay. Now, J. J. and Jeff
19 suggested that they would buy you out at the rate of
20 \$30,000 per month for a period of 20 or 30 years; isn't
21 that right?

22 A I believe that's correct.

23 Q All right. Now, you were getting \$15,000 a month
24 regular pay, right?

25 A Salary?

B. WILKINSON DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.1885-86

1 new management precipitously in place that were your kids.

2 A I believe they felt they might be a little young
3 and lacked the experience, but it wasn't all the banks.

4 Q So you reopened negotiations with Larry Miller
5 at that point?

6 A I did.

7 Q In late 1992, right?

8 A Yes, sir.

9 Q And you eventually came to terms with Larry
10 Miller in December of 1992 as to the price?

11 A On the building and the business, yes.

12 Q All right. The building was owned by Good Works?

13 A That's correct.

14 Q And there was a separate -- the transaction with
15 Good Works -- let me explain for the Court's -- let me
16 have you explain for the Court's benefit. Good Works was a
17 partnership of which you and one of your siblings were
18 partners, correct?

19 A That's correct.

20 Q Was that Jody Wilkinson?

21 A Yes, sir.

22 Q And you were 95 percent owner?

23 A At that time, yes, sir.

24 Q And Jody was five percent?

25 A That's correct.

1 Q And Good Works owned the real estate?

2 A That is correct.

3 Q And Good Works had a loan or several loans, one of
4 which was with Comerica that encumbered the real estate.

5 A I think that was the only loan that we had that
6 encumbered the real estate, but we did have a loan with
7 Comerica.

8 Q And in late 1992 there came a time when the bank
9 required you to have more cash in the dealership than you
10 had; isn't that right, or they were going to pull their
11 flooring?

12 A That isn't the reason they said they'd pull the
13 flooring line.

14 Q They required you to have more cash?

15 A That isn't what they said when they visited me.

16 Q Well, didn't you call Larry Miller and say, "Larry,
17 I've got to have cash"?

18 A But it had to nothing to do with the banks. It
19 had nothing to do with the banks. We were having over-
20 drafts. We didn't have all our cash at that time.

21 Q You were having overdrafts?

22 A That's correct.

23 Q And you needed approximately \$600,000?

24 A No, no.

25 Q How much did you need?

B. WILKINSON DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.1890

1 Heritage had made to Comerica on the Good Works loan,
2 mortgage loan, to the tune of about \$119,000.

3 A I'm not really sure. I'd have to rely on Ms.
4 Green to bring that to my attention.

5 Q Okay. Back to the sale. Larry Miller said that
6 he would cover your overdraft through this mechanism of
7 loaning money to Good Works and having you pay back the
8 590 that you owed Heritage.

9 A 595 I believe it was.

10 Q Right.

11 A Yes, sir.

12 Q All right, and you paid that back without any
13 interest. None of the debts that you paid back to Heritage
14 had accrued any one dime of interest, had they?

15 A No, but I was personally involved and nobody
16 paid me any interest either.

17 Q Okay, so Heritage had in essence given approxi-
18 mately 500-some-odd thousand dollars or allowed you to use
19 some 500-some-odd thousand dollars for two or three years
20 at no interest at all.

21 A But it was my money anyway.

22 Q Or was it Heritage's money, sir?

23 A I was the one that was the investor, and I was the
24 one that was the dealer, and I was the one that was responsible.

25 Q So you considered Heritage's corporate money your

R.1900

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(BY M.N. ZUNDEL)
R.1901-03

August 28, 1996

P R O C E E D I N G S

THE COURT: We'll return now to the matter pending,
Kraatz versus Heritage, et cetera, case number C-93-312.

When we recessed yesterday, Mr. Zundel, you were
examining Mr. Bry Wilkinson.

Mr. Wilkinson, if you'll take the stand again,
sir. You are still under oath.

You may continue, Mr. Zundel.

(Whereupon, O. Bryan Wilkinson resumed the
stand and continued to testify as follows:)

Q (By Mr. Zundel:) Mr. Wilkinson, let me as a
preliminary matter show you what's been marked Exhibit 51.
Do you recognize this document as a page of the cash
receipts journal of Heritage?

A Yes, sir.

Q Move for admission of Exhibit 51, Judge.

MR. WINDER: No objection.

THE COURT: Received.

Q (By Mr. Zundel:) This document's the payment by
you of the \$590,000 that we were speaking of yesterday in
December of 1992, right?

A I don't see a total, but I would guess it's right.

Q Can I show it to you?

A Sure.

Q \$590,950.05.

1 A Thank you.

2 Q Okay, and then on the right-hand side it's
3 itemized and the first item is \$114,760 to Comerica.

4 A Yes, sir.

5 Q And those were -- that was to repay Heritage for
6 principal payments made to Comerica on Good Works loans?

7 A I'm not sure they were all principal, but it was
8 to pay Heritage Honda for payments to Comerica.

9 Q On behalf of Good Works?

10 A That's what it says.

11 Q All right. With respect to -- there was a
12 question as to whether there were one or two payments to
13 the FDIC for \$33,333. Do you see those two payments there
14 on lines 4 and 9?

15 A Yes, sir.

16 Q Okay, and then there was -- the last item is a
17 repayment to -- and those were payments made by Heritage
18 in order to settle the FDIC lawsuit against you, correct?

19 A Yes.

20 Q All right, and then we have the last item on
21 line 10. It's a payment of \$93,098 and that just says
22 Bry Wilkinson, two forty two seventy-five account, and
23 those are simply advances made to you or for your benefit
24 at some period of time previous to this that you were
25 repaying?

1 A That's what it appears.

2 Q And then on line 6 is \$200,000 that we talked
3 about with the St. George payment, right?

4 A Essentially, but there was another payment I made
5 in the year '90.

6 Q But that was the 250,000?

7 A That's correct. The 200,000 as I remember would
8 be for the credit line that Heritage Honda and I were
9 endorsed on that had been used by Heritage Honda of St.
10 George, that's correct.

11 Q Thank you. Now, when we left off yesterday there
12 was a question and that was how much was paid for your
13 stock. Let me show you what's been marked as Exhibit
14 Number 53. Do you recognize that as a management
15 agreement that you entered into with -- or that Heritage
16 entered into with you and Landcor Management Company in
17 December of 1992?

18 A Yes, sir.

19 MR. ZUNDEL: I'll offer 53, Judge.

20 MR. WINDER: No objection.

21 THE COURT: It's received.

22 Q (By Mr. Zundel:) This Landcor is Larry Miller's
23 management company; isn't that right?

24 A That's correct.

25 Q And on page 4 -- yeah, on page 4 of the agreement,

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R.1922-23

1 showed first of all in the first writing, something like
2 360,000 for stock, and then I think it was adjusted to
3 nine something, and then the rest was real estate and the
4 provision for alimony, but it doesn't reflect the exact
5 different amounts here. I just lumped them together so I
6 could represent what the income was on an average per year.

7 Q Okay. Let me ask you, the stock purchase agree-
8 ment, the deferred compensation agreement, and the non-
9 compete agreement, you recognize those as reflective of the
10 fair market value of your stock?

11 A I'd have to look at those particular exhibits and
12 see what they allocated to the total amount of the stock,
13 plus the interest on it.

14 Q What I'm saying is that you don't -- do you
15 contend in this case that there is any separate value to
16 your agreement not to compete or your agreement, your
17 deferred compensation agreement, separate value other than
18 the fair market value of the stock of the corporation?

19 A It seems to me that there is.

20 Q Let me move on to something. Let me show you
21 what's been marked as Exhibit Number 58. Do you recognize
22 that document?

23 A Yes, sir.

24 Q What is it?

25 A I believe it's a note that I personally hand wrote

1 as I submitted what papers Tony had given me on his pro-
2 posal for an employment agreement. The note was to Mr.
3 Clark Christian of Grant, Thorton and Company, our
4 accountants.

5 Q You say in this letter, you say, "I need to hire
6 Tony but I can't give real ownership and I don't want to
7 stipulate to such stringent requests to any minority
8 stockholder. I must make this deal work, though, some
9 way. Tony is good at what he does, the very best."

10 Why did you feel that you had to make this deal
11 work?

12 A I believe in my deposition and earlier testi-
13 mony I was at a bit of a low point spiritually and
14 emotionally in my life and Tony was a friend, whose
15 friendship I value today, and I felt that he could shore
16 me up some.

17 Q What's the issue of phantom stock? What's that?

18 A It's a term that was suggested to me by Mr.
19 Prater and I don't know that I understand exactly what
20 it is. I think there are several classifications of
21 stock and what phantom stock is, I don't know.

22 Q Was it the stock appreciation rights we've been
23 talking about, or was it something else?

24 A Seems to me that it was something else that I
25 suggested to them, having heard it from them.

B. WILKINSON DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.1925

1 appears to be 51, but I can't really see it. I'm sorry.
2 It's a very light copy.

3 Q May I see what you have, sir? Maybe I should show
4 you my copy.

5 61,490; is that right?

6 A No, this says 51,948.

7 Q You're looking at 1991.

8 A Well, I thought you referred to that one first.

9 Q 1992.

10 A Thank you, sir. It does say 61,490.

11 Q And that is equivalent to \$7,686 per month, based
12 on eight months. Trust my math on that?

13 A I'll trust your math.

14 Q All right, and we were talking yesterday about
15 what Mr. Kraatz made, \$8,000 a month, and what Mr. Quinn
16 made, we know it's \$7,600 per month.

17 A Well, Mr. Kraatz made Mr. Quinn's payroll up.
18 I don't know how it was set.

19 Q And we agreed that you were being paid a base
20 salary of \$15,000 per month?

21 A That's correct.

22 Q And that's -- I asked you if that wasn't the
23 \$30,000 that the children offered to pay you for 30 years
24 to buy you out, that is, by letting Mr. Kraatz go, letting
25 Mr. Quinn go, and then you had your salary of 15,000; do

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R.1927-28

1 THE COURT: You may.

2 Q (By Mr. Zundel:) And read the question beginning
3 at line 25 for me. What did I ask?

4 A "Question: Did he complain about the job that
5 Tony Kraatz was doing?

6 "Answer: On occasion of any complaint from J. J.
7 it was most often we didn't need the expense of the
8 management people we have now and they're not doing much
9 for us. We could save some money if we did it differently."

10 Q "Question --" I'll ask the questions and you --

11 A Oh, I'm sorry.

12 Q "Do you recall him saying those sorts of things
13 to you at any specific time?" And your answer?

14 A "Not real specific times. Chuck Quinn said the
15 same thing to me. He was there a couple of times."

16 Q "Question: The times that J. J. said this to
17 you, you took it that he was referring to Tony Kraatz?"

18 And your answer?

19 A "He said it to me in the context of probably not
20 more than three or four times, and a couple of those times
21 was when we were talking about Chuck Quinn, too, when
22 Chuck was employed there. This would have been earlier
23 in May."

24 Q "Question: So that he was talking about both
25 Chuck Quinn and Tony Kraatz?"

1 A "In a couple of conversations, yes, earlier."
2 Q "Question: He said you didn't need them and you
3 would save some expense if you did it differently?"
4 A "Yeah, his suggestion was we don't need both.
5 I need hands-on training. I'm not getting it between the
6 management -- between Tony -- those were the earlier
7 conversations."
8 Q Okay, and you were going to say between Tony and
9 Chuck, right?
10 A We don't need both --
11 Q Okay.
12 A -- is what I answered.
13 Q So is it your testimony now that J. J. said get
14 rid of one or the other to you?
15 A Well, as I testified here, sir, it seems to me
16 that I wasn't totally clear on it, but that could have
17 possibly been.
18 Q All right.
19 A I certainly wouldn't deny this part of my
20 deposition.
21 Q Thank you. Could I get that copy back from you,
22 Judge?
23 When you said you don't need both, you're talking --
24 he was talking about the training aspect of it, that I
25 can't -- I'm down here at the new car -- is it the new car

B. WILKINSON DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.1932-33

1 A Meaning that I can't recall for sure that I gave
2 it to Mr. Kraatz.

3 Q Let me drop down here to advertising, item number
4 ten. Frank Allen and Associates was your advertising
5 agent?

6 A Allen Frank and Associates, yes.

7 Q Excuse me, that's right, and he'd been your --
8 that association had been your advertising agent for some
9 time?

10 A I would say at this time probably about a year.

11 Q Okay. You said, "Keep Allen Frank?"

12 A I did. That's my writing.

13 Q You were in charge of advertising for the dealer-
14 ship in 1992, even though Mr. Kraatz was there as the
15 general manager; that was your responsibility, right?

16 A Well, Mr. Kraatz and I discussed that. He felt
17 he could use some help in that area and the area of
18 placing insurance coverages and yes, I did help.

19 Q You took complete control over the advertising
20 in 1992?

21 A I did not take it. I talked to Tony about it
22 and we decided I could help there.

23 Q You had complete control over advertising in 1992?

24 A Sir, I was the dealer. I had complete control
25 over everything.

1 Q Okay.

2 A Okay? I had everything invested.

3 Q Now, item twelve, it says, "Legal and auditing,
4 get it under control," and then you've written on the
5 side, haven't you, this is your writing, "Some left for
6 Bry must be paid"?

7 THE COURT: Some left for what?

8 MR. ZUNDEL: I take it as Bry.

9 THE WITNESS: Bry, me.

10 Q (By Mr. Zundel:) Right?

11 A Yes, I believe I had in mind the FSLIC and there
12 could have been some other things, but yes, that's my
13 writing and that's what I said.

14 Q Like a divorced -- an obligation on a divorce?

15 A That could be.

16 Q Some lawyers that could help you with your
17 divorce?

18 A That could be.

19 Q Dealership paid those for you?

20 A I think on some occasion they did.

21 Q All right. Now --

22 A When you're the dealer and it's a sub S corporation
23 expenses seem to be expenses to me.

24 Q Personal divorce payments, you didn't have any
25 qualms about charging those to the dealership?

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(BY M.N. ZUNDEL)
R.1936-41

1 THE WITNESS: I didn't interpret it as that, no.

2 Q (By Mr. Zundel:) Okay. Did this document have
3 anything to do with your decision to terminate Mr. Kraatz
4 four days later?

5 A I don't really believe it had much bearing on it.

6 Q All right. Did you find it odd that the new
7 manager, the new car managers were writing to you directly
8 as the dealer and going past the general sales manager,
9 going past the general manager, as far as these operational
10 considerations for the dealership?

11 A Not really, being family and all. That's why I
12 think I gave Tony a copy, but I'm not absolutely certain,
13 as I testified before.

14 Q So it was okay because it was family; is that what
15 your testimony is?

16 A Well, often I had suggestions from family.

17 Q But if they weren't family, you'd find it awfully
18 odd for a manager down here to be by-passing the general
19 manager and talking directly to the dealer as to what
20 ought to happen in the dealership and giving a list of
21 suggestions for changes, right?

22 A If those people were stockholders, I don't know
23 that I'd find it odd, no.

24 THE COURT: How much longer, Mr. Zundel?

25 MR. ZUNDEL: Ten minutes, Judge.

1 THE COURT: Well, we need to take a recess. We'll
2 take a ten-minute recess and come back and let you finish up.

3 (Whereupon, a recess was taken.)

4 THE COURT: All right, Mr. Zundel, you may continue.

5 MR. ZUNDEL: Thank you.

6 Q (By Mr. Zundel:) Let me show you, Mr. Wilkinson,
7 what's been marked as Exhibit Number 257. Does that
8 document bear your signature?

9 A Pardon me, sir?

10 Q This document bears your signature, does it not?

11 A Yes, it does.

12 Q All right, and it says here that -- it says here
13 the first paragraph, "As a result of the, quote, buy-sell,
14 unquote, acquisition of the stock of Bryan Wilkinson
15 by members of the family, the management of Heritage
16 Imports dba Heritage Honda has been reorganized effective
17 September 16, 1992." Do you see that?

18 A Yes, sir.

19 Q Now, it was the -- you wrote this letter in order
20 to advise Mr. Fadel that Tony Kraatz was gone and that Mr. --
21 and that your son J. J. Wilkinson was now taking your place
22 and taking over; isn't that right?

23 A I don't see where it says Tony Kraatz is gone, but
24 to advise of reorganization and offer to buy-sell, yes.

25 Q J. J. Wilkinson was not the president of Heritage

1 as of September 11th, 1992, when he handed the schedule to
2 Mr. Kraatz, was he?

3 A No, he wasn't.

4 Q All right, and did you tell J. J. to prepare the
5 schedule and schedule Mr. Kraatz for all Saturdays and give
6 that -- and go give it to Mr. Kraatz?

7 A Well, there's two answers to that. Do you want to
8 ask one? I asked him to prepare a schedule, yes.

9 Q Did you tell him to give it to Mr. Kraatz?

10 A I did.

11 Q And why did you do that?

12 A Well, first of all, I don't remember asking him to
13 schedule all Saturdays, but I asked him to do it because I
14 felt that the general manager needed to be more visible
15 in the store in the later hours.

16 Q Now, you didn't ask Mr. Kraatz to schedule him-
17 self any particular Saturdays, you and Mr. Kraatz, with
18 respect to this schedule that we're talking about?

19 A I had asked Mr. Kraatz several times to work on
20 Saturdays.

21 Q We're talking about Exhibit Number 1.

22 A Yes, sir.

23 Q Now, that schedule was prepared by you or by J. J.
24 at your request, but you didn't go directly to Mr. Kraatz
25 and say, "Tony, I want you to prepare a schedule and this is

1 where I want you to work, with respect to this time period,"
2 did you?

3 A Not exactly that way, no, I didn't.

4 Q All right, thank you. May I have that back?

5 A Yes.

6 Q You in effect promoted your son to be Mr. Kraatz's
7 superior without telling Mr. Kraatz, didn't you?

8 A No.

9 Q It wouldn't be J. J.'s place to prepare a schedule
10 for Mr. Kraatz, would it, in September of 1992?

11 A I don't know that it wouldn't.

12 Q Okay. You say you don't know that it wouldn't.
13 New car manager doesn't prepare the schedule for the general
14 manager to work, does he?

15 A Are you telling me or --

16 Q I'm asking you.

17 A It's a possibility. In fact, Jeff -- and Jeff
18 often prepared schedules under the direction of Mr. Kraatz
19 and Mr. Quinn.

20 Q But not for them, for others.

21 A No, for them, too.

22 Q Okay. Now, this is something you're surmising
23 or is this something you know?

24 A I understood that that was done.

25 Q And where do you get your understanding that that

1 was done?

2 A I think I saw it being done by Jeff Gorringer and
3 Jeff Wilkinson.

4 Q You think you saw it being done? You're looking
5 over their shoulder while they --

6 A No, no, but I was often at the copy machine.
7 I'm sure that there was the charge of authority in preparing
8 schedules given by Mr. Kraatz to the sales manager from
9 time to time, or the sales managers.

10 Q To prepare schedules for the salesmen?

11 A Pardon?

12 Q To prepare schedules for the salesmen, not the
13 general manager, right?

14 A Well, no, I think that they were asked to prepare
15 several schedules, not just for the salesmen.

16 Q And you get this because you were wandering around
17 a copier and happened to see something?

18 A Well, I also feel that under the charge of
19 teaching my kids to be dealers, that some of those things
20 were delegated.

21 Q You feel that way?

22 A Well, I hoped that.

23 Q Hoped that that was what happened?

24 A And I think it did happen.

25 Q With respect to J. J. and this -- before you and

1 Mr. Kraatz entered into this agreement under which Mr. Kraatz
2 was employed, you warned Mr. Kraatz that J. J. might be
3 resentful of his position in the dealership, didn't you?

4 A I believe I said maybe all of my children would be
5 resistant.

6 Q And it might be difficult?

7 A I believe I did say that.

8 Q And that resistance actually manifested itself
9 primarily through J. J. during Mr. Kraatz's employment,
10 didn't it?

11 A I don't know that it was primarily through J. J.,
12 no.

13 Q J. J. did manifest a resistance that you predicted
14 during Mr. Kraatz's employment, didn't he?

15 A All of them did, but yes, J. J. did.

16 MR. ZUNDEL: I have no further questions at this
17 time for this witness, Judge. I may need to recall him in
18 rebuttal to their case, so I don't release him.

19 THE COURT: All right, Mr. Zundel.

20 Any cross-examination at this point, Mr. Winder?

21 MR. WINDER: There is, Judge.

22 CROSS-EXAMINATION

23 BY MR. WINDER:

24 Q Mr. Wilkinson, I show you what's been marked
25 as Defendant's Exhibit 590. It's a check for \$250,000 to

B. WILKINSON CROSS EXAMINATION
(BY M.N. ZUNDEL)
R.1947-2002

* * *

THE COURT: All right. Thank you, Mr. Winder.
Mr. Zundel, you may cross-examine.

MR. ZUNDEL: Thank you, Judge.

CROSS-EXAMINATION
OF O. BRYAN WILKINSON

BY MR. ZUNDEL:

Q Let me show you what's been marked as Exhibit 297.

THE COURT: Is that one we've handled before?

MR. ZUNDEL: No, Judge, 295 is what we've
handled before, but I would --

THE COURT: Well, I have a 297-K here, a balance
sheet for January '92 through August of '92.

MR. ZUNDEL: Yes, Judge, that would be the August
statement. We will be using that one.

THE CLERK: I've got 297 as received.

MR. ZUNDEL: 297 is all twelve months.

THE COURT: Okay.

MR. ZUNDEL: In order.

THE COURT: All right.

Q (By Mr. Zundel:) Let's see, you said that -- did
I understand you correctly to say that you fired Mr. Kraatz
because inventories were high?

A No, I said used car was overage -- used car
inventories were overaged.

Q In August?

1 A Pardon?

2 Q In August and September of '92.

3 A During several of our discussions -- I didn't
4 say in August of '92.

5 Q During several of your discussions over -- okay.

6 A The period of --

7 Q When?

8 A The period of his employ.

9 Q All right. I want to test whether or not cars
10 were overaged. I'm talking about used cars, okay? Used
11 cars overaged.

12 A All right.

13 Q Do you have a time?

14 A Well, there were many months.

15 Q Just pick one.

16 A Let's pick April of '92.

17 Q April of '92?

18 A Uh-huh (affirmative).

19 Q You're comfortable with that?

20 A Well, you told me to pick one, so I did.

21 Q Is it your recollection that they were overaged
22 in April, or are we just searching?

23 A I told you it was during several of Tony's and my
24 accountability meetings and review of statements and
25 schedules that there were way too many overaged used cars.

1 Q April of '92, who was the used car manager?
2 Jeff Gorringer, wasn't it?

3 A I don't remember for sure. Could have been. I
4 thought it was Brett Smith, but it could have been Jeff.

5 Q Brett Smith or Jeff Gorringer, used car manager.
6 Are you talking about the West Valley lot or --

7 A Just talking about used cars in total.

8 Q Do you know how many?

9 A Not without looking exactly at it.

10 Q Where would you look?

11 A Well, you'd look on the schedules, the aging
12 schedule.

13 Q Do you have aging schedules in this courtroom?

14 A No, I don't.

15 Q Have you ever produced aging schedules to my
16 office in support of an allegation that used cars were
17 too old?

18 A I don't know if we have or not.

19 Q Okay. The age of used cars, whether they get
20 too old or not on the lot is the primary responsibility
21 of the used car manager, isn't it?

22 A Under the general manager's management
23 capability, yes.

24 Q Okay. Just a minute. I didn't say ultimate
25 responsibility. It's primarily the responsibility of the

1 used car manager, right?

2 A I'd say that's accurate.

3 Q All right. Now, Jeff Gorringer, your son-in-law,

4 was the used car manager in 1992, right?

5 A I don't remember, but it surely could have been.

6 Q All right. Now, so the aging policy for used

7 cars was 60 days, right?

8 A Thirty days.

9 Q It was 30 days?

10 A Sixty's the worst.

11 Q But you --

12 A You don't want them to go past 60.

13 Q That's what I mean.

14 A Max.

15 Q They're overaged when they're 60, right?

16 A It depends on whose direction you're under. There

17 are some that say 30, some that say 60, some that say

18 longer.

19 Q What standard were you using when you fired Mr.

20 Kraatz for having overaged automobiles?

21 A Anything over 60 units that were in stock.

22 Q So it's numbers, not aging?

23 A No, past 60 days. I'm sorry. Excuse me. I

24 said 60 units but I meant 60 days.

25 Q Okay. Now, let me show you -- are you familiar

1 with Mr. Kraatz's personnel file?

2 A I'm not real familiar, no.

3 Q You'll admit, won't you, that you never gave Mr.
4 Kraatz any written warning of what -- that he was being
5 criticized for having allowed a manager below him to have
6 overaged inventory?

7 MR. WINDER: Judge, I'd object. We plowed this
8 ground, Mr. Zundel did, in his case.

9 THE COURT: I think it is already a fact in
10 evidence, Mr. Zundel, that there were no written reprimands
11 or warnings of that nature in the personnel file. That's
12 an undisputed fact that's already been established when
13 you had this man on the stand before.

14 Q (By Mr. Zundel:) Yes. Now, let me ask you to
15 refer to your deposition now. Was it the fact that there
16 were overaged cars or that Tony hadn't been honest with
17 you about there being overaged cars; what is it?

18 A The fact that there were overaged used cars and
19 there were some title problems. I said that before.

20 Q Let me ask you this then. With respect to the
21 overaged used cars, how many overaged used cars were you
22 upset about?

23 A I don't remember specifically each month without
24 looking it up. Of course, we had a schedule in front of us
25 then, but it occurs to me that most times, of the total used

1 car inventory, often half the inventory value was overage.
2 Q You don't have any documents, though, to support
3 that?
4 A Well, the statement's the only thing you gave me.
5 Q What statements?
6 A The financial statement's the only thing you
7 gave me.
8 Q Is that all cut from the financial statements?
9 A Yes. I can tell from what Honda says is an
10 overaged unit how much of the inventory was over.
11 Q From the financial statement?
12 A Yes, sir.
13 Q Okay. Please pick April then of '92. That would
14 be document 000169.
15 A Yes, sir?
16 Q Where do you look?
17 A You look on line number 250 for the number of
18 these cars.
19 Q On which page?
20 A On the front page, balance sheet.
21 Q Yes?
22 A I didn't pick a month that would help me, but
23 there were 130 used cars and a memo -- you see the next
24 line down, it says, "Thirty-plus days, 18," so there were
25 only 18 out of 130 that month.

1 Q Not too bad, I take it.

2 A No, that was good.

3 Q All right. Well, why don't we look at -- why

4 don't we just continue then, since we know where to look,

5 we look quickly at May.

6 A Okay. In May, out of 134 units there was 37

7 overaged for a total value of 349,973, and the total value of

8 used cars in stock at that time was 964,728.

9 Q How does that rate?

10 A Oh, that's not great.

11 Q Okay. How about -- but it's not real bad, I

12 take it.

13 A Well, the goal's to not have any overage units,

14 but, you know, as in life, you live with some of this stuff,

15 you know.

16 Q Sure. June '92 you had 28 out of 107.

17 July --

18 A Wait a minute, you're going too fast for me. I

19 can't find June.

20 June wasn't bad.

21 Q June wasn't bad?

22 A Uh-uh (negative).

23 Q July wasn't bad then, I take it, 23 out of 136.

24 A July was pretty good.

25 Q We get to August.

1 A Wasn't quite as good.

2 Q Well, you have 40 out of 176. Not bad, though,
3 right?

4 A Well, could have been a little better there.

5 Q Now, that's the last month you've got for Mr. --

6 A Well, let's try January. Let's try January.

7 THE COURT: Of '92?

8 THE WITNESS: Yes, January, there were 63 overage.

9 Q (By Mr. Zundel:) Well, let's try January for a
10 minute.

11 A Okay.

12 Q January isn't a great month for selling automobiles,
13 is it?

14 A January's a slower month in the car business,
15 yes, sir.

16 Q You expect that maybe some of your cars might go
17 overage more in January than other good months for sales,
18 wouldn't you?

19 A That's a possibility.

20 Q All right. A lot of people don't like to get out
21 and buy used cars in a used car lot in freezing temperatures,
22 do they?

23 A Surprisingly enough, January turns up over
24 December usually.

25 Q All right, so you go January 63. February --

1 A Seventy-seven.

2 Q Out of 139?

3 A A little bad in February. Wasn't great in March.

4 Then it starts better.

5 Q With April. Okay. So things are improving from

6 March on; is that right?

7 A Let me go find it again. That is right.

8 Q And you can't remember any specific times when

9 you and Mr. Kraatz talk about inventory where you thought it

10 was Mr. Kraatz's fault and he didn't do his job?

11 A Well, yeah, I can remember during our weekly

12 meetings that we'd have our used car overage schedule and

13 there could have been some in '91. I'd be glad to look at

14 those for you.

15 Q Well, how far back did you have in mind when you

16 fired Mr. Kraatz?

17 A Well, '91 was his first full year that he was

18 there. He had the longest chance at everything in '91.

19 Q At any rate, used car inventories were improving

20 five months before Mr. Kraatz was terminated; is that right?

21 A It was about time.

22 Q Okay. You'd lost patience long before, I guess.

23 A I had talked to him very sternly about it.

24 Q All right. Now, the other thing you've brought up

25 was Comerica. Let's talk about that for a minute.

1 A Okay.

2 Q Comerica had declared your loan in default in May
3 of 1990 for failure to meet tangible net worth calculations?

4 A I wasn't aware of that.

5 Q Okay. You had an agreement with Comerica that
6 Comerica would fund all of your flooring needs and that you
7 would have no flooring line on your used cars, right?

8 A They hadn't told me that that I remember in May
9 of 1990.

10 Q Okay. Well, you said that they told you that in
11 May '92.

12 A Pardon?

13 Q You obtained a flooring line in 1989 to floor used
14 cars from Key Bank to the extent --

15 A That could be.

16 Q To the extent of \$800,000.

17 A That could be.

18 Q Well, is it could be or --

19 A Well, we had a floor line with Key Bank for used
20 cars, yes.

21 Q Before Tony ever came?

22 A Oh, yes.

23 Q And you kept that secret from Comerica?

24 A No, I didn't. I never kept it secret. Tony
25 knows I didn't keep it secret.

1 THE COURT: Tony what, sir?

2 THE WITNESS: Knows I didn't keep that a secret
3 from Comerica.

4 Q (By Mr. Zundel:) Just a moment, please.

5 The relationship with Comerica, it was this. You
6 had three loans with Comerica before Tony came, three-
7 million-dollar loan that was to Good Works on real estate;
8 is that right?

9 A Yes, sir.

10 Q Approximately three million dollar loan that was
11 to Heritage for flooring new cars exclusively?

12 A That's probably correct.

13 Q All right, and a small line of credit for the
14 equipment that was to Heritage?

15 A I think we did have some -- another small line.
16 I don't know the amount. I don't remember the amount.

17 Q Now, in 1989 you decided you needed a flooring
18 line for used cars from Key Bank and so you went and got an
19 \$800,000 flooring line on your used cars, right?

20 A I can't remember if it was '89 or '88 but we did
21 have a line for used cars through Key Bank.

22 Q Did you draw upon it?

23 A Yes, sir.

24 Q And the collateral for Key Bank's loans was your
25 used car inventory, right?

1 A I thought it was the new car inventory and the
2 real estate.

3 Q For Key Bank?

4 A Oh, excuse me. For Comerica. Yes, Key Bank
5 collateralized the used car line with the used cars in
6 inventory, that's correct.

7 Q And Comerica had a security interest in Good Works
8 real estate, in Heritage's new cars and in Heritage's used
9 cars?

10 A They could have, but nobody ever bothered me
11 about it.

12 Q But you admit they did have --

13 A Well, they had --

14 Q -- all of your automobiles?

15 A They may have filed securities with the Secretary
16 of State on everything I owned. I think they did.

17 Q And your loan that you got from Key Bank on
18 \$800,000 then was sharing -- those two banks were sharing
19 the same collateral, but they didn't know it, did they?

20 A I'm not so sure they were sharing the same
21 collateral. Where's the letter showing I was in default
22 in May of '90?

23 Q Well, I have a memo here from Dan Hartman to the
24 file. It's Exhibit 260.

25 A Thank you.

1 Q Second page, do you see that, letter agreement --
2 "Heritage Honda is in default as of 4-30-90 of the following
3 covenants: maintaining tangible net worth minimum \$900,000,
4 actual, \$872,000." Do you see that?
5 A But it didn't have anything to do with floor lines.
6 Q Well, this is the default; we're getting into
7 something else.
8 A Well, I didn't know of any default.
9 Q Did you know that Comerica had downgraded your
10 loan to "D"?
11 A That could have happened, but I -- actually, they
12 didn't call the loan. I can't find the signature on this
13 stuff from Comerica.
14 Q Okay. Let me show you your deposition at 632.
15 I found what I was looking for.
16 A Okay.
17 Q Beginning at line 1.
18 A Let me find it.
19 Q This is Volume Five. I'll hand it up.
20 THE COURT: Very well, Volume Five of the
21 deposition of Mr. Wilkinson's published.
22 Here's the copy, sir.
23 THE WITNESS: Thank you, sir.
24 Line 5?
25 Q (By Mr. Zundel:) Beginning at line 1.

1 A 632?

2 MR. ZUNDEL: Your Honor, if the Court wants to
3 read, I have this. I have a copy myself.

4 THE COURT: Sure.

5 Q (By Mr. Zundel:) "Question: Do you take any
6 responsibility yourself for changing the floor line to Key
7 Bank?

8 "Answer: To Key Bank?

9 "Question: Yes.

10 "Answer: The only responsibility I could take
11 is if we had a floor line with Key Bank on used that I had
12 initiated some months, maybe even years prior to this,
13 1990, '91, and we -- we had that line. It was in state.
14 Then Tony wanted to get stronger in the used car business,
15 which I agreed with, so we needed a stronger used car line.
16 Well, we asked for from Key Bank two million instead of an
17 \$800,000 used car line and they granted it to us, but
18 apparently somehow when they did that, some of the -- some
19 of the Secretary of State filings and stuff were brought to
20 the attention of Comerica that we had that line and they
21 said we don't, you only get flooring from us and we don't
22 floor used. We'll make you capital loans and loans on other
23 stuff, but we don't floor on used cars, so Tony and I both
24 told them we need to floor used cars. We've got to have
25 flooring on used cars to get into this operation because we

1 feel there is a new profit center there and we have this new
2 lot and we need more inventory and so that really started a
3 stink from Mr. Hartman at Comerica and he wasn't one of my
4 favorites anyway because my initial work with Comerica was
5 not through him. It was through another fellow that was
6 very accommodating and very good to work with, but anyway,
7 it wasn't that I initiated it, no, I didn't initiate the
8 floor line."

9 THE COURT: I'm not sure what we're doing here.
10 Were you seeking to refresh his memory about the acceptance
11 of some responsibility in the switching to Key Bank, or are
12 you --

13 MR. ZUNDEL: This is substantive evidence, your
14 Honor.

15 THE COURT: Well, substantive evidence you can get
16 from the witness on the stand now. I don't want you to just
17 stand here and read his deposition.

18 MR. ZUNDEL: This is impeaching.

19 THE COURT: Okay. To what extent then?

20 MR. ZUNDEL: To the extent that he says that he
21 doesn't remember any difficulty with the used floor line
22 and Key Bank -- and Comerica.

23 THE COURT: I misunderstood. I thought you were
24 challenging his statement regarding acceptance of responsi-
25 bility for the switching of the loan which you covered in the

1 first three lines of your reading.

2 MR. ZUNDEL: Yes, your Honor, and I understand
3 that he accepts some responsibility, but this explains
4 what I've been trying to elicit from this witness for a few
5 minutes and haven't been able to and I think it's faster
6 just to get it in this way.

7 THE COURT: Well, go ahead, since you're about
8 through; you're on page 633.

9 MR. ZUNDEL: Yes.

10 THE COURT: Well, go ahead and finish that clause
11 then, that part of the examination.

12 Q (By Mr. Zundel:) "But anyway, it wasn't that I
13 initiated it, no, I didn't initiate the floor line. I
14 really didn't get involved in it until I got a nasty call
15 from Dan Hartman while Tony was up on a trip, really
16 scolding me about this, and I said, 'Well, we've got to have
17 a used line,' and I kind of staved him off until Tony got
18 back, but it triggered some real consequences and costs
19 for us.

20 "Question: Those are consequences that --

21 "Answer: That I feel Tony is most responsible
22 for, yes.

23 "Question: Well, didn't you foresee that Comerica
24 would react the way it did when you approved the -- got the
25 flooring line from Key Bank?

1 "Answer: Well, no, because I had already had a
2 flooring line with them before. Tony came for \$800,000 --
3 before Tony came for 800,000 it had been going on for a while,
4 so Comerica hadn't objected to the 800,000. They hadn't said
5 anything to me about it, no."

6 Okay. Now, what Mr. Hartman said to you was you
7 only get your flooring from Comerica and they don't floor
8 used, right?

9 A I believe that's what his statement was.

10 Q All right.

11 A Yeah.

12 Q They didn't -- they were not upset at the fact
13 that you had a two million dollar floor line with Key Bank
14 for used, it was just the fact that you had a flooring line
15 at all with another bank and they'd found out about it by
16 the Secretary of State filings, right?

17 A I never hid it and I told you in my recent
18 answer --

19 q I'm not asking --

20 A -- that the \$800,000 I knew about --

21 Q I'm not asking you about whether you hid it or not.

22 A -- and they never said a word until this call.

23 Q Now, what you said under examination from Mr.
24 Winder was is that the problem with Key Bank started when
25 Mr. Kraatz decided to change the new flooring line, new car

1 flooring line, right? That's what you said in your
2 testimony?

3 A I think that's right and I did feel that way and I
4 do feel that way.

5 Q But the problem really started with the used flooring
6 line when Key Bank --

7 A I'm not sure that's right.

8 Q When Comerica found out about that, wasn't that
9 what you said to me in the deposition that we've read?

10 A What you've read me does not disqualify the fact
11 that they were upset about the changes in the new car floor
12 line.

13 Q Sir, I'm asking you when it started, Comerica was
14 upset about the fact that you had a used flooring line.

15 A No, they weren't, not till we changed it to the
16 new one to Key Bank. This was at the time we switched our
17 new car flooring to Key Bank. Then they asked about used,
18 which they have never asked me about before, and that's
19 what I said.

20 Q Okay, sir, is this the answer -- are these -- is
21 this the answer you gave me on May 12, 1994?

22 A Yes, sir.

23 Q Okay, and on that date we were talking about the
24 used flooring line, right?

25 A In what you read me that appears correct.

1 Q All right. Now, Mr. Hartman never said anything at
2 all, he never -- what you said, scolded me about this. He
3 scolded you about the fact you had a used flooring line with
4 Key Bank, right?

5 A He scolded me for switching a new car line.

6 THE COURT: We've heard enough of this, counsel.
7 Let's move on.

8 Q (By Mr. Zundel:) Now, with respect to the
9 switching of the used floor -- new car line, whichever, Mr.
10 Wilkinson, you're the only signatory on those documents for
11 Heritage, right?

12 A Yes, sir.

13 Q Tony wasn't an officer of Heritage, was he?

14 A That's right.

15 Q He couldn't make a move without your approval,
16 could he, with those banks?

17 A Well, without my ultimately having to sign, that
18 would be correct.

19 Q And you discussed it with him, everything about
20 your financing arrangements, whether it be Comerica or Key
21 Bank where you were going to get your flooring lines, right?

22 A His broach to me on Key Bank --

23 Q Sir --

24 A -- was not discussed in advance.

25 Q Of you signing the documents?

1 A No, no -- yes, in advance of signing the documents,
2 but at this time I did not think we'd signed the documents.

3 Q This all happened in 1990?

4 A No, I'm talking about the new car line switch.

5 Q When did that occur?

6 A My understanding was is that it occurred in the
7 latter part of November of '91. Maybe it was November of '90,
8 but I thought it was '91.

9 Q But you approved that switch also, didn't you?

10 A Eventually, yes.

11 Q Well --

12 A I did have to sign.

13 Q And if you hadn't signed, it wouldn't have been
14 switched, right?

15 A I think they had drafted it -- I think Key Bank
16 had drafted and paid off all the new cars prior to my signing
17 for that line. This is what I remember.

18 Q You think that Key Bank advanced two million dollars
19 to your dealership before you signed any papers?

20 A Oh, I think I signed Key Bank's papers, yes, but I
21 didn't know that I'd signed anything with Comerica.

22 Q Well, Comerica, sir, was very upset with you in
23 October of 1991, right?

24 A If that's what this referred to in the deposition,
25 I didn't look at the exact month.

1 Q Well, let me show you what's been marked as
2 Exhibit Number 275.

3 A Do we have it here?

4 Q I'll show you this. This is a loan modification
5 and extension agreement with Comerica. Do you see that?

6 A Yes, sir.

7 Q Now, you, according to your recollection, you
8 didn't change the new car line until November of 1991,
9 right?

10 A Well, I said late '91. I thought it was November
11 or December.

12 Q Well, Comerica had already declared you in default
13 and you had already entered into extensive negotiations with
14 Comerica so much that you had entered into a loan modifica-
15 tion and extension agreement, which is this Exhibit 275.

16 A Yes, sir.

17 Q And that extension agreement required you to
18 exit Comerica and get rid of all your loans with Comerica,
19 didn't it?

20 A But I thought that was in '91. We had a --

21 Q This is '91, sir.

22 A Yeah, but May of '91 --

23 Q That they required you to exit.

24 A Well, then, I was wrong. Then maybe our new car
25 line was switched in October of -- or November of '90. I

1 don't remember.

2 Q So it was switched?

3 A But I did feel and I did say with all honest
4 intent that they got on us for the switch of the new car line
5 to Key Bank and I thought it was in '91.

6 Q But now you think it's in '90?

7 A Well, I don't know. I'd have to read all these
8 papers.

9 Q The point is, were you harboring some malice
10 towards Mr. Kraatz --

11 A No.

12 Q -- for this period of time that would cause you
13 to fire him in September of '92?

14 A Hey, this wasn't the only reason. I cited
15 articles out of his employment agreement. This was a costly
16 situation.

17 Q That you started in 1989 before Mr. Kraatz ever
18 came.

19 A When that used car floor line was granted, could
20 have been before '89, but I never, ever knew when I had a
21 used car line from Key Bank that it was in violation of
22 anything with Comerica and Dan Hartman had been out several
23 times.

24 Q Now, you didn't get along very well with Dan
25 Hartman, did you?

1 A No, I didn't.

2 Q In fact, you had a very acrimonious meeting with
3 Dan Hartman in late 1990 or early '91, didn't you?

4 A As I remember, it was at the time this all came
5 up and I thought it was '91. It may have been late '90.

6 Q All right. Let me show you what's been marked
7 as Exhibit 266. This is your letter to Mr. Hartman,
8 is it not?

9 A Yes, sir, it was in '91.

10 Q I'll trade you.

11 A Oh, sorry.

12 Q It's January of 1991, right?

13 A Correct.

14 Q Mr. Kraatz had been at your dealership for about
15 seven months at this time, right?

16 A Yes.

17 Q Okay, and you accused Mr. Hartman of misrepresen-
18 ting -- let's see, you say in the first paragraph, second
19 sentence, "In numerous previous conversations with you we
20 have advised you that Heritage has obtained and is seeking
21 to obtain financing from local banks for its new and used
22 vehicle flooring and for certain other purposes, thereby
23 replacing some of the financing arrangements it presently
24 maintains with Comerica," right?

25 A Yes, sir.

1 Q And this is the letter that you signed?

2 A Oh, yes.

3 Q Not Mr. Kraatz?

4 A I understand that.

5 Q Okay.

6 A So the switch on the new car line must have been

7 in late '90 instead of '91 and I did say I wasn't sure which

8 year because as I remember following up with Comerica, it

9 would be after Key Bank paid off a used car -- a new car

10 line. That's my recollection; really is.

11 Q So this big switch of your flooring line

12 occurred within what, four months after Mr. Kraatz had --

13 A If it occurred in October of '90, it would have

14 been about that.

15 Q Do you remember a meeting on or about January --

16 or around January with Mr. Hartman that was fairly heated?

17 A Yes, I do.

18 Q Okay, and who was -- when did that meeting occur?

19 A I don't remember exactly.

20 Q Who was present?

21 A I don't remember. I remember that Dan and I

22 were there.

23 Q Dan Hartman and you and Mr. Kraatz, right?

24 A Could have been.

25 Q And you recall whether Mr. Kraatz said anything

1 at all in that meeting?

2 A No, I don't remember who was at the meeting, but
3 I remember Dan was upset with me.

4 Q And you were upset with him?

5 A Yes, I was.

6 Q And you swore at him?

7 A Did I?

8 Q Didn't you?

9 A I don't know.

10 Q Can't remember?

11 A I can't.

12 Q Okay.

13 A Not that I may not have, but I don't remember it.

14 Q And you said to him in the last -- second to the
15 last paragraph, "Dan, I can not express strongly enough
16 how upsetting it has been for you to continue to contact
17 our local banks in an apparent attempt to interfere with our
18 negotiations with those banks. These activities must stop
19 immediately or we will be forced to pursue legal remedies.
20 However, in saying that, I wish to stress that we would prefer
21 to avoid confrontation but instead seek an arrangement along
22 the lines described above so that all of these matters can
23 be put behind us."

24 Now, with this history, do you really blame Tony
25 Kraatz as the primary instigator of your problems with

1 Comerica?

2 A Hey, I didn't -- I said the problem occurred in
3 either late '90 or '92 over having Key Bank pay off our new
4 car line and I fully to this moment thought it did. Dan
5 and I have had discussions over the years, but this letter
6 I'm sure was helped in preparation to try and save it.
7 I mean, I remember when he got mad at me and I remember Tony
8 saying, "Well, let's do what we can to make him happy,"
9 but I don't remember who was in the meeting.

10 Q Fact is Key Bank had threatened to call your
11 loan.

12 A Key Bank?

13 Q Excuse me. Comerica had threatened in 1990 to
14 call your loan and you and Tony decided that you'd better go
15 out and get a new car line from Key Bank. That's the
16 sequence, right?

17 A Well, Tony did represent that we should get
18 flooring close to home. I was not aware and don't even
19 remember -- in fact, there's no signature on this letter.

20 Q Oh, there is.

21 A No, I don't mean mine. I mean this one showing
22 something about in default as of 4-30-90, but it had nothing
23 to do with the used car line.

24 Q Let me ask you another question. In connection
25 with your dealings with Comerica, you were represented by

1 counsel, weren't you?

2 A Yes, sir.

3 Q Mr. Prater at Suitter Axland?

4 A That's correct.

5 Q And Mr. Prater dealt very closely with Comerica's

6 counsel, didn't he?

7 A Most of those meetings and workings were -- Tony

8 did handle through the Suitter Axland people. I didn't have

9 a lot of personal involvement after this letter, but we

10 were represented by Suitter Axland, that's correct.

11 Q All of your dealings with Comerica, any decision

12 you made regarding Comerica was done after you had

13 professional advice from your accountants and attorneys,

14 you and Tony had talked about it after Tony had come and a

15 decision was made to go one way or another, right?

16 A No, because the new car line was paid off at

17 Comerica before all that arose --

18 Q All right.

19 A -- by Key Bank and I'm still trying to find out

20 if this is Heritage Honda of St. George or Heritage Honda of

21 Murray that this letter came from or this memo came from

22 Comerica on.

23 Q This is 275. Now, what was the problem with

24 titles that you mentioned, failure to get titles?

25 A There were some used cars that were --

1 Q Nevada or California?

2 A There was a Nevada, couple of Nevada ones.

3 Q Well, which one --

4 A And California, I believe the titles have been

5 sent and we didn't have the money and the guy never paid us

6 and I asked Tony for the check and he didn't --

7 Q Just a moment. With respect to California,

8 this is the Jim Snider affair?

9 A That's correct.

10 Q All right, and this occurred when?

11 A Man, I can't remember the exact time. It was over

12 a period of time because he hadn't sent the money to us.

13 Q Well, when you say it was over a period of time,

14 as a matter of fact, the money came in within a few days

15 after you brought it to Mr. Kraatz's attention, didn't it?

16 A No, I brought it to Mr. Kraatz's attention

17 before that, no, no.

18 Q Within a few days after you brought the matter

19 to Mr. Kraatz's attention, the money came in?

20 A When did I bring the matter to Mr. Kraatz's

21 attention?

22 Q Let me turn your -- let me ask you to turn to

23 Volume Three of your deposition.

24 A Can you help me with the page on that?

25 Q Yes.

1 It says here on 308 -
2 A Thank you.
3 Q -- line 10, and I'll read from 308, line 10,
4 to the rest of the page and 309 to half a page.
5 A Just a minute. I can't find it, 309 in here.
6 Q You have Volume Three?
7 A I think this is Volume Four. Yeah, it is.
8 MR. ZUNDEL: Move for the publication of Volume
9 Three of Mr. Wilkinson's deposition, your Honor.
10 THE COURT: Okay. This is Volume Three here,
11 Mr. Wilkinson.
12 THE WITNESS: Thank you, sir.
13 Q (By Mr. Zundel:) I'm going to start at --
14 A 302 you say?
15 Q Yes.
16 A Thank you.
17 Q 308 is what I said.
18 A Okay.
19 Q Okay. "Question: And what did you say?
20 "Answer: And I said, 'I don't care how you get
21 it here and I don't care who goes --'"
22 MR. WINDER: What line, counsel?
23 MR. ZUNDEL: Line 10. "I don't care how you get
24 it here. I don't care who goes, but that money has got to
25 be here by tonight.

1 "Question: Okay, and what did he say?
2 "He said, 'Well, I think it will be.'
3 "Question: And what did you say?
4 "I said, 'Think is not good enough.'
5 "Question: And he said?
6 "Answer: I don't remember what he said. I was
7 steamed.
8 "Question: And who had let the titles go?
9 "The used car title clerk."
10 Now, that's not Tony, is it?
11 THE WITNESS: No.
12 Q (By Mr. Zundel:) "You weren't particularly mad
13 at Tony then?
14 "Answer: I was made because Tony hadn't followed
15 it up and it was his responsibility to see that things like
16 that didn't get out of hand. Yeah, I was mad at Tony.
17 "Question: Because the used car title clerk
18 had made a mistake?
19 "Answer: Because he's the general manager and
20 didn't know what the hell was going on. That's why I was
21 mad at him.
22 "Question: Did you get the money?
23 "Answer: I did.
24 "Question: When?
25 "About two days later."

1 A But that wasn't the first time I'd talked to Tony
2 about it. I discussed it off a schedule in a meeting that
3 we'd had together before. The context of this -- and you
4 took it a little bit out of context. You need to read the
5 page before, as well, because it refers to that, but never-
6 theless, it came in after this conversation, quickly.

7 Q This was in 19 -- when, '91?

8 A I think it was in '91, yeah.

9 Q Early or late '91, sir?

10 A I can't remember.

11 Q And it was a reason that you're now asserting
12 in this case for firing Tony in September of 1992?

13 A It was one that I didn't feel I was dealt up front
14 with and it's just one.

15 Q That same volume of your deposition you don't
16 believe -- before I return -- you believe -- you don't
17 believe that Tony was dishonest in any way in connection
18 with the Snider transaction we just talked about, do you?

19 A I think I said in my deposition that I don't
20 think Tony's basically a dishonest person.

21 Q And he didn't deceive you; he didn't intentionally
22 deceive you?

23 A Well, I haven't read this, you know, as you've
24 referred here, but I don't think he would try to do that,
25 but when you have a manager, you leave a lot of stuff in his

1 hands and you -- and it gets scary when it doesn't happen.

2 Q Well, he was relying on his managers, too,

3 wasn't he?

4 A I know.

5 Q Brett Smith?

6 A But that's his job.

7 Q And your son-in-law Jeff Gorringer?

8 A Certainly.

9 Q And Jeff Wilkinson, he had to rely on him?

10 A It doesn't matter. They're employees and it was

11 his job to get a handle. It doesn't matter whose job it was.

12 Q Now, the car, the fifth wheel, wasn't it, that

13 went to Nevada is what you're talking about was the other

14 instance?

15 A Well, there was a trade-in involved in Nevada,

16 too, but I don't think that was a fifth wheel. It was a

17 truck and trailer, but I don't know that both the units

18 went back to Nevada. I can't remember. We didn't have the

19 title on those. I was told we did.

20 Q Who was Tim Rideout?

21 A Tim Rideout was a salesperson.

22 Q And this also occurred in 1991; isn't that right?

23 A That could be.

24 Q And Tim Rideout had sold a vehicle and taken some

25 trade-ins and the trade-ins were in Nevada, right?

1 A I understood the trade-ins were on our lot, but
2 I could be wrong. I don't think they were in --
3 Q Oh, the trade-ins were on your lot, but you
4 didn't have the titles?
5 A Right, that's what I found.
6 Q And whose responsibility was it to get the
7 titles primarily initially?
8 A Well, it would be the responsibility of the
9 salesperson.
10 Q Tim Rideout, right?
11 A Yes, these were friends of Tony's and he gave the
12 deal to Tim Rideout. Now, I would assume that Mr. Kraatz
13 would follow up on the titles on his deal. It's called a
14 spoon. Tim Rideout got most of the spoons back then
15 because he and his dad and Tony's dad are very close.
16 Q Now, he got the titles?
17 A Well, I don't think both -- both units went back
18 there, as I remember, he got some cash.
19 Q Mr. -- Tony got Mr. Rideout to actually go to
20 Nevada and get the titles and get it resolved, right?
21 A He got Mr. Rideout to go to Nevada and get it
22 resolved, but it was some cash and a title involved, I
23 believe. I think we wholesaled half the units locally and
24 the other was taken back down there and I think he collected
25 some cash. It wasn't the amount that I was told that the

1 deal would reflect.

2 Q You were told by who?

3 A Tony.

4 Q Well, who was Tony relying on?

5 A Look, I hired him as a general manager so I
6 wouldn't have to do it. That's all I'm saying.

7 Q And so is it your philosophy that if one of the
8 general manager's underlings makes a mistake, the general
9 manager should be fired?

10 A Well, after so many times, I mean, this is
11 evidenced by the fact that he and I discussed these problems
12 many more times than once. There are another couple of deals
13 if you want to go through them.

14 Q Well, I only want to go through the deals you told
15 me about because I took five days to try and figure out
16 why you were trying to fire -- or why you'd fire Mr.
17 Kraatz, right?

18 MR. WINDER: I don't imagine that was a question.
19 If it was, I object to it.

20 THE COURT: Well, it wasn't a question.
21 How much longer, Mr. Zundel?

22 MR. ZUNDEL: Your Honor, I have a few more items
23 to go over. I just listed them as fast as I could list them
24 and I have a file for each one.

25 THE COURT: Well, all right, go ahead.

1 Q (By Mr. Zundel:) Now, the title problems we've
2 talked about were resolved, right?

3 THE COURT: I don't know that it's necessary,
4 counsel, to recap it. Let's move on to the next point.

5 Q (By Mr. Zundel:) Okay. Let's see. You mentioned
6 that gross profits were down and so that's why you fired
7 Mr. Kraatz; is that right?

8 A I remember attesting to the fact that there were
9 two articles cited in the employment agreement in his
10 termination letter. These other things we've talked about
11 were discussed with Mr. Kraatz and I expected them to
12 discontinue.

13 Q I asked you, did you fire Mr. Kraatz because you
14 thought gross profits were down?

15 A Not only, no.

16 Q Even was it any part of the problem?

17 A Yeah, it was part of the problem.

18 Q Were gross profits down?

19 A Per unit for the best part of the time he was
20 there, the gross profit per unit did decline.

21 Q What is the baseline that you are referring
22 to? Declined from when?

23 A What do you mean, baseline?

24 Q Declined from when?

25 A I think they declined from when he -- what they

1 were when he first came, for a while, and then I think a
2 couple of months they went up again and then they went back
3 down again and there is new and used to consider.

4 Q Is the baseline May, before he came, May 1990?

5 A I would just have to say any time before he came
6 in a reasonable period of time. It wouldn't have to be
7 three years.

8 Q Exhibit Number 295, the May statement, would you
9 get that, please? Do you have that before you?

10 Now, do you know where to look to get the gross
11 profits, sir?

12 A Yeah, I had a schedule that Tony and I reviewed
13 that had the --

14 Q The last page?

15 A Comparative months.

16 Q The very last page of the statement for the
17 month.

18 A Yes, I know.

19 Q And in May 1990 it would be line 9.

20 A Okay.

21 Q On the right-hand side, right?

22 A Yes, sir.

23 Q And the gross profit was \$1,220 per unit, right?

24 A On new, on new, that's right.

25 Q Well, what were you referring to?

1 A No, that's correct, in this statement.

2 Q All right.

3 A Okay. We'll take new first.

4 Q Well, let's look at August 1992.

5 A Well, no, no, let's don't go from 1990 to 1992.

6 Q Here you go, sir. Evidently that's already out

7 someplace.

8 A Yeah, well, that's going from the month before

9 he started to the month before he left. Let's take some

10 months in between.

11 Q Here's the August 1992 statement, sir. Do you

12 know where to find the gross profit per vehicle?

13 MR. WINDER: What exhibit number, counsel?

14 MR. ZUNDEL: That would be 297.

15 MR. WINDER: And August is which?

16 MR. ZUNDEL: 297 and then you take it chronological

17 to get to August. 1992 is 297.

18 THE WITNESS: Yes, sir.

19 Q (By Mr. Zundel:) And the gross profit for new

20 vehicles in August of 1992 was \$1,310.

21 A Three hundred and nine, one thousand three-O-nine,

22 that's fine, but --

23 Q All right.

24 A But you didn't give me anything in between.

25 Q Sir, I asked you what you were comparing it with

1 and you told me --

2 A I said --

3 Q Let me ask you what -- just quickly, \$1,309 is

4 not a bad gross profit, is it?

5 A Well, it's not really what it is now.

6 Q Not a bad profit.

7 A But it's comparative to the month before he

8 started, yes, it's more than the month before he started.

9 Q Now, did you hear Larry Miller's testimony?

10 He was here --

11 A Yes, sir, he was here.

12 Q I asked him how much you were saving, how valuable

13 this right of yours was to buy a brand new vehicle every

14 year and he said it was about a thousand dollars per

15 vehicle. Remember that?

16 A That's assuming if I bought two new vehicles for

17 personal use every year, I guess.

18 Q And he indicated that that was about the gross

19 profit that he was looking at is a thousand dollars that

20 you were taking from him?

21 A That could be.

22 Q All right. Did you ever tell Tony Kraatz, "Look,

23 I want gross profit to be 'X' or you're fired?"

24 A Pardon?

25 Q Did you ever tell Tony Kraatz, "I want gross

1 profits to be a certain level or you'll be fired"?

2 A No, sir.

3 Q Did you ever tell Tony Kraatz that you wanted

4 gross profits to be a certain level period?

5 A You want a yes or no answer?

6 Q Right.

7 A No, I didn't say it exactly that way.

8 Q Never gave him a gross profit figure he had to

9 make?

10 A There were targets, yes.

11 Q Have we covered the gross profit issue?

12 A On new we have but not month by month.

13 Q Is there a gross profit issue regarding used?

14 Just yes or no.

15 A Yes.

16 Q This is something you referred to in your direct

17 examination. Where do you get the gross profit per used

18 vehicle?

19 A Off the statement.

20 Q Let's just look at that statement.

21 A All right.

22 Q August, what line do you look at, sir?

23 A Is there any reason --

24 Q Isn't that line 20?

25 A Which statement are we on?

1 Q August 19 --
2 A Yes, it is.
3 Q All right. Gross profit per used vehicle, \$1,312,
4 right?
5 A That's correct.
6 Q Not a bad gross profit for used vehicles, is it?
7 A No.
8 Q All right. Now, in 1990 gross profit for used
9 vehicles was \$1,323, right?
10 A That's correct.
11 Q You'd say that's about the same, wouldn't you?
12 A Yes.
13 Q Okay. No drop there then, to speak of, right?
14 A One dollar, that's it, looks like -- well, no,
15 eleven dollars. It's not a big deal
16 Q Have we covered the gross profit issue, sir?
17 A We have not covered the gross profit issue.
18 Q Okay. What is it that is your issue?
19 A Month to month.
20 Q Yes? Month to month?
21 A Yes.
22 Q So when you say -- I'll ask you again then. When
23 you say that gross profits were down, between what period, sir;
24 do you know?
25 A I think I answered you already that they --

1 you just alluded to it, you said something about deferment
2 of expenses; is that right?

3 A When did I say that?

4 Q Did you fire Mr. Kraatz because any expenses at
5 the dealership had been deferred as far as recognition of
6 them?

7 A We discussed, I think, a particular month, yes.

8 Q Did you fire Mr. Kraatz because expenses at the
9 dealership had been deferrred as far as recognition?

10 A I thought I said it was a combination of things
11 I released him.

12 Q Was this one of the reasons?

13 A It's the cause and effect of so many peculiarities
14 that you can't just take one and pick it out.

15 Q None of them are in and of themselves grounds to
16 fire Mr. Kraatz; is that what you're saying?

17 A No, that's not what I'm saying.

18 Q Are any of them grounds, in your opinion, in and
19 of themselves, to fire Mr. Kraatz under your contract with
20 him?

21 A The reasons I cited.--

22 Q Sir, I've got a question --

23 A Yes, they are.

24 Q Which ones?

25 A All of them collectively. That's why he was there

1 THE COURT: Counsel --

2 THE WITNESS: -- went down over a period of time.

3 THE COURT: Just a minute. The records speak for
4 themselves. I suppose that if this is a matter that is of
5 interest to you to pursue, you ought to pick, for instance,
6 a month in each of the three years involved, for instance,
7 August -- August '90 both new and used, August '91 new and
8 used, August '92 new and used, and I submit that it will
9 give you a picture of this fluctuation that's being
10 reerred to, but I've heard, I think, enough of this to get
11 a feel for what your position is and what Mr. Wilkinson's
12 position is.

13 MR. ZUNDEL: All right.

14 THE COURT: All right.

15 Q (By Mr. Zundel:) Now, let's talk about the
16 number of units for a moment. The number of units that were
17 sold for used cars, for example, was way up in 1992
18 before Mr. Kraatz left, right?

19 A We had a second location and that's probably
20 correct. I haven't looked but --

21 Q And I suppose if you've got a lot of volume, you
22 might even be willing to take a few less dollars per
23 unit; is that right?

24 A Volume's important, you bet.

25 Q Now, you mentioned something in your testimony,

1 for such a long time.

2 MR. ZUNDEL: Move to strike the answer, your
3 Honor. It's nonresponsive to my question.

4 MR. WINDER: Your Honor, I think it's the
5 witness's answer. It may not be the one he sought, but
6 it's the witness's answer.

7 THE COURT: I will allow the answer to stand.
8 I think that there may be some miscommunication in the
9 question to the witness, counsel, in his understanding of it.
10 The witness has delineated what he thought were the reasons
11 that went into his decision to terminate and I realize that
12 the mere perspective -- we've spent considerable time here
13 trying to analyze each of those one by one, but the
14 witness's position, as I understand it, is that if you wish
15 him to delineate the most serious of those, he didn't fire
16 the gentleman for any particular one reason, but for all of
17 the reasons, or maybe some of the reasons, but I don't
18 know how much further we're going to get with this. It took
19 you five volumes in your deposition to try to work it out
20 and I'm not sure we got the answer yet, so --

21 Q (By Mr. Zundel:) Let me -- you had deferred -- the
22 deferment of the recognition of expenses at Heritage
23 predates Mr. Kraatz by years, right?

24 A Excuse me, sir. Say that again, please.

25 Q Before Mr. Kraatz ever came, you would sometimes

1 make the decision not to recognize an expense in a
2 particular month in which the expense was incurred but recog-
3 nize it later on your financial statements, right?

4 A So hard to give -- it's hard to give a yes or no
5 answer on that because it is a collective, but the way that
6 question is asked, I would have to say truthfully yes,
7 that's true.

8 Q All right. Let me show you what's been marked
9 as Exhibit 249, for example. Do you have that document?
10 I'll show this to you. It's a check to Paul Thomas
11 Jewelers for a Rolex watch and some Lladro, right?

12 A Yes, sir.

13 MR. WINDER: Judge, I'm going to object. This is
14 clearly beyond the scope of the direct examination. A Rolex
15 watch? Paul Thomas in 1988?

16 MR. ZUNDEL: I don't think it is. Well, it really
17 depends at -- what's at issue here, Judge, and frankly, I've
18 had a hard time in trying to find out exactly what is at
19 issue. I've got these vague gunshot accusations against my
20 client and I don't know how else to deal with them other than
21 take them one at a time and show how silly they are.

22 THE COURT: Well, the witness has acknowledged
23 that prior to the time the plaintiff arrived on the scene,
24 there were decisions about deferred expenses. Now, that's
25 one thing, but if my virtue of that we're opening up a door

1 to start itemizing the detailing of each of those deferred
2 expense decisions, we are belaboring the point.

3 Now, I don't know how many of these you have or
4 you propose to introduce, but if you're trying to get the
5 witness to respond as to what specific deferred expenditure
6 decision was made that went into the decision to terminate,
7 then that's fair game, but I don't know that going back over
8 the course of time on various expenses deferred is going to
9 assist us in deciding which, if any, of those decisions
10 went into the decision to fire, unless it has to do with a
11 Rolex watch.

12 MR. ZUNDEL: I would agree with you, Judge. I
13 suppose what I need is a specific allegation which I've
14 never gotten.

15 THE COURT: Well, I can't solve your problem,
16 you know.

17 MR. ZUNDEL: I understand.

18 Q (By Mr. Zundel:) 249, let me explore this for 30
19 seconds. The last time I said that it was a problem.

20 This was a personal expense of yours?

21 A Not at all, sir.

22 Q Was it an expense for a gift to a Honda repre-
23 sentative? Yes or no?

24 A No, it wasn't.

25 Q Denny Boyle?

1 A No, sir.

2 Q What was it for?

3 A It was in honor of Ms. Green's 25th anniversary

4 as our financial and office manager, and it was given at a

5 party and it was engraved on the back and so was the

6 Lladro given.

7 Q And it was an expense for \$6,072?

8 A Which was less than what we gave Mr. Boyle after

9 ten years he was there.

10 Q And you didn't recognize you put this -- you paid

11 this money, gave the Lladro and the watch to Ms. Green?

12 A That's correct.

13 Q And you put the expense in the prepaid account,

14 275?

15 A May I explain why?

16 Q You put it in the prepaid?

17 A Yes, sir, I did.

18 Q Now, that is an asset account, right?

19 A Yes, sir.

20 Q It says you've got something coming to you that

21 you haven't yet received.

22 A No, no, that isn't true. May I explain why?

23 THE COURT: There's no question pending at this

24 point, sir.

25 THE WITNESS: Thank you, your Honor.

1 THE COURT: All right.

2 Q (By Mr. Zundel:) Now, whatever expenses were
3 deferred during Mr. Kraatz's tenure were deferred with your
4 knowledge, right?

5 A No.

6 Q You stipulated to the deferment of the expenses;
7 that's the term you used.

8 A After the fact.

9 Q After the fact. At any rate, you're saying this
10 happened in 1990 is what you referred to, right? That's
11 what you have referred to?

12 A Well, I can't remember which conversation we're
13 going back to, I'm sorry, or which question.

14 Q The one you have referred to in your direct
15 examination. You said there was a conversation between
16 you and Mr. Kraatz in 1990 where the deferment of expenses
17 was discussed; is that right?

18 A That's correct.

19 Q Do you remember the conversation?

20 A I do.

21 Q What month did it take place in?

22 A I believe October of 1990.

23 Q And it's your recollection that some expenses
24 had been deferred in that month?

25 A Deferred out of that month, yes.

1 Q And the end of the month hadn't yet come?

2 A Yeah, it had.

3 Q So was the conversation in November? --

4 A So it must have been November. It was about

5 October of '90, I mean, the conversation was about -- not

6 timewise but the content was about October of '90.

7 Q And you talked about this with Mr. Kraatz?

8 A Yes, sir.

9 Q Whether you found it before or after, and you

10 stipulated to it and said okay?

11 A That is correct.

12 Q All right. Now, was there ever any month that

13 you said don't do that, assuming that Mr. Kraatz was making

14 a decision at all? Ever object to it? Yes or no?

15 A Ask it again, please, sir.

16 Q Did you ever object to it, say don't do that,

17 whatever it is we're talking about?

18 A I'm just trying to figure out how to answer you.

19 I know it's supposed to be yes or no, but there was a con-

20 dition on my answer to him and I don't know how to state it.

21 All I can tell you is deferred expense did continue, yes,

22 but there were conditions that he and I discussed.

23 Q Well, I guess you'll tell me about them and then

24 I'll respond to them so I don't have to drag it out of you.

25 A Well, I'm not trying to be difficult. I'm not --

1 MR. ZUNDEL: Your Honor, may I have -- there was
2 a long list. May I have five minutes, a recess, to look and
3 see if I've responded adequately to everything that was
4 leveled at my client?

5 THE COURT: We'll take a brief recess, counsel.

6 (Whereupon, a recess was taken.)

7 Q (By Mr. Zundel:) Mr. Wilkinson, let me show you
8 what's been marked as Defendant's Exhibit Number 65 which is
9 your letter you sent to Mr. Kraatz giving him notice of
10 termination. Do you see that?

11 A Yes, sir.

12 MR. WINDER: What's the number again, counsel?

13 MR. ZUNDEL: Sixty-five.

14 Q (By Mr. Zundel:) In that letter you said that
15 you were terminating him pursuant to the provisions of your
16 contract with him, correct?

17 A Provisions in the employment agreement, yes.

18 Q All right. Now, what were you referring to
19 in that letter? The terms of dishonesty and refusal to do
20 one's duties or something else?

21 A I believe those two references refer to non-
22 performance and dishonesty.

23 Q Okay, those two things?

24 A That's my understanding.

25 Q Now, you didn't tell him in that letter, you

1 didn't cite any instance at all in the letter, did you?

2 A Just the articles, the numbers.

3 Q Just a general reference.

4 Now, you received eventually a demand letter for

5 breach of contract from my office, didn't you?

6 A Yes, sir.

7 Q And you responded with a letter with a litany of

8 reasons, right?

9 A Yes, sir.

10 Q And you were mad when you wrote the letter.

11 A Yes, sir.

12 Q And you really didn't care whether what you said

13 in that letter was a real -- a true reason for terminating

14 him, or just everything you could think of, right?

15 A I cared but yes, I was mad. I was hurt. I'd

16 worked a long time in my life for what I have and for some-

17 body to threaten me that way did hurt me and I did react

18 without any legal counsel and I did write the letter and it

19 was in poor taste.

20 Q You came up with everything you could think of

21 that even touched on a possibility of a misrepresentation

22 and put it down, right?

23 A Everything that crossed my mind and heart in the

24 moment, I did, sir.

25 Q And you just did the same thing while you were on

1 the witness stand in direct examination, didn't you?

2 A Not entirely.

3 Q But pretty close.

4 A You referred to those matters, though, so I had

5 to answer.

6 Q Now, let's get to the issue of profitability,

7 sir, just general profitability. The dealership actually made

8 a profit in 1992 of \$5,900, right?

9 MR. WINDER: Ninety-two?

10 MR. ZUNDEL: Ninety-one.

11 THE WITNESS: I'm glad you mix up some years, too.

12 It could have. I don't have the statement in front of me.

13 Q (By Mr. Zundel:) All right. Now, you're familiar

14 with Dr. Schmitt's report on the 1992 year and the profit-

15 ability issue, aren't you?

16 A The 1992 year?

17 Q Tab three.

18 A No, I have never been shown those.

19 Q Let me show you what is a schedule in that report,

20 sir. Do you see it?

21 A Yes, sir.

22 Q It shows that if the dealership had been operated

23 within NADA guidelines after expenses the dealership would have

24 made a profit through August of \$720,000.

25 MR. WINDER: Judge, I'm going to object as way

1 beyond the scope of my --

2 THE COURT: Objection sustained. We're not going
3 to cross-examine this witness on something your expert has
4 prepared. He has not seen it, he's indicated.

5 Q (By Mr. Zundel:) Sir, you were in charge of
6 expenses in 1992, right?

7 A I was?

8 Q You won't admit that you were?

9 A I don't know that I was in charge of expenses
10 myself in 1992, no.

11 Q You were in charge of -- it was up to you as to
12 what employee benefits the employees of Heritage received,
13 wasn't it?

14 A Not entirely, no.

15 Q All right. It wasn't entirely up to Mr. Kraatz,
16 was it?

17 A I don't believe it was either, no.

18 Q All right, and it wasn't entirely up to Mr. Kraatz
19 how much advertising expenses got expended in 1992 either,
20 was it?

21 A I think we conferred on that, yeah.

22 Q All right, and it wasn't entirely up to Mr. Kraatz
23 how much compensation you took out of the store, was it?

24 A I don't think it was.

25 Q It was entirely up to you how much compensation

1 you'd take out?

2 A I don't know if it was entirely up to me, but it
3 wasn't his responsibility, that's true.

4 Q It was not entirely up to Mr. Kraatz how much
5 Helen Green got paid, was it?

6 A No.

7 Q You also had to approve any adjustments he made
8 in that regard, right?

9 A That's correct.

10 Q All right, and it wasn't entirely up to Mr.
11 Kraatz how much legal and auditing got billed to Heritage
12 in 1992, was it?

13 A He had a say in it just as I did.

14 Q Okay, but Heritage was paying the legal bills for
15 all of the business enterprises that you were involved with,
16 whether it be Good Works, St. George store --

17 A I don't think that's true.

18 Q -- FSLIC -- you don't think that's true?

19 A No, because some was reimbursed that you
20 haven't accounted for.

21 Q But Heritage paid for them in the first instance
22 and then you might reimburse some and you might not?

23 A I'm not sure that's right, either.

24 Q But you would admit that Mr. Kraatz didn't have
25 full control over the legal expenses that were billed to

1 this store. Full control is what we're talking about, sir.

2 A The guy who has all the risk and that everybody

3 finally comes to, I guess, has to be looked at as the one

4 that has full control.

5 Q And that's you.

6 A On this particular case I'm the person that has

7 all the risk.

8 Q Mr. Kraatz had no say whatsoever in what the

9 store was billed for rent by Good Works.

10 A Oh, yes, he did.

11 Q What?

12 A He made suggestions on rent. As a matter of fact,

13 he wanted to raise it.

14 Q You were Good Works, right?

15 A You didn't ask me that.

16 Q Mr. Kraatz had no control over Good Works, did he?

17 A Mr. Kraatz conferred with me very strongly on it

18 and we made decisions on that together, as a matter of fact,

19 and I deferred to him a couple of instances.

20 Q Do you take any responsibility for the losses in

21 the store that were suffered in 1992, sir?

22 A I know you want a yes or no answer, so I would have

23 to say yes, I do.

24 Q All right. Mr. Kraatz tried --

25 A Pardon?

R.2000

1 Q Mr. Kraatz tried to operate this store in a
2 profitable fashion, didn't he?
3 A I would have to say a lot of people tried, yeah,
4 he tried.
5 Q He didn't refuse.
6 A He refused instances and requests, yes, he made
7 some refusals, but I mean, you can't take it as one whole
8 deal.
9 Q You haven't told me about any of the refusals,
10 though.
11 A Yes, I have. I've told the Court and in my
12 deposition.
13 Q When he refused?
14 A Yes, sir.
15 MR. ZUNDEL: Okay. I'm all through. What do I
16 do with that, Judge? Launch in?
17 I suppose the record will reflect whether you've
18 explained any instance of a refusal.
19 No further questions, Judge.
20 THE COURT: All right.
21 MR. WINDER: One minute, Judge. I agree that the
22 documents speak for themselves. So the record is clear,
23 I move for the admission of all of the financial statements
24 Exhibits 291, 2 -- 300, and in particular, the summary of
25 those years, 208.

1 THE COURT: And there being, under our previous
2 arrangement, no objection, they are received.

3 MR. WINDER: If I might approach the bench, I
4 have a copy of 208.

5 I have no questions for this witness.

6 THE COURT: All right.

7 MR. ZUNDEL: Your Honor?

8 THE COURT: What?

9 MR. ZUNDEL: I need to see 208 for a minute.

10 THE COURT: You want to look at it before I do?

11 MR. ZUNDEL: No, Judge.

12 THE COURT: Mr. Wilkinson, sir, you may step down.
13 There are no further questions.

14 THE WITNESS: Thank you, your Honor.

15 * * *

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2004-06

IN THE DISTRICT COURT OF THE THIRD JUDICIAL
SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

SEP 12 1996

By *[Signature]* SALT LAKE COUNTY
Deputy Clerk

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS, a Utah
corporation dba Heritage
Honda, O. BRYAN WILKINSON,
and JEFF J. WILKINSON,

Defendants.

Case No. CIV 930900312 CN

REPORTER'S TRANSCRIPT OF DIRECT
EXAMINATION OF O. BRYAN
WILKINSON BY MR. WINDER ONLY
(PARTIAL TRANSCRIPT OF
TRIAL PROCEEDINGS)

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Thursday, August 29, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
(801) 532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
(801) 322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

1 * * *

2 O . B R Y A N W I L K I N S O N , having been
3 previously duly summoned and sworn as a witness, took the
4 stand again and testified on behalf of the Defendants as
5 follows:

6 DIRECT EXAMINATION

7 BY MR. WINDER:

8 Q I'd like to start with a little bit of housekeeping.
9 You were present when Mr. Schmitts testified about making
10 a \$48,000 annual adjustment based on 4000 a month to Ida
11 Jean?

12 A Yes.

13 Q And Ida Jean is who, Mr. Wilkinson?

14 A Ida Jean is my first wife and the mother of our
15 children.

16 Q And you have an obligation to her?

17 A I do.

18 Q And that's from -- arising out of what?

19 A A divorce in the very early part of 1988.

20 Q Is that obligation paid by the company?

21 A No, sir.

22 Q How is it paid?

23 A It's paid out of my personal account.

24 Q Thank you. Now, there was also -- you were
25 present when Mr. Kraatz talked about the initial meeting

1 with everybody at Heritage to announce that he was the new
2 GM. Do you remember his testimony?

3 A Yes.

4 Q And Mr. Kraatz said that when you introduced him,
5 you said he had a no cut contract. Do you remember that?

6 A I remember he said that, yes.

7 Q Did you say that, Mr. Wilkinson?

8 A Not at all.

9 Q Now, somewhere in front of you -- and there are a
10 lot of pieces of paper and maybe you can find it there and
11 maybe you can't, but you know what Exhibit Number 1 is, the
12 schedule?

13 A Yes, sir.

14 Q That's been talked about; do you have that?

15 A I do.

16 Q Mr. Wilkinson, in the car business, what's the
17 significance of Saturdays and evenings?

18 A Well, most all the time I can remember, Saturdays
19 are the biggest sales day and from 4 p.m. in the afternoon
20 till closing is the best sales time of each day.

21 Q In the evening?

22 A That's correct.

23 Q Okay. Let's talk some, Mr. Wilkinson, about the
24 car business. How long have you been in the car business?

25 A Personally I have been either a lot boy or a wash

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2010

1 | the dealer, operating the business yourself without a GM?

2 | A I considered it, but it wasn't a choice I wanted
3 | to make.

4	Q	Why not?
---	---	----------

5 A I had had some circumstances in my life that
6 brought me to feel that I really wasn't in a position
7 emotionally or spiritually or physically to do that.

8 Q Okay. There came a time when you started talking
9 to Tony Kraatz about becoming the GM at Heritage?

10 | A | Yes.

11 Q Can you give us a time frame?

12 A When I was in St. George living and had opened
13 a Honda store there, I'd become more acquainted with Tony,
14 mostly on a friendship and supportive basis, and as a result
15 of that, I felt good about Tony. He and some of his friends
16 he'd introduced me to had shored my personal life up and
17 given it direction that I had appreciated.

18 Q So in -- for a time frame are we talking about
19 May of 1990?

20 | A Most of this began probably in '88, '89 area.

21 Q But I'm talking now about when you were talking
22 to him.

23 A Talking to him about employment and general
24 manager --

25	Q	Right.
----	---	--------

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2020

1 of the store. It was kind of uncanny that in May of '90, in
2 the early part of the month, the middle part of the month,
3 it seemed to be turning up a little, but getting better, but
4 I still felt that a man of Tony's background --

5 THE COURT: No, Mr. Wilkinson. Mr. Wilkinson, the
6 difficulty we have is that we can't distinguish what your
7 feelings are from what is being said.

8 THE WITNESS: All right, your Honor, I'm sorry.

9 THE COURT: All we can inquire into is what the
10 conversation was, so the question pending to you is, was
11 there discussion at the time regarding specific numbers on
12 profitability, and if so, what was the discussion? Who said
13 what?

14 THE WITNESS: I don't remember specific numbers
15 being discussed, but I do remember the word profitability
16 and --

17 Q (By Mr. Winder:) Thank you.

18 Anything else you can recall from this meeting
19 that was said?

20 A To the best of my recollection, we left. I believe
21 he had an early evening appointment and we were going to get
22 together again in the presence of Mr. McCollough and try and
23 refine an agreement.

24 Q Okay, and eventually you did get together with
25 Tony's counsel and your counsel, right?

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2024

1 duties?

2 A The first actual face-to-face meeting that
3 discussed Tony's duties would be the first American Grill
4 meeting.

5 Q All right, and you've told us that you and Clark
6 Christian and Tony were there, Clark for part of it?

7 A No, that was another one at American Grill.

8 Q All right.

9 A Tony and I met first --

10 Q Okay.

11 A -- as I remember.

12 Q Who was at that meeting?

13 A Tony and I.

14 Q And can you give us an approximate time frame?

15 A I think that was an earlier one, mostly close to
16 noon and again, that one could have had Tanya in it, I can't
17 remember, but Tony and I discussed --

18 Q Tell us what he said and what you said.

19 A He seemed really interested and he felt that he
20 had the qualifications and stated what he felt those
21 qualifications would be, to come to work and make a good
22 thing for both of us and allow me time away from the store
23 and allow me a mental and physical and emotional and spiri-
24 tual healing time, which I appreciated.

25 Q What did he say his qualifications were?

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2027

1 Mr. Prater had a copy of that in his possession prior to my
2 having it, speaking over the phone, during these negotiating
3 times with Mr. McCollough or not, but there were, as I
4 remember, specifically, there were the qualifications, the
5 commitments to one another throughout the contract, and an
6 attempt to arrive at a value or worth of the business
7 between the two of us that would be a basis of starting for
8 Mr. Kraatz to make profitable improvements on the worth
9 of the store.

10 Q All right. Let's take those subjects one at a
11 time. What was said about qualifications and by whom?

12 A Well, there were not a lot of qualifications, as
13 I remember, laid out in the first and second draft. My
14 memory says that there were a few things that -- it was a
15 brainstorming almost. Clark talked, Lee McCollough talked,
16 and I talked, and we all addressed each topic as it came
17 along, and the qualifications and the representations and the
18 abilities to do what he knew I had to have done to be an
19 absentee dealer were finally put to paper as best and
20 concisely as you can.

21 Q Now, after that was put together and you had
22 Exhibit 38, did you then have meetings after Tony came to
23 work concerning his duties?

24 A Oh, yes.

25 Q Tell me, were these regularly scheduled meetings?

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2029

1 Q You reviewed financial statements at those
2 accountability meetings?

3 A We did sometimes.

4 Q Did you discuss profitability at these meetings?

5 A Oh, yes.

6 Q Did you always discuss it?

7 A Well, that was pretty important to him and to me.
8 I'd say we discussed it most every time, along with other
9 things.

10 Q All right. Now, let's just direct your attention
11 to the latter half of 1990. Are you able to distinguish
12 in your mind any particular meetings in 1990 where
13 profitability was discussed between you and Tony?

14 A Oh, yes.

15 Q Okay. Tell me when was the first one.

16 A After the first month he was there, first full
17 month that he had been in the store, which would not have
18 been June but July.

19 Q What did you say and what did he say about
20 profitability?

21 A Well, I mentioned that I had hoped our gross per
22 car would have been better and our total gross had been
23 better and that we'd have done a little better, and he said,
24 "Well, you know, it takes a little while to get started.
25 Put some people in place and it's going to come, Bry, it's

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2031

1 about profit as well as gross, but overall gross profit.

2 Q And what was the profitability picture of
3 Heritage in 1990?

4 A The total year?

5 Q Uh-huh (affirmative).

6 A Well, it wasn't great and some of that wasn't
7 Tony's fault. There were a couple of things discussed that
8 concerned me a little. Helen had brought my attention to
9 some deferral of advertising expense and I discussed it with
10 Tony at one of the meetings, and he explained to me that
11 it's real important to get off to a quick start for our
12 creditors, and I said, "Well, I just don't want them coming
13 back on me and saying that we didn't represent it like
14 most other dealers might."

15 Q Now, concerning creditors, did Heritage ever have
16 any creditor problems in terms of not paying its bills?

17 A Oh, no, we always paid our bills on time.

18 Q Did any employees not receive pay checks?

19 A No, payroll was met promptly.

20 Q Any lawsuits filed by any creditors for payment?

21 A I don't remember any.

22 Q Did you ever have any floor checks?

23 A Yes.

24 Q What's a floor check?

25 A A floor check, you have different lines of credit

R.2033-41

(Heritage's Reasons for Discharge)

B. WILKINSON CROSS EXAMINATION
(BY D.J. WINDER)
R.2033-41

1 Q Now, Mr. Wilkinson, there came a time, September
2 11 of '92, in which you had to let Tony go.

3 A Yes.

4 Q Why did you let him go?

5 A I let him go for reasons cited in the employment
6 agreement and because there had been a good period of time
7 for performance to show some fruits, and it was going the
8 wrong way.

9 Q So what was wrong with performance?

10 A Well, we weren't profitable on a month-to-month
11 basis and really, overall. It came later, which you have
12 not asked me about, but it came later that Tony and I in
13 late '91 and early '92 began to meet weekly, including
14 Helen Green with us, and we reviewed many schedules and
15 overage units of used were a problem. Some had stayed on
16 as much as a year.

17 MR. ZUNDEL: Objection, your Honor, objecting to
18 the -- we were asked -- the question was asked directly,
19 why did you let Tony --

20 THE COURT: So it's nonresponsive.

21 MR. ZUNDEL: Nonresponsive.

22 THE COURT: Sustained.

23 THE WITNESS: I let Tony go for -- excuse me.

24 THE COURT: Okay, now, that's important. You were
25 back telling us why it was that you terminated the plaintiff.

1 You said performance was going down rather than up.

2 THE WITNESS: Lack of profit and --

3 THE COURT: Give us the reasons, if you will, sir.

4 THE WITNESS: Well, that -- I was trying to do that
5 by virtue of the review of the schedules.

6 Q (By Mr. Winder:) If you'll just -- Mr. Wilkinson,
7 if you'll just give us the reasons, tick them off, I'll go
8 back and ask you questions about those.

9 A Thank you. Overage inventory on used units that
10 were supposed to either have been wholesaled -- used, now --
11 or given back to the people that traded it in, in exchange
12 for the cash that the actual cash value had been represented
13 on their deal, titles not collected, cars delivered to
14 wholesalers without the collection of titles or without the
15 collection of monies, and already having given wholesalers
16 the titles.

17 Limited, though, I would say no profitability and
18 certainly limited, if any, purchase of a car from the
19 Salt Lake Auto Auction from time to time that turned out
20 to be a real bad purchase that Tony had made on an auction
21 basis.

22 Claims from some customers that they couldn't get
23 customer satisfaction through customer relations, or that
24 the general manager wouldn't talk to them.

25 Tony's not having been exactly honest with me about

1 the status of used car overage inventory, and titles on
2 hand on trade-ins and titles that had been remitted without
3 payment.

4 The inability to bring the management team
5 together, the inability to direct department heads, the
6 inability to train my children to become dealers, the
7 inability to be visible in the store in the evenings and on
8 Saturdays.

9 Visibility was -- well, that's not a yes or no,
10 so -- but anyway, that was important.

11 Q Were you experiencing, or was a reason also
12 related to any banking relationships?

13 A The worst problem we had which cost us a lot of
14 money was Tony elected to change the flooring from Comerica
15 to Key Bank, and I believe that was in -- might have been
16 even late '90. I can't remember exactly when it was, but
17 that strained a relationship that lots of revisions were
18 made on that cost a lot of money.

19 Q All right. Concerning profitability, what was the
20 problem?

21 A Well, the gross per unit declined, except maybe
22 for a couple months, on new car sales from the time Tony
23 came until he left, or until I asked for his resignation.
24 The overall gross in departments declined. The net worth of
25 the dealership in total, as I remember, was reduced almost

1 in half from June first of '90 until August of '92.

2 MR. ZUNDEL: Your Honor, I'm going to make a
3 motion now and would ask that the evidence regarding
4 profitability be stricken as irrelevant in this case under
5 the contract.

6 THE COURT: Counsel, the motion's denied. You
7 can make your request to me at closing statements, but not
8 during the course of examination of a witness.

9 Go ahead.

10 MR. WINDER: Thank you, thank you.

11 Q (By Mr. Winder:) What were the problems with
12 scheduling of hours?

13 A Well, I would from time to time call to talk to
14 Tony about the operation, how many cars we'd sold that day,
15 and he wasn't there, especially during peak traffic times
16 on Saturdays. In fact, the occasion arose where Tony would
17 call in earlier than I did and then call me before I called
18 there and let me know what was happening so I wouldn't find
19 that he wasn't there.

20 MR. ZUNDEL: Objection, Judge, no foundation for
21 that testimony, ask that it be stricken.

22 THE COURT: Objection is sustained.

23 Q (By Mr. Winder:) What other problems were there
24 in terms of hours scheduled?

25 A Well, the evening hours are the most productive

1 hours. Visibility of, quote, unquote, the man who's
2 responsible for the operation day to day, I felt that over a
3 period of time Tony slacked off on his later in the evening
4 and Saturday performances.

5 Q You mentioned Comerica. Who was Comerica?

6 A Comerica is affiliated with -- I think it's a large
7 bank in Detroit. It might even be the Bank of Detroit,
8 Michigan, I don't know, but they are the finance arm that
9 offers floor lines, capital loans, real estate loans tied
10 in conjunction with each other to automobile dealers across
11 the country.

12 Q And did Heritage have a floor line or lines with
13 Comerica?

14 A Yes.

15 Q And what did Comerica finance?

16 A Comerica had our new car floor line at the Honda
17 store in Murry, and we had a operating credit line endorsed
18 by Murray and me personally, Heritage Honda and me
19 personally, and the St. George store until it was dissolved.

20 Q Did they also finance anything else?

21 A Yes, real estate.

22 Q What real estate?

23 A They financed the building and property upon which
24 and in which Heritage Imports dba Heritage Honda of Murray
25 was operated in.

1 Q The real property?

2 A The real property and the building.

3 Q Was there any connection between these two floor
4 lines?

5 A That was actually a real estate loan, but the
6 floor line --

7 Q I'm sorry. Was there any connection between these
8 two lines of financing?

9 A Yes, the real estate loan was contingent upon
10 the continuance of the flooring line.

11 Q And did Heritage -- did there come a time when
12 Heritage opened its flooring line for new cars, opened a
13 flooring line for new cars somewhere else?

14 A Yes.

15 Q When was that, approximately?

16 A I think it was in -- around November or December
17 1991.

18 Q And with what institution was there a new floor
19 line?

20 A Key Bank of Utah.

21 Q How did that come about?

22 A Am I allowed to expand?

23 Q Yes.

24 A When Tony first came to work for me, I took him up
25 to those that bought retail contracts from us and that

1 offered other services to us and introduced him to each of
2 the heads of those that I could at least get to --

3 Q Let me --

4 A -- and one was Key Bank.

5 Q Let me stop you for a moment. Who's a Mr. Ashton?

6 A Well, Mr. Ashton, I believe, was a medium officer
7 at Key Bank in their -- I think it was in their mortgage
8 department in St. George.

9 Q You recall Tony's testimony where he said that
10 you told a banker, I believe the name is Mr. Ashton, that
11 he had a no cut contract?

12 A I did not tell anything like that to Mr. Ashton.

13 Q You didn't say that?

14 A No.

15 Q Or to anybody else at Key Bank?

16 A I didn't.

17 Q But continue, please, we were talking about --

18 A Anyway, so we had met several bankers. Well, the
19 key ones with us at that point were the people at Key Bank
20 and Tony, through the course of day to day business, cemented
21 relationship ties with several entities due to the fact that
22 we needed to sell a lot of retail paper. Key Bank bought
23 from us, West One bought from us, many banks that we had
24 agreements that would allow us to share in the reserve, the
25 earnings of the interest charged to the customer, and Tony

1 and I had discussed trying to be at home partners, at home
2 dealing with those around us because they were more
3 accessible to us, and some discussion had taken place
4 between Tony and the officers at Key Bank about moving the
5 real estate loan on the building and property to them and
6 obtaining lower discount rates on the retail purchases of
7 paper and other services that they felt they could offer us.

8 Q And did there come a time when the flooring line
9 was moved to Key Bank?

10 A Yes.

11 Q Who made that decision?

12 A Tony.

13 Q Did Comerica threaten default because of that?

14 A Yeah, they threatened default and they started
15 with a revision of the note.

16 Q Did you have to pay extra monies to Comerica?

17 A We did.

18 Q About how much?

19 A I would say over the course of late '91 through
20 August of '92, upwards of over \$100,000.

21 Q All right.

22 THE COURT: Mr. Winder, how much more time do you
23 think you'll need with this witness?

24 MR. WINDER: About ten minutes, Judge, fifteen.

25 THE COURT: All right. Let's take a brief recess.

1 We've been in session for some time.

2 (Whereupon, a recess was taken.)

3 THE COURT: All right, go ahead, Mr. Winder.

4 MR. WINDER: Thank you.

5 Q (By Mr. Winder:) Mr. Wilkinson, I'm just going to
6 ask you about two more of the areas that you listed as
7 reasons why you let Tony go. One of them you mentioned was
8 training kids. What was the problem or problems there?

9 A Well, that was one of the most expressed concerns
10 I had when we entered into our employment agreement, and it
11 just did not happen.

12 Q And you also mentioned management team, department
13 heads. What was the problem there?

14 A Incrementally over the period of time Tony was
15 there from when he started, the morale in the whole dealer-
16 ship, especially along department heads, really declined.

17 MR. WINDER: Thank you. No further questions.

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**D. HARTMANN DIRECT EXAMINATION
AND CROSS EXAMINATION
R.2043-54**

FILED DISTRICT COURT
IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH SEP 12 1996

By Deputy Clerk

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS, a Utah
corporation dba Heritage
Honda, O. BRYAN WILKINSON,
and JEFF J. WILKINSON,

Defendants.

Case No. CIV 930900312 CN

REPORTER'S TRANSCRIPT OF TRIAL
TESTIMONY OF DANIEL J.
HARTMANN

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Friday, August 30, 1996

APPEARANCES:

For the Plaintiff: MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
(801) 532-7700

For the Defendants: DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South, #4000
Salt Lake City, Utah 84110
(801) 322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

865023

1 * * *

2 D A N I E L J . H A R T M A N N , having been
3 duly summoned and sworn as a witness by and on behalf of
4 the Defendants, took the stand and testified as follows:

5 THE WITNESS: My name is Daniel J. Hartmann,
6 H-a-r-t-m-a-n-n.

7 DIRECT EXAMINATION

8 BY MS. FALK:

9 Q And what is your address?

10 A Home address?

11 Q (nodded head up and down)

12 A 41 South Indiana Place, Golden, Colorado 80401.

13 Q What is your current employment?

14 A With Comerica Bank of Detroit.

15 Q How long have you been employed with Comerica
16 Bank?

17 A I think it's 12 years.

18 Q And what is your position?

19 A I'm first vice-president.

20 Q Describe your relationship with Comerica Bank
21 with Heritage Honda.

22 A Our formal relationship became -- or started,
23 I think it was June in 1987, and we provided floor plan
24 financing, a capitalization loan, or a term loan, and a
25 mortgage loan to Good Works partnership.

1 Q Describe what flooring is, the flooring loan is.

2 A Floor plan financing is when we provide financing
3 for the inventory that the dealer carries for retail sale.

4 Q Was the flooring line cross-collateralized with
5 any other loan?

6 A We had all the loans cross-collateralized. We
7 had -- of the three loans that we had in place, we had
8 Heritage Imports providing a secured guarantee to Good Works
9 partnership for a mortgage loan, so they were cross-
10 collateralized and cross-defaulted.

11 Q And did this exist in December of 1990?

12 A Yes.

13 MS. FALK: Your Honor, I'd ask that Exhibit 501,
14 Defendant's Exhibit 501, be received.

15 THE COURT: Is that one that's in the binder?

16 MS. FALK: That is, but I have an extra copy.

17 THE COURT: Well, I've got your binder right
18 here, and this is the original you're presenting here now?

19 MS. FALK: That's a -- yes, it's a copy of the
20 original.

21 THE COURT: Any objection to 501?

22 MR. ZUNDEL: None, Judge.

23 THE COURT: It's received.

24 Q (By Ms. Falk:) Mr. Hartmann, I've just handed you
25 what's been marked as Exhibit 501. Do you recognize that

1 document?

2 A Yes.

3 Q Is it part of Comerica's loan file?

4 A Yes.

5 Q What is it?

6 A It's a letter that was faxed to me on the same
7 date of the letter itself, December 18th, 1990, indicating
8 that the intention of Heritage Honda to move its new car
9 floor plan financing from Comerica Bank to Key Bank is written
10 and signed by Tony Kraatz.

11 Q When you received this letter, what did Comerica
12 do?

13 A Well, I made a number of attempts to try to contact
14 the customer regarding this. We considered this a very
15 grave occurrence because it is -- we are in the business to
16 provide new car floor plan financing, so the intention of
17 them to move their new car financing away from Comerica, we
18 considered very seriously and I made many attempts to reach
19 Bry Wilkinson by phone.

20 MR. ZUNDEL: Objection, Judge. The question's
21 now a narrative.

22 THE COURT: I believe the question was, what -- what
23 was the original question?

24 MS. FALK: What did Comerica do when it received
25 this letter.

1 THE COURT: All right. We're still in the process,
2 I presume, of telling us what you did in response to the
3 letter, sir. Go ahead.

4 THE WITNESS: That's correct. I made numerous
5 attempts to contact Bry Wilkinson and Tony Kraatz.

6 Q (By Ms. Falk:) I'm now handing you what's been
7 marked as Defendant's Exhibit 504. Do you recognize that
8 document?

9 A Yes.

10 MS. FALK: Your Honor, I ask that Exhibit 504 be
11 received.

12 MR. ZUNDEL: Your Honor, I'm going to make an
13 objection at this point, based on relevancy, simply because
14 of the time, beginning in 1990, '91, early '91. Mr. Kraatz
15 was terminated in mid-1992, and this simply doesn't seem
16 relevant.

17 MS. FALK: I think this is directly relevant,
18 your Honor.

19 THE COURT: Well, counsel, I concur. Part of the
20 issue here has to do with termination for cause or not, and
21 the dealing with Comerica and Key Bank was one of the items
22 delineated by Mr. Wilkinson. I believe it has relevance.

23 Now, I haven't had a chance to look at the actual
24 letter itself, that is, 504, but at least at this point
25 I'm going to make the preliminary determination that it is

1 relevant.

2 Go ahead.

3 Q (By Ms. Falk:) Did you send this letter to Mr.
4 Wilkinson?

5 A Yes.

6 Q Was the loan in default at the time you sent this
7 letter?

8 A Yes.

9 Q Was the loan -- did you notify -- is this the
10 letter that you notified Mr. Wilkinson the loan was in
11 default?

12 A This letter doesn't formally provide a notification
13 of default, but our loan agreements prohibit Key Bank from
14 filing on the assets of the company and in conjunction with
15 them taking over the floor plan from us, they filed on the
16 assets, and by them filing, it created an event of default.

17 Q Did this event of default cause a loan modifica-
18 tion agreement to be entered into?

19 A Yes.

20 Q Under the loan modification agreement, what were
21 the penalties?

22 A The penalties included raising the interest rate
23 on Good Works partnership mortgage one percentage point.
24 It included some extension fees. There is a significant
25 amount of legal expense incurred, and I think that was the

1 extent of the financial burden it placed upon the dealership.

2 MS. FALK: I have no further questions.

3 THE COURT: You may cross-examine.

4 MR. ZUNDEL: Thank you.

5 CROSS-EXAMINATION

6 BY MR. ZUNDEL:

7 Q Did you know that Heritage Honda had a used car
8 flooring line with Key Bank for \$800,000 which they had drawn
9 upon in 1989?

10 A I can't recall specifically, but I don't believe so.

11 Q You did not know that?

12 A I was not aware of it, I don't think.

13 Q If you had been aware of it, that would have been
14 an event of default?

15 A We would have -- not necessarily. If they'd asked
16 us for consent to do so and we provided consent, in fact,
17 we did do that.

18 Q Later, but I'm asking 1989, without consent,
19 that's an event of default, correct?

20 A That would be.

21 Q All right, and when did you find out that Key Bank
22 had the used car flooring line?

23 A I can't recall a specific time, but it was in
24 conjunction with opening the West Valley used car lot.

25 Q That would have been in late 1990?

1 A Probably.

2 Q All right, so you didn't find out that Key Bank
3 had a used car flooring line with Heritage until after
4 Mr. Kraatz had come; is that right?

5 A I knew when they asked for permission for a large
6 used car floor line with Key Bank when the timing of that,
7 I think it was after Tony was --

8 Q That's a two million dollar flooring line, okay,
9 but hypothetically, since you don't know, if the facts were,
10 and I represent to you that Mr. Wilkinson has testified
11 in this court that he had an \$800,000 line for used cars
12 with Key Bank from 1989 onward, that would be an event of
13 default?

14 A If they would have filed on the assets of Heritage
15 Honda, yes.

16 Q Okay, because you thought you were secured by all
17 of Heritage Honda's used cars, as well as their new cars?

18 A We were secured by all assets, including used
19 cars. We had a first lien interest, but they would have
20 filed a second position behind us which our loan agreements
21 prohibit.

22 Q Now, you told Mr. Wilkinson that Comerica simply
23 wasn't willing to make a used car floor line to Heritage
24 in 1990; isn't that right?

25 A That's not correct.

1 Q Okay. Did Mr. Wilkinson ask Comerica for a used
2 car line?

3 A Yes.

4 Q And did you refuse?

5 A No, we suggested that we could provide 50 percent
6 advance on specific used cars and they were looking for more
7 aggressive terms than that.

8 Q So it wasn't enough for Mr. Willinson?

9 A Right.

10 Q All right, and Mr. Wilkinson told you that
11 himself?

12 A That's correct.

13 Q You had a conversation with Mr. Wilkinson in late
14 1990 or early 1991 at Heritage with a Mr. Williams, Al
15 Williams?

16 A Uh-huh (affirmative).

17 Q That was fairly heated?

18 A Yes.

19 Q And when exactly did this heated conversation
20 occur?

21 A I can't recall specifically. I think it was
22 sometime in January.

23 Q Of 1991?

24 A It was after the date of the letter, this
25 letter, January 11th, 1991, shortly after that.

1 THE COURT: Exhibit 504.

2 Q (By Mr. Zundel:) Who was present?

3 A Tony Kraatz, myself, Al Williams, and Bry Wilkinson.

4 Q And do you remember what was said?

5 A I can recall the general conversation, but no

6 specifics.

7 Q Did Mr. Kraatz say anything at all during that

8 meeting, that you recall?

9 A Very little.

10 Q Who did the talking?

11 A Primarily Al Williams and Bry Wilkinson.

12 Q And Mr. Wilkinson became very upset?

13 A Yes, he was agitated.

14 Q And he used foul language?

15 A He did.

16 Q And do you recall what he said?

17 A Not specifically.

18 Q Did he swear at you?

19 A I can't recall. I think he swore in general,

20 but not necessarily at me or Al Williams.

21 Q He threatened to sue the bank?

22 A He threatened to sue us if we caused harm to

23 Heritage Honda.

24 Q Now, Mr. Wilkinson was the primary decision-

25 maker at Heritage, as far as you could tell, as to what

1 went on with Comerica?

2 A I disagree.

3 Q Mr. Wilkinson had the signature authority on
4 Comerica's loans?

5 A That's correct.

6 Q He did the talking when you were in his presence?

7 A That conversation you're referring to is the
8 first time I'd met with Bry since Tony came on at the dealer-
9 ship. I had virtually no access to Bry while Tony was there
10 up until that conversation, so -- and this letter was signed
11 by Tony Kraatz, not Bry Wilkinson.

12 Q Well, the letter that you're referring to is signed
13 by Tony Kraatz, I suppose. Let me show you what's been
14 marked as Exhibit 266. It has already been received into
15 evidence. Do you see that letter?

16 A Yes.

17 Q Is that signed by Bry Wilkinson, correct?

18 A Correct.

19 Q And he told you that he didn't like what you were
20 doing, right?

21 A Correct.

22 Q And he again threatened to sue Comerica if
23 Comerica didn't do it his way?

24 A That's correct.

25 Q All right. Now, long before Tony Kraatz had arrived

1 at the scene, you had been monitoring Heritage's loan at
2 Comerica, correct?

3 A That's correct.

4 Q And you had noted as early as May 1990 that
5 Heritage --

6 MS. FALK: Your Honor, this is beyond the scope
7 of my direct examination.

8 THE COURT: I'm not sure where we're going with it,
9 Mr. Zundel. Do you wish to state --

10 MR. ZUNDEL: Yes, your Honor. It's the question
11 of -- I think that the assertion is that Tony Kraatz severed
12 or is somehow responsible for the schism between Comerica
13 and Heritage and I wish to flesh that out a little bit.

14 THE COURT: Well, the witness is here, it seems
15 to me, to testify regarding particular incidents that
16 occurred in conjunction with correspondence that have now
17 been received as exhibits.

18 I'm not persuaded that by expanding that to all
19 of this witness's relationship with the individuals involved
20 here is what was anticipated when he was called.

21 MR. ZUNDEL: The witness is an out of state
22 witness.

23 THE COURT: Right.

24 MR. ZUNDEL: And I don't know -- I don't have him
25 under subpoena.

**D. HARTMANN DIRECT EXAMINATION
AND CROSS EXAMINATION
R.2058-62**

1 THE COURT: And you chose, however, after having
2 done that, not to call him to this trial?

3 MR. ZUNDEL: I couldn't get him here. He's out
4 of state.

5 THE COURT: You made no effort, I presume, to
6 inquire about the compulsion process in a foreign state
7 potentially? You deposed him in a foreign state, I take it,
8 and you haven't sought to introduce his deposition.

9 MR. ZUNDEL: It hasn't been -- I haven't had a
10 chance. I haven't had a need to rebut anything yet, Judge.

11 THE COURT: Suffice it to say, counsel, I'm not
12 persuaded that by him now showing on the scene to testify
13 regarding limited matters, it therefore opens up the
14 opportunity that you may have, having made apparently no
15 effort through this Court, to have required his attendance
16 at the trial, or to use his deposition at this trial.

17 MR. ZUNDEL: I have his deposition here, Judge.

18 THE COURT: I am not prepared to rule that he
19 remain under order of this Court to allow you to make all
20 of these inquiries. Consequently, your request to order
21 him to stay is denied.

22 MR. ZUNDEL: Thank you, Judge.

23 THE COURT: All right, you bet. You're free to
24 go, sir. Thank you.

25 MS. FALK: Your Honor, I had one or two other

1 questions; may I ask of this witness?

2 THE COURT: Oh, well, okay. She wants to open it
3 up again. Sit tight.

4 REDIRECT EXAMINATION

5 BY MS. FALK:

6 Q Why do you disagree that Mr. Wilkinson was a prime
7 decision-maker on this matter?

8 A Well, when Tony Kraatz was hired by Heritage
9 Imports, I had a conversation with Bry Wilkinson prior to
10 meeting Tony, at which time Bry had indicated that Tony was
11 his man and that he had given Tony complete control and
12 responsibility for running the dealership, that he felt
13 very good about Tony's abilities to turn the dealership,
14 the operations around, which is the reason we downgraded
15 the loans is because of some operating losses, and then I
16 had a conversation with Tony Kraatz and he had confirmed those
17 same statements. In fact, Tony had indicated he even had
18 the ability to fire Bry's children if need be.

19 Q And who was your main contact during the time
20 before the January 11th --

21 A Exclusively with Tony Kraatz.

22 Q When -- just for clarification, when was the
23 flooring actually pulled?

24 MR. ZUNDEL: Objection, Judge, that's an ambiguous
25 question, since we've talked about new and used.

1 Q (By Ms. Falk:) The new flooring which related
2 to the letter of January 11th, January 22 and the loan
3 modification agreement.

4 A We -- actually, it was phased out over time. We
5 no longer accepted any new vehicles coming in inventory and
6 Key Bank took on the new inventory as it came in and as the
7 inventory we financed was sold, our loan was paid down, and
8 eventually we were -- I think the loan was completely --
9 the floor plan loan was completely paid out in late '91.

10 Q And the 1989 or 1990, early 1990, anything prior to
11 the December 18th letter have anything to do with the
12 default?

13 A No.

14 MS. FALK: No further questions.

15 MR. ZUNDEL: Your Honor, I think counsel has now
16 opened the door with that last question and other questions
17 to the relationship between Comerica and Heritage, anything
18 to do with the default.

19 THE COURT: Well, you may examine the witness
20 regarding what you perceive to have been the redirect.

21 RECROSS-EXAMINATION

22 BY MR. ZUNDEL:

23 Q Let me show you what has been marked as Exhibit
24 263.

25 MS. FALK: Which exhibit is this?

1 Q (By Mr. Zundel:) 263.

2 Do you recognize this document?

3 A Yes.

4 Q It contains your writing?

5 A Yes.

6 Q And you say there the additional debt for Heritage
7 Honda intended for St. George but drained working capital
8 from Murray; isn't that right?

9 A Correct.

10 Q And you note here that the Murray store was in
11 default for failure to meet your tangible net worth.

12 Excuse me. This is twelve ninety.

13 Let me show you what has been marked as Exhibit
14 260. This is your document, is it not?

15 A That's correct.

16 MS. FALK: Is 263 not in evidence?

17 MR. ZUNDEL: It is in evidence, your Honor, for
18 the issue of working capital being drained from the store.
19 I offered it for that purpose anyway.

20 THE COURT: Well, 263, having been referred to
21 here, under our preceding rule, is that it's deemed admitted
22 unless there's a specific objection to it, so it's received.

23 Q (By Mr. Zundel:) Thank you.

24 Looking at 260, Mr. Hartmann --

25 A Uh-huh (affirmative).

1 Q -- you note there that Heritage was in default
2 under the minimum tangible net worth calculations of Comerica
3 in May of 1990; isn't that right?

4 A Yes.

5 Q All right. Now, in calculating net worth, minimum
6 net worth, you exclude as assets anything owed to the
7 corporation by the owner/dealer, don't you?

8 A That's correct.

9 Q That's correct? Now, in November of 1990 -- let
10 me show you that financial statement. This is a portion of
11 Exhibit 265, Judge.

12 Are you familiar with Heritage's financial
13 statements?

14 A Yes.

15 Q You've reviewed them and analyzed them?

16 A In the past.

17 Q All right.

18 THE COURT: My 265 is a one-page document memo
19 regarding Good Works Heritage --

20 MR. ZUNDEL: I misread. It's 295, Judge.

21 THE COURT: 295?

22 MR. ZUNDEL: Yeah.

23 THE COURT: All right.

24 MR. ZUNDEL: I was looking at it upside down.

25 THE COURT: All right, go ahead.

L. MILLER CROSS EXAMINATION
(BY M.N. ZUNDEL)
R.2070-71

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

SEP 12 1996

By C. B. BAKER Deputy Clerk

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS, a Utah
corporation dba Heritage
Honda, O. BRYAN WILKINSON,
and JEFF J. WILKINSON,

Defendants.)

Case No. CIV 930900312 CN

REPORTER'S TRANSCRIPT OF
CROSS-EXAMINATION OF LAWRENCE
MILLER BY MR. ZUNDEL ONLY
(PARTIAL TRANSCRIPT OF
TRIAL PROCEEDINGS)

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Friday, August 30, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL
Attorney at Law
JARDINE, LINEBAUGH & DUNN
370 East South Temple #400
Salt Lake City, Utah 84111
(801) 532-7700

For the Defendants:

DONALD J. WINDER
JENNIFER L. FALK
Attorneys at Law
WINDER & HASLAM, P.C.
175 West 200 South #4000
Salt Lake City, Utah 84110
(801) 322-2222

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

* * *

CROSS-EXAMINATION

BY MR. ZUNDEL:

Q Mr. Miller, when you were doing your due diligence with respect to this automobile dealership, whether you would buy it or not, one thing that you examined were the expenditures that Bry Wilkinson was making for his personal benefit out of the store; isn't that right?

A Yes, sir.

Q You looked at expenditures that he was making that were being charged in advertising, and to entertainment and travel and to legal and auditing, all of those, right?

A Yes, yes, I looked at all the expenditures that he was making that were being charged to the dealership.

Q And you determined that there would be a significant amount of money on a monthly basis that could be saved just by eliminating those from the store?

A That is correct.

Q All right, and you also looked to determine what the store would do for you as a megadealer with respect to what you call ancillary income; isn't that right?

A Yes, sir.

Q And you're not the only megadealer in the United States, are you?

A Not by a long shot.

L. MILLER CROSS EXAMINATION
(BY M.N. ZUNDEL)
R.2076-77

1 Q But Heritage Honda was in an overdraft situation
2 at the time.

3 A Yes, sir.

4 Q And you could solve Heritage's problems simply
5 by picking up the phone and calling your banker or calling
6 Heritage's banker, Key Bank, and saying, "I'm Larry
7 Miller. Will you do something for me?" Right?

8 A I also put \$800,000 in the store that day.

9 Q Okay. Now --

10 THE COURT: The name Larry Miller plus 800 grand
11 gets done what you need, right?

12 Q (By Mr. Zundel:) You could do the same thing
13 for your Toyota store that you talked about the other day
14 when it's \$500,000 overdrawn?

15 A It's 500,000 overdrawn on a GL balance. It's
16 never overdrawn in the checking account.

17 Q But because you are who you are, and you have as
18 much welath as you have and as big operation as you have,
19 you find that banks are more defem~~en~~tial to you than they
20 would be to Heritage before you took over, right?

21 A I don't know how to answer that. Let me say this.
22 I personally guarantee everything to every bank, so I'm
23 guaranteeing that to them and I'm sure they're relying on
24 my total financial statement to some degree, and I guess --
25 I'll give you the opinion that the answer to the question

1 is yes, they would give me more consideration than they
2 would have given Bry on December 9th of '92.

3 Q Okay. Now, your general managers don't have to
4 chase money, do they?

5 A We don't like --

6 MR. WINDER: Now I'm going to object, your Honor.
7 This is beyond the scope.

8 MR. ZUNDEL: No. May I explain it, Judge?

9 THE COURT: I don't know what chasing money is.
10 Is that a specialty term? What are you talking about,
11 chasing money?

12 MR. ZUNDEL: The question is, what did Mr. Miller
13 do in order to make this dealership prosper. That was how
14 this -- the line of questioning started. Mr. Miller, I
15 think, will testify that one of the differences between his
16 operations and Heritage's is that his general managers don't
17 have to go out and try and finance the stores. That's a
18 big distraction to a general manager.

19 THE COURT: Well, I'll allow that question. On
20 the other hand, counsel, I don't propose that we go into
21 each and every modification change that Mr. Miller has made
22 in the operation as compared to what it was prior, just by
23 virtue of --

24 MR. ZUNDEL: I'll try and be --

25 THE COURT: This may be an important one that you

L. MILLER CROSS EXAMINATION
(BY M.N. ZUNDEL)
R.2081-84

1 little bit to understand. I think that chasing cash in that
2 dealership was going on and I think it was a distraction to
3 Tony in his performance as a GM, but I also think that the
4 resources were available had he maximized his day-to-day
5 cash flow opportunities like keeping deals moving through
6 the service contract -- or I'm sorry, through the finance
7 office, keeping --

8 MR. ZUNDEL: But just a minute, your Honor, this
9 is beyond the scope.

10 THE WITNESS: No, it's not.

11 THE COURT: No, counsel. Counsel, I consider this
12 an opportunity for the witness to explain his answer, and I
13 don't see anything out of order about it.

14 Do you have any further examination?

15 MR. ZUNDEL: Yes, Judge.

16 THE WITNESS: I didn't finish.

17 THE COURT: Oh, well, go ahead and finish.

18 THE WITNESS: I won't make it much longer, but
19 there are so many places in a dealership for cash to get
20 spread out, in contracts, in transit, in the business office,
21 in the finance office, in parts and service, receivables,
22 that to me, one of the main parts of the job description
23 of a general manager is to manage all those sources of cash
24 so that they stay current and liquid so that you don't have
25 to meet the daylight overdraft, so you don't have to get

1 that phone call from the bank that you described.

2 Now, clearly, there's a point where you have --
3 where the store is so cash deficient that it is out of the
4 general manager's hands and no matter how good he is at his
5 cash management sources, that he's going to get that call,
6 but in my opinion, that store had enough cash to never
7 have to have that call.

8 Q (By Mr. Zundel:) When? What is it that you're
9 talking about? It didn't have it in December.

10 A Yes, it did. In my opinion, it did because I
11 looked at the four months -- if you'll recall my testimony
12 the day before yesterday --

13 Q I see.

14 A -- I looked at the four months of September
15 through December to see how much cash that store had in it
16 and it had less in that period, as you asked me a question
17 I responded to, than it did when Tony was there, and I
18 looked at that store and at our Toyota store just down the
19 street for the same period and the Honda store had more
20 cash in it than the Toyota store did.

21 Q But nevertheless, the bank threatened to pull
22 the line and call the loans on the Honda store during that
23 same period, right?

24 A Because the cash in the store was not being
25 managed as effectively as it could have.

1 Q Now, Tony wasn't even there then, right?

2 A But he was getting the calls. He had more cash
3 when he was there than he did in the period I'm describing.

4 Q The period you're describing right now is from
5 September to December, right?

6 A Yes, sir, and it had less cash then than when Tony
7 was there, and it still had more than the Toyota store.

8 Q Now, the store wasn't ever called upon by the
9 bank, as far as it wasn't in the crisis before Tony
10 left, that it was in December; it hadn't gotten that bad,
11 right?

12 A I think it must have if he was getting the phone
13 calls you described.

14 Q Well, that's a different type of phone call, one
15 that says we're going to pull your loan, we've had enough,
16 and one, get us some cash in the bank, right?

17 A That's ture. That is a different type of call.

18 Q All right. Now, you took over the West Valley lot?

19 A Yes, sir.

20 Q And you made that -- you could see an opportunity
21 there, you bought real estate and you put more vehicles
22 on it, right?

23 A That is correct.

24 Q And you spent \$600,000 doing it, right?

25 A That would be approximately correct, yes.

1 Q And that 600,000, that wasn't in Tony's operation
2 to do, right?

3 A The 600,000 came in land and infrastructure, not
4 in vehicles. It didn't go into operating capital in the
5 store. It went into the physical facility.

6 Q Someone had to come up with \$600,000 and put it
7 into that piece of property to take full advantage of that
8 profit-making opportunity which you took advantage of, right?

9 A That is correct.

10 Q And Tony didn't have it when he was there to do
11 that, did he?

12 A No, Tony didn't have that, but I think that's
13 mixing apples and oranges.

14 Q Now, when you looked at this store, you didn't do
15 a complete audit of the books when you decided whether you
16 were going to buy it or not, deciding how much it was
17 worth, did you?

18 A That's correct.

19 Q You could look at it and just by category you
20 could see that some of the categories of expenses were out of
21 whack, right?

22 A My analysis of it was -- the answer to your
23 question is yes, I could see they were out of whack, some
24 of them.

25 Q And so you knew that there was an opportunity there

L. MILLER CROSS EXAMINATION
(BY M.N. ZUNDEL)
R.2086-88

1 make the decisions, right?

2 A Yes, sir.

3 Q Now, with respect to this reality meeting that
4 you had in February or March that you talked about --

5 A February, yes- sir.

6 Q -- Heritage was losing money badly without Tony
7 Kraatz there, right?

8 A Yes, sir.

9 Q And they were doing things, in fact, they were
10 losing a lot more money without him than they were with him,
11 right?

12 A I don't know how much they were losing with him.

13 Q You know how much cash he needed, how much cash
14 he had and all of that, but you don't know how much money
15 they were losing?

16 A That's correct, because I don't think the
17 financial statement accurately reflected the performance of
18 the store.

19 Q Okay. Now, you didn't have Bry Wilkinson to
20 deal with in February of 1993, did you?

21 A I was dealing with him, but I don't know.

22 Q He had no impact on any decision you made,
23 whether you were going to fire somebody, how you were going
24 to change things?

25 A That is correct. Okay, I see where you're

1 going, and yet I was able to make decisions with my
2 management team independent of Bry, yes, sir.

3 Q You could tell those people you were going to do
4 it your way?

5 A Yes, sir.

6 Q All right. How many stores do you have?

7 A I think about 21.

8 Q You have 21 general managers?

9 A Yes, sir.

10 Q How many of them are stockholders in your stores?

11 A Probably 15 or 16.

12 Q That's something you commonly offer general
13 managers, isn't it, to be a stockholder in the store; isn't
14 that right?

15 A We offer them the opportunity to buy some percen-
16 tage of the store, generally ten.

17 Q All right. Now, let me show you, that's an
18 opportunity that Tony Kraatz would have had had he remained
19 general manager at Heritage in all probability; isn't that
20 right?

21 A Had he remained general manager, that's an
22 opportunity, yes, that he would have had.

23 Q All right. Now, by the way, in your operation
24 when you add a dealership, you add an entire 'nother level
25 of management, don't you?

1 A I don't know what you mean. Above it?

2 Q Above.

3 A We have a management company that has a counter-
4 part for each department manager in the dealership. In
5 other words, we have a director of service operations in a
6 management company that can interact with the service
7 manager in a dealership, parts manager, parts director, yes, sir.

8 Q You have a specialist that interacts with every
9 manager in this line of authority, don't you?

10 A Yes, sir, that's what the management fee goes to
11 pay.

12 MR. WINDER: Judge, I'm going to object, beyond
13 the scope. I didn't go into his chart and organization
14 and all of that. We've had this guy on the stand already in
15 Mr. Zundel's case in chief.

16 MR. ZUNDEL: We're talking about why his dealer-
17 ship does better.

18 THE COURT: Well, I'm not sure we are, counsel.
19 I think, as I indicated to you earlier, I'm inclined to
20 allow you to make some headway in terms of how the operation
21 was different, but I don't want to rehash what we've gone
22 through with this gentleman when we had him on the stand
23 before and the chart of organization and authority I don't
24 see as being helpful to us at this stage.

25 MR. ZUNDEL: All right.

L. MILLER CROSS EXAMINATION
(BY M.N. ZUNDEL)
R.2091-92

1 Q At that time, meaning September of 1990 or
2 December of 1990?

3 A Yeah, anywhere in the time frame he was at
4 Heritage Honda. In fact, he and I talked about it on
5 occasion and I would not have had any qualms about doing it.
6 Your question was, is there any doubt in my mind, and today,
7 yes, there is some doubt because of this conflicting
8 information.

9 Q From this lawsuit?

10 A I wouldn't say it's from the suit. Well, I think
11 he gets the job done, to answer that question, yes.

12 Q Now, your lawyers are the same lawyers that Bry
13 Wilkinson has, right?

14 A That is correct.

15 Q And you and Bry have been friends for a long time?

16 A That is correct.

17 Q And you and Bry are on the same side in this
18 lawsuit, right?

19 A I don't feel like I'm on a side. I can under-
20 stand -- I feel like you're leading me when you say that
21 because I feel like I'm in a position to give information that
22 I know. I'm trying to give the information objectively. I
23 don't think I'm taking a side in the lawsuit. I happen to
24 have a friend on both sides of it.

25 Q Tony Kraatz has a good reputation as a general

1 manager in this community, doesn't he?

2 A I think he does.

3 Q And he's known -- he's been around for more than
4 twenty years; he's well-known, right?

5 A I would say that's a fair statement.

6 Q And you know that the dealership that he now
7 operates is very profitable?

8 MR. WINDER: Object, your Honor, way beyond the
9 scope.

10 THE COURT: Objection is sustained.

11 Q (By Mr. Zundel:) No questions -- let me ask you,
12 is it foreseeable that if Tony Kraatz -- to you -- that if
13 Tony Kraatz were still the general manager of Heritage
14 Honda in December of 1992, that you would have kept him on
15 as general manager?

16 MR. WINDER: Objection, asked and answered.

17 THE COURT: Well, I think, counsel, not only
18 that, it calls for speculation. I mean, we're getting far
19 afield from the purpose of this witness being called.

20 MR. ZUNDEL: No further questions, Judge.

21 THE COURT: Is there any redirect?

22 MR. WINDER: Yes, your Honor, just briefly. There
23 were a few things that Mr. Miller was dying to respond to.

24 REDIRECT EXAMINATION

25 BY MR. WINDER:

R.2100

B. WISON, CPA, DIRECT EXAMINATION
R.2118

1 MR. ZUNDEL: Your Honor, we call Bruce Wisan to the
2 stand. Let me just get him.

3 MR. WINDER: Your Honor, I have my expert account-
4 ant here by the name of Jeff Jensen. I'd ask that he be
5 allowed to come in to assist me at this point.

6 THE COURT: If there's no objection to that.

7 MR. ZUNDEL: There's no objection. It would be
8 helpful for the expert.

9 THE COURT: That's fine.

10 MR. ZUNDEL: I plan on doing the same thing.

11 THE COURT: Come forward, sir, if you will, please,
12 and be sworn.

13 BRUCE R. WISAN,
14 called as a witness by and on behalf of the Plaintiff, having
15 been first duly sworn, was examined and testified as follows:

16 MR. ZUNDEL: Your Honor, Mr. Wisan is expected to
17 testify from what we've marked as Exhibit 302, and I don't
18 think the Court has a copy of that. May I hand it up?

19 THE COURT: Yes, please.

20 DIRECT EXAMINATION

21 BY MR. ZUNDEL:

22 Q Mr. Wisan, please state your name and address for
23 the record.

24 A My name is Bruce R. Wisan. That's W-i-s-a-n. My
25 address is 3648 Terrace Heights Circle, Salt Lake City, Utah.

1 Q You're a C.P.A. by profession?

2 A I am.

3 Q How long have you been a certified public
4 accountant?

5 A I passed the C.P.A. exam in 1972 and received a
6 certificate in February of 1973, and I've been working for a
7 C.P.A. firm since 1971.

8 Q And how long have you been the principal partner in
9 the C.P.A. firm?

10 A I became a partner in the C.P.A. firm in 1977, the
11 principal partner. We formed Wisan Smith in January 1, 1985,
12 and I was the founding partner and the majority partner of
13 that firm, and the name today is Wisan, Smith, Racker &
14 Prescott, and I'm still the managing partner of that firm.

15 Q Have you been qualified as an expert witness in
16 courts in this state before?

17 A Yes, I have.

18 Q Would you tell me state or federal or both?

19 A Both state and federal.

20 Q And how often have you testified as an expert
21 witness?

22 A Approximately 10 times.

23 Q You're Mr. Kraatz's brother-in-law, are you not?

24 A Yes, his wife is my sister.

25 Q You are charging Mr. Kraatz a fee for this?

L. TERRY DIRECT EXAMINATION
R.2153-57

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P R O C E E D I N G S

(Whereupon, the witness O. Bryan Wilkinson completed his testimony, which testimony is contained in a separate transcript volume.)

THE COURT: Call your next witness.

MR. ZUNDEL: Thank you, Judge. We call Larry Terry, Junior to the stand.

LARRY DON TERRY,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEVASHRAYEE:

Q Mr. Terry, would you please state your full name for the Court?

A Larry Don Terry.

Q Where do you currently reside?

A Orem.

Q What's your present occupation?

A Sales manager.

Q With who?

A Rick Warner Toyota.

Q How long have you worked with Rick Warner Toyota?

A Since December of '92.

Q Where did you work before you joined Rick Warner Toyota?

1 A Heritage Honda.

2 Q For what period of time were you employed with
3 Heritage Honda?

4 A September of '91, to the best of --

5 THE COURT: Say those dates again.

6 THE WITNESS: September of '91 to December of '92.

7 Q (By Mr. Devashrayee) What was your position while
8 at Heritage Honda?

9 A I was the F&I manager.

10 THE COURT: The what?

11 THE WITNESS: F&I.

12 MR. DEVASHRAYEE: Finance and insurance manager.

13 THE COURT: Thank you.

14 Q (By Mr. Devashrayee) Now, Mr. Terry, the Plaintiff
15 in this case, Tony Kraatz, was the general manager of
16 Heritage Honda while you were there; is that right?

17 A Yes, he was.

18 Q Did you know Tony before you began employment with
19 Heritage?

20 A Yes, I did.

21 Q How long have you known Tony?

22 A Sixteen, seventeen years.

23 Q Thank you. While at Heritage, Mr. Terry, did you
24 have any discussions with Mr. Jeff Wilkinson about
25 Mr. Kraatz?

1 A Yes.

2 MS. FALK: Objection, your Honor. I don't see how
3 this is relevant to the case.

4 THE COURT: Well, I don't know if it is or it
5 isn't. All I know is that there have been some discussions.
6 If your objection is well taken, it's premature.

7 MS. FALK: Okay.

8 THE COURT: Go ahead. For the record, you're
9 Mr. Devashrayee?

10 MR. DEVASHRAYEE: Devashrayee.

11 THE COURT: And Ms. Falk, you're now standing in
12 for Mr. Winder?

13 MS. FALK: That's correct.

14 THE COURT: So the record is clear.
15 Go ahead, Mr. Devashrayee.

16 MR. DEVASHRAYEE: Thank you, your Honor.

17 Q (By Mr. Devashrayee) Mr. Terry, how often did you
18 talk with J. J. in general?

19 A Daily.

20 Q Did Mr. Wilkinson ever express a dislike for
21 Mr. Kraatz?

22 A Yeah.

23 Q How often would he do that?

24 A Oh, I couldn't say how often.

25 Q More than once?

1 A More than once, yes.

2 Q What did Jeff Wilkinson say to you about Tony
3 Kraatz?

4 MS. FALK: Objection, your Honor, foundation.

5 THE COURT: Objection sustained.

6 Q (By Mr. Devashrayee) Mr. Terry, when would you
7 talk to Mr. Wilkinson, Mr. Jeff Wilkinson?

8 A Just -- I'm -- you know, at times when we were
9 there at work together.

10 Q And you testified earlier that he expressed his
11 dislike for Tony Kraatz.

12 A That's right.

13 Q What did he say to you about Tony?

14 MS. FALK: Objection, your Honor, foundation.

15 THE COURT: Objection sustained.

16 Counsel, if you persist in trying to get this in,
17 you need to tell us when and where it took place and who was
18 present and what was said and by whom.

19 Q (By Mr. Devashrayee) Where did your discussions
20 usually take place with Jeff Wilkinson, Mr. Terry?

21 THE COURT: At the water fountain?

22 THE WITNESS: No, it was usually up on the sales
23 tower.

24 Q (By Mr. Devashrayee) Where at? Heritage?

25 A At Heritage Honda.

1 Q And who was typically present during those
2 discussions?

3 A Me, J. J., Jeff Gorringer could have been there.

4 Q Can you give dates as to when those took place, or
5 did it just happen periodically through your employment?

6 A Happened periodically through employment.

7 Q During these discussions, Mr. Terry, did
8 Mr. Wilkinson ever express his dislike for Tony Kraatz?

9 A Yeah, particularly just once in particular when he,
10 J. J., was moved into the F&I.

11 Q What did J. J. say?

12 A Just how much he disliked Tony and wished that his
13 dad would make a decision to get J. J. back out of F&I.

14 Q Did he ever tell you that he wished that his dad
15 would fire Tony?

16 A I think on that occasion he did, yes.

17 Q Do you remember that occasion particularly?

18 A Yeah, because I was involved pretty much in that
19 situation.

20 Q Okay. Mr. Terry, do you remember a person by the
21 name of Matt Wilkinson while you were working at Heritage?

22 A Yes.

23 Q And was Matt Wilkinson employed at Heritage while
24 you were at Heritage?

25 A Uh-huh (affirmative), he worked over at the used

1 car lot.

2 THE COURT: Now, Matt Wilkinson?

3 MR. DEVASHRAYEE: Matt Wilkinson, your Honor.

4 THE COURT: Okay.

5 Q (By Mr. Devashrayee) What was Matt Wilkinson's
6 position while he was at Heritage; do you remember?

7 A He was the F&I manager over at the used car lot.

8 Q Did you ever have any conversations with Matt about
9 Mr. Kraatz?

10 A Occasionally, yes.

11 Q Can you recall when those conversations would have
12 taken place?

13 A Right toward -- it was the summer of '92, right
14 after Chuck Quinn had been let go, Matt had said that, you
15 know, that J. J. was going to be talking with his dad trying
16 to -- so that the kids --

17 MS. FALK: Objection, hearsay.

18 MR. DEVASHRAYEE: Your Honor, it's not hearsay.
19 First of all, it's a statement by an agent. Both J. J. and
20 Matt were agents. They're servants of Heritage. They're
21 both co-conspirators. It's not hearsay and an admission
22 against a party opponent.

23 MS. FALK: Co-conspirators?

24 THE COURT: Well, Matt Wilkinson is not named as a
25 party to this lawsuit.

1 MR. DEVASHRAYEE: But he is a servant of Heritage,
2 your Honor.

3 THE COURT: Well, he's not named as a party to this
4 lawsuit.

5 MR. DEVASHRAYEE: Right.

6 THE COURT: And you're suggesting to me that a
7 statement made by Matt Wilkinson outside the presence of any
8 of the parties to this lawsuit being offered for the truth of
9 what was stated is admissible because Matt happened to work
10 for Heritage? Is that what you're saying to me?

11 MR. DEVASHRAYEE: Yeah.

12 THE COURT: In what capacity was he working there?

13 Q (By Mr. Devashrayee) What capacity again?

14 A He was an F&I manager.

15 MR. DEVASHRAYEE: He was a servant of Heritage.

16 THE COURT: Well, servant is a broad term, Counsel.
17 I need to know what his specific relationship was and now the
18 witness has told us he was a manager for F&I.

19 MR. DEVASHRAYEE: Right, and I'm trying to show,
20 your Honor, also that this statement made by Matt was in the
21 course of his employment, within the scope of his employment.

22 THE COURT: Well, I don't perceive that as being
23 the exception that's going to allow you to get this statement
24 in. My impression at this point is because Matt was an
25 officer of the organization, a statement made by him is

L. TERRY DIRECT EXAMINATION
R.2160

1 admissible for use against the organization, that is, the
2 corporation for which he worked. It is not, however, admis-
3 sible as to the individual co-defendants J. J. and his father
4 and it is hearsay to them.

5 MR. DEVASHRAYEE: Your Honor --

6 THE COURT: I will allow the statement to come in
7 as it bears upon the claims against the corporation only, so
8 go ahead with your examination.

9 Q (By Mr. Devashrayee) All right. Mr. Terry, do you
10 want to repeat then what you were telling the Court before
11 the objection was raised?

12 A Well, Matt had told me that they were going to meet
13 with their father and they wanted to basically have Bry
14 terminate Tony's contract so that they could take over --

15 MS. FALK: Objection.

16 THE WITNESS: -- the dealership.

17 THE COURT: I think we've covered the foundational
18 issue, Counsel. The objection's overruled and the answer's
19 now in.

20 Q (By Mr. Devashrayee) Mr. Terry, once again, when
21 you say "they," who did you mean by "they"? They were going
22 to --

23 A J. J., Jeff Gorringer, Matt.

24 MR. DEVASHRAYEE: Okay. Thank you, Mr. Terry.

25 I have no further questions, your Honor.

C. CHRISTIAN, CPA, DIRECT EXAMINATION
R.2161-70

1 THE COURT: You may cross-examine.

2 CROSS-EXAMINATION

3 BY MS. FALK:

4 Q Mr. Terry, did you ever hear J. J. say anything to
5 his father about Tony Kraatz?

6 A No.

7 Q Did you ever -- did J. J. ever tell you that he had
8 told you he complained to his father about Tony Kraatz?

9 A No.

10 MS. FALK: I have no further questions.

11 THE COURT: All right, Mr. Terry, sir, you may step
12 down.

13 MR. DEVASHRAYEE: No further questions.

14 THE COURT: You may step down. Thank you.

15 Call your next witness.

16 MR. ZUNDEL: Call Clark Christian, your Honor.

17 CLARK E. CHRISTIAN,

18 called as a witness by and on behalf of the Plaintiff, having
19 been first duly sworn, was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. ZUNDEL:

22 Q Mr. Christian, state your name, please, for the
23 record.

24 A My name is Clark E. Christian.

25 Q How do you spell Christian?

1 A C-h-r-i-s-t-i-a-n.

2 Q And you're an accountant?

3 A Yes.

4 Q And you have worked for Mr. Wilkinson at Heritage
5 Honda for a number of years; isn't that right?

6 A Yes. I don't currently do work for Heritage Honda,
7 but I have done work for Heritage Honda in the past.

8 Q You still work for Mr. Wilkinson?

9 A Yes.

10 Q You do his personal finances?

11 A Yes, that's correct.

12 Q And you were Heritage Honda's accountant for how
13 long?

14 A Oh, probably beginning somewhere around 1976, the
15 time when Mr. Wilkinson sold his interest.

16 Q Okay. Let me show you what's been marked as
17 Exhibit 235. This is a document you prepared, isn't it?

18 A Yes.

19 MR. ZUNDEL: Your Honor, I have an extra copy if
20 it's easier, given so many volumes.

21 THE COURT: I don't know if it's easier or not.
22 I'm just trying to find the right volume here. If you have
23 it readily at hand, I'll take it.

24 Q (By Mr. Zundel) Would you tell the Court what this
25 is, please?

1 A This is a schedule of the W-2 wages which were
2 paid.

3 Let me rephrase that. The wages and other compen-
4 sation which were reported on forms W-2 for Mr. Wilkinson for
5 the years 1987 through 1993.

6 Q Now, the W-2's that are referred to here are in
7 most cases amended W-2's; isn't that right?

8 A No, that's not right.

9 Q In some cases they're amended W-2's?

10 A I don't even know if that's correct.

11 Q Okay. Do you have your source information here for
12 this exhibit?

13 A Yeah, I do in my briefcase.

14 MR. ZUNDEL: May the witness be excused to get it
15 so we can get this straight?

16 THE COURT: Well, are you calling this gentleman as
17 an adverse here?

18 MR. ZUNDEL: Yes.

19 THE COURT: I presume you are.

20 MR. ZUNDEL: He is.

21 THE COURT: And you're asking him now to verify
22 your question of whether or not certain or all or most of the
23 W-2's that are represented in your exhibit have a founda-
24 tional basis of having been amended?

25 MR. ZUNDEL: This is his exhibit, actually, he

1 prepared and gave it to me in a deposition.

2 THE COURT: Well, is it quite worth the candle to
3 have him do this at this moment? I don't understand the
4 essential nature of why it is -- let's ask him a hypothetical
5 then if it's that important. If some of these were amended,
6 then where are we going with it? Ask him that.

7 Q (By Mr. Zundel) Well, okay. Where we're going is
8 this.

9 Mr. Christian, the top line, wages and bonuses,
10 that shows what Mr. Wilkinson was paid as base salary in
11 those years, does it not?

12 A Base salary and bonuses, that's correct.

13 Q Now, the other benefits that are shown here are
14 expenses that Mr. Wilkinson incurred or that the dealership
15 paid for Mr. Wilkinson during the particular years shown that
16 you eventually decided should show up in his W-2, right?

17 A That's correct.

18 Q Now, he was issued in most years a W-2 at the close
19 of December 19~~a~~whatever, and then you would decide in
20 January, February or March what additional compensation he
21 should be recognizing and would amend his W-2.

22 A No, that's not correct.

23 MR. ZUNDEL: Okay. That's what I think his papers
24 would show, but maybe he knows better, Judge. I don't know
25 that it is worth the wait.

1 THE COURT: I suspect from my perspective it's
2 probably not. The witness is here and he seems to me like
3 he's prepared to answer your questions. They may not neces-
4 sarily be to your liking, but he's prepared to answer them,
5 so let's go forward.

6 Q (By Mr. Zundel) Would the types of expenses that
7 Mr. Wilkinson would incur that the dealership would pay
8 include personal country club expenses?

9 A Yes, personal country club expense is one of the
10 items on the schedule.

11 Q All right, and life insurance premiums paid?

12 A That's correct.

13 Q That's a \$45,406 figure?

14 A That's correct.

15 Q And that's for Banner Life; isn't that right?

16 A Banner Life is in that number. I'm not sure that
17 all of it is Banner Life.

18 Q Okay. Those were policies for which the dealership
19 was not the beneficiary?

20 A That's correct.

21 Q All right. Now, in 1990 you don't have anything
22 shown there, but you would agree with me that if Banner Life
23 were paid for Mr. Wilkinson in that year, that that should
24 also be included?

25 A That's correct.

1 Q Let me show you what's been marked as Exhibit 73.

2 I would offer the exhibit, your Honor.

3 THE COURT: Well, it's received unless there's
4 objection, Counsel.

5 Q (By Mr. Zundel) This letter on its face would tell
6 you --

7 MR. WINDER: My objection, Judge, is it's hearsay.

8 MR. ZUNDEL: It's a letter written to the corpora-
9 tion in the ordinary course of business, Judge. It's
10 authentic.

11 THE COURT: Well, you're asking this witness to
12 examine the letter and tell us something about it?

13 MR. ZUNDEL: I'm just asking him to make a conclu-
14 sion from what it actually says.

15 THE COURT: Well, he may look at the letter,
16 Counsel, and then you may ask him the question if it helps.

17 Q (By Mr. Zundel) That letter would tell you that
18 Banner Life was being paid by Heritage in 1990, right?

19 A For a portion of 1990, that's correct.

20 Q Well, look at Exhibit 238, and are you familiar
21 with Heritage's vendor files?

22 A No, I'm not.

23 Q I'll represent to you that that is a copy of the
24 vendor file from Heritage for Banner Life for 1990. The
25 documents there would show that Heritage was paying for

1 Banner Life through direct draws on Heritage's bank account,
2 do they not?

3 A Well, not that I've seen.

4 THE COURT: Well, what was your answer, sir?

5 THE WITNESS: Not that I've seen. The first two
6 are checks. The first two documents here are checks to
7 Banner Life Insurance, one of them dated May 31st, 1990, the
8 other April 9th, 1990, and they're for other individuals.
9 They're not for Mr. Wilkinson.

10 Well, no, that's not true. They're small amounts
11 for --

12 Q (By Mr. Zundel) Please continue through the
13 documents. You'll see the directions to the bank to pay
14 directly.

15 THE COURT: Are you talking about the correspond-
16 ence Bates stamped 275 or 276? Why don't you help him out?
17 There are a number of pages.

18 THE WITNESS: The document Bates stamped 275 indi-
19 cates that beginning in July that a policy was taken out for
20 Bry.

21 Q (By Mr. Zundel) Thank you. Is it the policy was
22 taken out or the payments would be made directly?

23 A It says the first draft date will be July 10th.

24 Q From the bank, so that's when the bank started to
25 pay the payments directly?

1 A That's right.

2 Q Okay, not when the policy was taken?

3 A Well, my understanding is it was a new policy in
4 1990.

5 Q So you had payments being made in May, some in
6 July, and none of those payments were recognized by
7 Mr. Wilkinson in 1990 as on the W-2, were they?

8 A No.

9 Q And they should have been?

10 A Yes, that's correct.

11 MR. ZUNDEL: Your Honor, may I have, just so the
12 record is clear, 238 and 73 are admitted as part of the
13 record for what they show as authentic documents.

14 THE COURT: That is the ruling. They are received
15 without objection.

16 Q (By Mr. Zundel) Okay. Now, let me show you what's
17 been marked as Exhibit 236. I'll represent to you -- I'll
18 offer this exhibit as a part of the general journal entries
19 of Heritage, y^our Honor, which can be read by this witness,
20 an accountant.

21 THE COURT: Proceed with your examination of the
22 witness, see if he's able to help us.

23 Q (By Mr. Zundel) All right. The bottom entry,
24 6100, would show that the payment was made to the law firm of
25 Dart, Adamson & Kasting of \$1,644.30 for legal fees; is that

1 right?

2 A That's correct.

3 Q All right. Now, are you aware that the firm of
4 Dart, Adamson & Kasting is a well known domestic relations
5 firm in this city?

6 A Yes, I am.

7 Q All right. Mr. Wilkinson did not recognize any
8 payments for legal fees on behalf of -- that were paid in
9 connection with his personal divorce in 1990 or any other
10 year, did he?

11 A Well, that's not exactly correct. He was audited
12 by the IRS and I picked up a small amount of legal fees,
13 adjusted a small amount of legal fees as a result of that
14 audit, I believe, for 1990.

15 Q In what year was he audited, sir?

16 A '89 and '90, as I recall.

17 Q In what year was he audited? Not for what year.

18 A Oh, I don't remember. Obviously it was subsequent
19 to that time. *

20 Q All right. Is it your recollection that the
21 Internal Revenue Service required Bry to recognize approxi-
22 mately \$3400 or something paid to divorce attorneys in 1990?

23 A I don't recall that it was that much.

24 Q At any rate it's clear that amounts were paid for
25 Mr. Wilkinson's personal benefit in addition to those set

1 forth in your Exhibit 235 that were not recognized on any
2 W-2.

3 A Yes.

4 Q And even in those instances when the IRS went back
5 and audited and said you've got to recognize these things,
6 you didn't add them to this.

7 A No, because they were not reported on its W-2.

8 Q Okay. Now, let me show you what's been marked as
9 Exhibit No. 228. Do you recognize that exhibit as your
10 notes?

11 A Yes.

12 Q And this shows a meeting -- this is a note, these
13 are notes of a meeting that you had with Mr. Wilkinson,
14 Mr. Kraatz, Halin Green and two officers of Comerica Bank
15 over the telephone; isn't that right?

16 A Yes, and also Bill Prater.

17 Q All right, an attorney for Mr. Wilkinson. These
18 notes show a conversation with Comerica about loans that were
19 -- that Comerica was asserting were in default that were made
20 to Good Works and to Heritage; is that right?

21 A Yes.

22 Q And Good Words is Bry Wilkinson's partnership?

23 A Yes.

24 Q And they owned the real estate upon which Heritage
25 sat, right?

C. CHRISTIAN, CPA, DIRECT EXAMINATION
R.2182

1 under advisement your objection.

2 Go ahead with your examination, Mr. Zundel.

3 Q (By Mr. Zundel) Before I get to this 234, let me
4 ask you a couple of quick questions. The \$200,000 that
5 Mr. Wilkinson repaid was not repaid until two years later,
6 right? Maybe even three years later. In fact, it was repaid
7 in December of 1992. It was taken in November of 1990,
8 right?

9 A That could be true. I'm not sure of the exact date
10 it was paid.

11 Q Okay. You know that it was paid without any
12 interest?

13 A Yes, I do.

14 Q And you know that the Internal Revenue Service
15 would want someone to recognize some imputed interest as
16 income, right?

17 A Yes, but the fact that the corporation was an S
18 corporation, imputed interest doesn't really have an impact.

19 Q Other than the fact that it may not impact the tax
20 picture, but it certainly impacts the corporate cash picture
21 by the amount of the interest paid to Comerica on
22 Mr. Wilkinson's behalf, or conversely, the amount of interest
23 not recovered from Mr. Wilkinson by Heritage, right?

24 A That's true.

25 Q All right. In fact, Mr. Wilkinson never paid

**L. MILLER DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.2185-86**

1 but will shortly, and then my affidavit on attorney's fees up
2 through a certain date, so I think that there's some likeli-
3 hood that we might finish on my case in chief today.

4 THE COURT: So the way it stands at the moment,
5 you're contemplating calling three more witnesses, possibly
6 four?

7 MR. ZUNDEL: That's right, Judge.

8 THE COURT: All right. Very good.

9 All right, folks, it's time for us to take our noon
10 recess. We'll be in recess until 1:30 this afternoon.

11 (Whereupon, a recess was taken.)

12 THE COURT: Parties and counsel are present.

13 Mr. Zundel, you may call your next witness.

14 MR. ZUNDEL: Thank you, Judge. Plaintiff calls
15 Larry Miller to the stand.

16 LAWRENCE WARREN MILLER,
17 called as a witness by and on behalf of the Plaintiff, having
18 been first duly sworn, was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. ZUNDEL:

21 Q Mr. Miller, would you state your full name for the
22 record, please?

23 A Lawrence Warren Miller.

24 Q And where do you reside?

25 A In Sandy.

1 Q And you're presently employed where?
2 A I am self-employed and make my offices in Murray,
3 Utah.
4 Q Are you an officer of Heritage Imports?
5 A I am.
6 Q And what position do you hold?
7 A Secretary-Treasurer.
8 Q You're also shareholder?
9 A That's correct.
10 Q You own 60 percent of the shares?
11 A That is correct.
12 Q You purchased the shares of Bry Wilkinson and it
13 was actually documented in April of 1993; is that right?
14 A That's correct, we closed in April of '93.
15 Q Your negotiations regarding the price value of
16 those shares had concluded in December of 1992?
17 A That's correct.
18 Q And you had agreed that -- you and Bry Wilkinson
19 had agreed that he would receive \$3 million in various forms
20 for 60 percent of the corporation.
21 A I will say that we agreed that he'd receive the \$3
22 million for the deal that we culminated in April which I
23 don't interpret as being for 60 percent of the corporation.
24 Q Okay. Now, what is it that Bry Wilkinson had to
25 sell?

R.2200

L. MILLER DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.2200

1 A That is correct.

2 Q And so if you total all those things together, that
3 equals \$4.2 million, right?

4 A If you total those together, that equals 4.2
5 million.

6 Q Now, you would agree, would you not, that the stock
7 of the corporation was worth \$200,000 more in September of
8 1992 than it was in December of 1992?

9 A I would agree that on December 1st it was worth a
10 hundred nine thousand more and on December 31st you could
11 increase that, the differential, to a hundred ninety-four
12 thousand because of an 85,000, almost \$86,000 loss in
13 December. We came in on the 9th of December, so I don't know
14 where you put that.

15 Q Well, I was just asking --

16 A But if you go to the end of December, then it would
17 be very close to that hundred ninety-four thousand, yes, sir.

18 Q A hundred ninety-four thousand?

19 A At the end of December, yes, so the first to the
20 end makes a significant difference here, so that's the reason
21 I wanted to point out, depending on whether you measure it on
22 the 1st of December or the 31st of December.

23 Q Okay. Would you agree that the corporation was
24 worth approximately \$4.4 million, the stock, in September of
25 19 -- the 1st of September of 1992?

L. MILLER DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.2205-06

1 Q (By Mr. Zundel) Let me ask this, Mr. Miller, I
2 asked you if you would admit that the shares were worth \$4.4
3 million in September and you gave me an explanation and the
4 Court also an explanation, and you came back to say \$3
5 million.

6 A Yes, sir.

7 Q You were, in fact, willing to pay \$3.4 million Blue
8 Sky in August of 1992 in addition to the book value of the
9 corporation which you assume was a million dollars for a \$4.4
10 million total, weren't you?

11 A Do you want the long answer or the short answer?

12 Q I'll take the short answer, yes or no, and then --

13 A Okay, I'm going to answer the short answer on that.
14 I'm going to answer no.

15 Q All right. I'm going to ask you to look at your
16 deposition at page 42 --

17 A Okay.

18 Q -- line 4.

19 A Uh-huh, (affirmative).

20 Q And that question, I say, "You were willing to pay
21 \$3.4 million in Blue Sky, just not 4 million at that time."
22 We were talking about August.

23 A Correct.

24 Q All right, and you said, "I would have to answer
25 that question yes."

1 A Okay, but that's dealing only with Blue Sky. When
2 you add the 1.1 million book value, I would qualify it by
3 saying 1.1 million book value to the extent it stood up to
4 review or audit --

5 Q Okay.

6 A -- which is what the balance sheet was at the time,
7 but after review, I backed that balance way up or way back so
8 that's why I'm qualifying my answer, but the answer to your
9 question on Blue Sky at that time and that deal, the answer
10 was yes.

11 Q 3.4 million?

12 A That's correct.

13 Q All right, so whatever the book value was plus 3.4
14 million?

15 A Correct.

16 Q All right. Now, I asked you -- you mentioned this
17 book value issue and I asked you on page 52 what the book
18 value was.

19 A Okay.

20 Q And we were dealing with 1992 or with December 1992
21 numbers here, but on page 52 I asked you, "Can you tell me
22 what the book value of Heritage Imports was at the end of
23 1992 as adjusted?"

24 THE COURT: What line are you talking about?

25 MR. ZUNDEL: Line 18, Judge.

L. MILLER DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.2200

1 A It just went into the bank account and became part
2 of the operating capital.

3 Q What happened, Mr. Miller, between September of '92
4 when Mr. Kraatz was let go and December of '92 at this
5 dealership in terms of the -- I want to make sure I get this
6 -- in terms of the profit or loss of the dealership?

7 A In September, October, November combined, the oper-
8 ating losses were \$109,000. In December alone they were an
9 additional 85, almost \$86,000.

10 Q Okay, so when that money came back into the shop,
11 there was how much in additional operating losses since when
12 Mr. Kraatz had left?

13 A If you add December to those, about a hundred
14 ninety-four thousand.

15 Q Between December of '94 and when you closed -- I'm
16 sorry, December of '92 and April of '93 when you closed this
17 transaction, did you experience losses or profits?

18 A We experienced losses again in January of 90,000,
19 in February of 79, almost 80,000. We did make some profit,
20 relatively marginal, in March. That's when the corner was
21 turned, and then we made money in April. I'm going to guess
22 25,000, 35,000 respectively.

23 Q Now, Mr. Miller, do you have an opinion as to
24 whether or not in September of '92 that this dealership was
25 undercapitalized?

1 A I do have an opinion.

2 Q And what's that opinion?

3 A My opinion that the dealership had a sufficient
4 capital to operate so as not to have been a hindrance to a
5 general manager's ability to run a dealership normally.

6 Q And upon what, Mr. Miller, do you base that?

7 A I checked on the basis of the argument that the
8 store was undercapitalized with out Toyota dealership in
9 Murray, which to me is the best match-up in terms of size,
10 Japanese import and in the same market and about the same
11 volumes -- by the way, the Toyota store and the Honda store
12 are about the same -- for the four-month period September of
13 '92 through December of '92 inclusive, the Toyota store ran
14 an average general ledger overdraft of 576,000, and the Honda
15 store ran an average overdraft negative 553,000, so in my
16 opinion, the Honda store was \$23,000 better capitalized than
17 the Toyota store and the Toyota store was profitable during
18 that period.

19 Q Now, when you say general ledger overdraft,
20 Mr. Miller --

21 A Right.

22 Q -- what are you talking about?

23 A The bank balance, the cash in the store.

24 Q Mr. Miller, some of us may not understand how a
25 business like a Toyota dealership can have that kind of

B. WISAN DIRECT EXAMINATION
R.2230-32

1 testify as follows:

2 DIRECT EXAMINATION

3 BY MR. ZUNDEL:

4 Q May I hand these up to the Court? The witness has
5 his own.

6 Mr. Wisan, you were called yesterday.

7 May I assume the witness has already been sworn,
8 your Honor?

9 THE COURT: He has been, yes.

10 Q (By Mr. Zundel) Let me direct your attention to
11 what has been marked as Exhibit 327, which is your scenario
12 number two at the top, okay?

13 A Okay.

14 Q Yesterday you were asked to tell the Court what the
15 amount due would be under the profit sharing column, which is
16 the third column in from the left. If you have not done any
17 adjustments to the income statements, profit and loss state-
18 ments, and Mr. Winder suggested might be 4,000, you said it
19 might be 18,000, this is an actual calculation, is it not?

20 A Yes, of all adjustments being removed. Actually,
21 Mr. Winder had asked some of the adjustments to be removed
22 and I came up with the \$12,000.

23 Q Okay, and how much would be due if all of the
24 adjustments were removed under this column?

25 A Under the profit sharing scenario number two, the

1 total is \$34,975.40.

2 Q All right, and that changes -- that would change
3 then the total cumulative amount due as far as damages goes
4 to \$250,184.03; is that right?

5 A Yes.

6 Q All right, and that's shown on the second page?

7 A Yes.

8 Q Far right-hand column?

9 A The final column.

10 THE COURT: 250,184?

11 THE WITNESS: Yes.

12 THE COURT: That's the number we're looking at?

13 THE WITNESS: Yes, that's the total amount of
14 damages including interest with all adjustments that we had
15 made to the profit sharing taken out.

16 Q (By Mr. Zundel) All right. Now, you were ques-
17 tioned yesterday also about whether or not it was proper to
18 adjust the balance sheet for the rent that Larry Miller was
19 required from the dealership; is that right?

20 A Yes.

21 Q And you've made an adjustment to your previous
22 calculations by removing the rent adjustment and leaving it
23 as Miller wanted it; is that right?

24 A Yes, just the rent has been adjusted out and -- or
25 I mean that adjustment for rent has been removed from our

1 calculations, so we have used the Larry Miller actual rent.

2 Q All right, and that is your scenario number one?

3 A Yes.

4 Q Which has been marked as Exhibit 328; is that
5 right?

6 A I don't know if it's marked as 328.

7 THE COURT: It is.

8 Q (By Mr. Zundel) And the amount that would be due
9 under the profit sharing column if just the rent were not
10 adjusted?

11 A Is \$88,272.30.

12 Q And the bottom line figure for your damages would
13 be?

14 A Total amount of damages then including interest
15 would be found on the second page and far right-hand column,
16 is \$313,927.31.

17 Q All right, and so the adjustments that remain in
18 this scenario number one are basically removing or adding
19 back into income the expenses that are incurred because of
20 the buy-out of Mr. Wilkinson?

21 A Yes.

22 MR. ZUNDEL: No further questions, Judge.

23 THE COURT: All right.

24 *

25 *

M. SCHMITZ DIRECT EXAMINATION
R.2235-37

1 MR. ZUNDEL: Right.

2 THE COURT: Okay.

3 MR. WINDER: No objection.

4 THE COURT: Very well. I'm delighted to receive
5 it.

6 DIRECT EXAMINATION

7 BY MR. ZUNDEL:

8 Q Mr. Schmitz, would you state your name for the
9 record, please?

10 A It's Mark D. Schmitz.

11 Q And where do you live?

12 A I live most of the time in Park City.

13 Q And how are you employed?

14 A I'm an independent consultant and I own a software
15 company, as well.

16 Q Does this binder contain a copy of your resumé?

17 A The other two do. Yours does not.

18 Q I see. Where can the Court find a copy?

19 A Behind tab number 7.

20 Q Okay. Would you tell us, where were you educated?

21 A I got my undergraduate degree at Purdue University,
22 economics and math, Ph.D. in economics, University of North
23 Carolina back in 1974.

24 Q Okay, and when you say you are a consultant, what
25 is that you are primarily engaged in consulting?

1 A The three main things that I do is put on manage-
2 ment seminars on how to run a car dealership, how to manage a
3 car dealership, all financial topics. I do those for state
4 dealer associations, for NADA, for some dealerships. I also
5 value dealerships, some of them for purchases, sales, a lot
6 of it for litigation support such as this case here.

7 Q And you've actually written manuals for the
8 National Automobile Dealer Association, have you not?

9 A Back in 1989 I wrote the first volume of the Guide
10 to Valuing an Automobile Dealership, and I've also written
11 two accounting manuals, one for BMW dealers and one for
12 Mercedes Benz dealers.

13 Q All right, and can you give the Court some idea of
14 the breadth of experience you have had in evaluating
15 dealerships?

16 A My count now probably is, I'm pretty sure is well
17 over a hundred and fifty dealerships. I started doing this
18 back in about 1988 or '89, and I've testified in court from
19 New York to Florida to Colorado to California, Washington,
20 I've done lots of depositions on the same topics, written
21 numerous reports for people going through divorces, going
22 through estate plans, consulted with other dealers on when
23 they're going to buy or sell a dealership.

24 Q And you've been hired by Mr. Kraatz in this case to
25 prepare certain reports and formulate opinions?

1 A That's correct.

2 Q One of those reports deals with -- well, will you
3 explain to the Court what you have done for Mr. Kraatz?

4 A The first thing that was asked of me to do was to
5 look at the dealership as of September 1992 and tell you,
6 Mr. Kraatz, what I thought the fair market value of that
7 dealership was as of that date, and then along with that, you
8 also asked me to look at the actual transaction that took
9 place for the 60 percent of the stock and what that implied
10 would be value of the dealership as of March of 1992. Subse-
11 quent to that there was the request for additional informa-
12 tion that would back up some of the comments I'd made in the
13 first report concerning expenses, working capital, things
14 like that.

15 Q And all of your reports are contained here in this
16 Exhibit 329?

17 A Yes.

18 Q All right. Let's go first to the valuation report
19 then and that's under tab 1.

20 A Yes.

21 Q And do you have an opinion of the value of the --
22 of 100 percent of the stock of Heritage Imports as of
23 September 1992?

24 A As of September 1992, I placed that value at \$4.4
25 million. That would be for a hundred percent of the stock,

M. SCHMITZ DIRECT EXAMINATION
R.2255-58

1 A This is simply a table showing the amount of
2 compensation and benefits that Mr. Wilkinson was taking out
3 of Heritage Honda during this time. For the first few years
4 the company accountant was publishing an adjusted W-2
5 compensation. I used that for the early years and then we
6 went through some of the larger accounts and found that there
7 were numerous other amounts that were paid on behalf of
8 Mr. Wilkinson, or paid to Mr. Wilkinson in addition to what
9 is shown on his W-2.

10 Q Now, Mr. Christian has prepared a chart that has
11 been received in evidence in this case.

12 A Yes, I included a copy of it in here for reference.

13 Q Where is that? Oh, I see.

14 A It's about three pages from the back.

15 Q Yes, uh-huh.

16 THE COURT: That's the one we've looked at
17 previously?

18 MR. ZUNDEL: Right.

19 THE COURT: Here it is.

20 Q (By Mr. Zundel) Now, this -- Mr. Christian's chart
21 showed the wages and bonuses that Mr. Wilkinson received from
22 his base pay and then in addition --

23 MR. WINDER: I know what it is, I just can't find
24 it in mine but --

25 THE COURT: Three or four pages from the end of

1 tab 2 in your new binder.

2 Q (By Mr. Zundel) And then he added amounts expended
3 by the dealership for Mr. Wilkinson's behalf which were even-
4 tually recognized on the W-2?

5 A That's correct.

6 Q And that is the total W-2 wages line on
7 Mr. Christian's chart, and you've started with that line on
8 your chart?

9 A Yes, which is right behind the barred charts there.

10 Q Yeah.

11 THE COURT: I think it's this one, is it not, with
12 the yellow on it?

13 MR. ZUNDEL: It's this one right here, yes.

14 THE COURT: Oh, okay.

15 MR. ZUNDEL: You're past it now, Judge.

16 THE COURT: Right here, okay.

17 Q (By Mr. Zundel) So that is the same one as the W-2
18 income revised one that you've got there; is that right?

19 A Yes, it is.

20 Q Okay, and just for interest's sake, up at the top
21 you've given a number which is the income for owners and
22 operators shown on the financial statements and just compared
23 those?

24 A Yes, I did.

25 Q Okay. Then to the W-2 income you've added numbers

1 for 1990, '91 and '92 to come up with a total known
2 compensation?

3 A That's correct.

4 Q Will you explain to the Court what you added and
5 why?

6 A What I was adding back were either debts of
7 Mr. Wilkinson's that were assumed or payments made in his
8 behalf. The largest one in 1990 is 200,000 which was a debt
9 that the St. George Honda dealership had and when that deal-
10 ership was essentially liquidated or sold, Heritage Honda for
11 some reason assumed that debt, even though it wasn't theirs,
12 so in my opinion, that was a benefit to the owner of both of
13 these dealerships, Mr. Wilkinson.

14 Q Let me just stop you right there. You added that
15 into compensation benefits that he received. Is it an actual
16 economic benefit to receive \$200,000 in 1990 if you have to
17 pay it back in 1992?

18 A Well, in the end, it ends up probably somewhat
19 washing out, so I don't think there was any interest paid,
20 but it certainly hurts the dealership not to have that
21 200,000 and it's hard for me to see how this could be a
22 legitimate responsibility of Heritage Honda and something
23 that ever should have shown up on their books at all, so it's
24 certainly a benefit to Mr. Wilkinson for this Heritage to
25 step up and take this responsibility.

1 Q And what other items are there that you added in?

2 A In that same year of 1990 there's a \$45,000, I
3 think it's -- the line is insurance premiums. These insur-
4 ance premiums in Mr. Christian's exhibit, he started picking
5 these up in later years, but the documents that we see from
6 Banner Life show that even in 1990 there were insurance
7 policies that were for the benefit of Mr. Wilkinson that were
8 being paid for by the dealership and those premiums are
9 picked up to 45,000.

10 Later in 1991 there was loan fees and defaults on a
11 Comerica loan. In 1992 there were additional loans and some
12 legal fees that the dealership simply paid for the benefit of
13 Mr. Wilkinson, and then later in the year they actually were
14 repaid, but they went to him in terms of benefits during the
15 year.

16 Q And so this numerical information that you have
17 there is summarized on a bar chart that precedes it by a
18 couple of pages then?

19 A Yes, it's the one -- that last blue and yellow
20 bars.

21 Q All right. You don't have any yellow bars before
22 1990 because you didn't look?

23 A We didn't look, no.

24 Q All right. Now, you've got this graph in the back
25 that's kind of going downward. What's that?

M. SCHMITZ DIRECT EXAMINATION
R.2261-62

1 four or five pages in.

2 Q (By Mr. Zundel) So the blue bar is what you would
3 have expected given the industry averages?

4 A That's the actual average reported by NADA for
5 those years, yes.

6 Q And the yellow is what Heritage was spending on
7 advertising?

8 A Yes, took their advertising right off the financial
9 statement, divided by the number of new cars that they
10 reported sold, and got the high yellow bar there.

11 Q So this is only the advertising that was shown on
12 the financial statement?

13 A Correct.

14 Q Is advertising something that a car dealership can
15 control as far as expense?

16 A Absolutely.

17 Q It is not a fixed cost?

18 A I think you have to have some level of it, but it's
19 really the manager's choice, the dealer's choice of how high
20 that level is going to be.

21 Q And what other kinds of expenses did you find that
22 were out of line?

23 Let me show you the chart that you prepared.

24 A The chart on the following page breaks this down
25 just for the period August 1992, the year through August

1 1992, and what I did was said if they had been at the guide-
2 line, then how much lower would their expenses have been. I
3 only looked at the ones that were high which was most of them
4 anyway, and the big ones that stand out are line 9, advertis-
5 ing new and used, which was just for eight months high by a
6 hundred and eighty-six thousand. Down on line 17, employee
7 benefits, high by 82 -- I'm sorry, outside services, line 27,
8 high by 58, which could be things like just garbage pickup.
9 We don't know exactly what's in there, and then the travel,
10 entertainment, legal and auditing are also very high in this
11 particular year.

12 If you just look at the total, if the expenses had
13 been at the guidelines, it would have been like \$691,000
14 lower for just eight months, so you know a million two per
15 year high in all of it or most of it in just these precise
16 expense lines.

17 Q Did you also prepare a market analysis or sales
18 analysis?

19 A Yes, I did.

20 MR. WINDER: Counsel, what tab?

21 MR. ZUNDEL: That's tab 4.

22 Q (By Mr. Zundel) Are you prepared to talk about
23 that?

24 A Absolutely.

25 Q Would you tell the Court what it is that you had

R.2300

M. SCHMITZ CROSS EXAMINATION
(BY D.J. WINDER)
R.2323-24

1 under your second example. We didn't yet talk about net
2 asset value approach under your first example. Do you have
3 that in front of you, Exhibit 5?

4 A Yes, sir.

5 Q Okay. Now, the book value of Heritage Honda in
6 August of '92 is the first number, 738,000, right?

7 A Yes.

8 Q The next line is 444,000 worth of adjustments that
9 you made to that book value, right?

10 A Yes, that's what it says, yes, that's right.

11 Q Okay, and what you did there is you went to the
12 depreciation, and we ought to get this -- Ms. Falk, what's my
13 number on August of '92 so we get that?

14 So it's 297K. I'd move for the admission of 297K.
15 The K is not indicated, unfortunately, in the Plaintiff
16 exhibit, or is it?

17 MR. ZUNDEL: It's not.

18 MR. WINDER: K simply represents alphabetically if
19 we start in January where we end up in August.

20 MS. FALK: I think it's H.

21 MR. WINDER: Is it H?

22 THE COURT: All right. Any objection to Exhibit
23 297?

24 MR. WINDER: H.

25 MR. ZUNDEL: Well, I think the entire exhibit

1 should come in as 297. We have no objection.

2 THE COURT: Very well. That's what I will -- I
3 will receive it.

4 Q (By Mr. Winder) Okay, so what you did on this
5 August of '92 statement -- and Judge, I have the partial
6 copy.

7 THE COURT: I have it here.

8 Q (By Mr. Winder) What you did is you went down on
9 the first page under assets, towards the bottom there's
10 887,000 in total fixed assets, accumulated depreciation, and
11 you divided that by 50 percent and you came up with 444,000,
12 right?

13 A Multiplied by 50 percent but that's how I did it,
14 yes.

15 Q So what you're saying is that in your opinion the
16 accumulated depreciation of the assets, the fixed assets at
17 Heritage was too great.

18 A Correct. It understated the fair market value of
19 those assets.

20 Q By 50 percent?

21 A Well, the asset value doesn't change by 50 percent,
22 but the depreciation changes by 50 percent.

23 Q Right.

24 A The asset value goes up from 244 up by 444 so it's
25 actually more.

J. WILKINSON DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.2345-54

1 advertising was very high in '90, '91 and '92.

2 MR. ZUNDEL: Nothing further, Judge.

3 THE COURT: All right, thank you.

4 MR. WINDER: Nothing, Judge.

5 THE COURT: All right, Dr. Schmitz, you may step
6 down, sir. Thank you.

7 THE WITNESS: Thank you.

8 THE COURT: You can call your next witness.

9 MR. ZUNDEL: Jeff Wilkinson, your Honor.

10 THE COURT: Do you anticipate this will be your
11 last witness?

12 MR. ZUNDEL: I do, Judge.

13 THE COURT: Very well. Come forward,
14 Mr. Wilkinson, and be sworn.

15 JEFFREY JOSEPH WILKINSON,
16 called as a witness by and on behalf of the Plaintiff, having
17 been first duly sworn, was examined and testified as follows:
18 DIRECT EXAMINATION
19 BY MR. ZUNDEL:

20 Q Mr. Wilkinson, will you state your name for the
21 record?

22 A Jeffrey Joseph Wilkinson.

23 Q And you go by J. J. commonly?

24 A Correct.

25 MR. ZUNDEL: Your Honor, I expect to call him

1 Mr. Wilkinson and I don't think the record will be too con-
2 fused with the other Wilkinson.

3 THE COURT: Oh, I think not. That's fine.

4 Q (By Mr. Zundel) Mr. Wilkinson, you were employed
5 as general manager before Mr. Kraatz became employed at
6 Heritage; isn't that right?

7 A No.

8 Q Or excuse me, the general sales manager.

9 A Yes.

10 Q That's this position here on Exhibit 324?

11 A Yes, sir.

12 Q And the other managers answered to you, the manag-
13 ers in the used car department and the new car department?

14 A Yes, sir.

15 Q And when Mr. Wilkinson came to the dealership, you
16 were demoted from general sales manager down to one of the
17 regular part managers, right?

18 A No.

19 Q What happened? Did you stay as a general sales
20 manager?

21 A I think you're referring to Mr. Kraatz, not
22 Mr. Wilkinson.

23 Q What did I say?

24 Let me ask the question again.

25 A Okay.

1 Q You were demoted to a new car manager at the time
2 that Mr. Kraatz came to work at Heritage?
3 A No.
4 Q Did you maintain your position at the time that
5 Mr. Kraatz came to work for Heritage?
6 A No.
7 Q Well, what position did you take?
8 A Sales manager.
9 Q And that's different than general sales manager?
10 A Yes.
11 Q And it's a lower position than general sales
12 manager?
13 A Yes.
14 Q So you were demoted?
15 A No.
16 Q Well, explain to me then, please, what you mean.
17 A Jeff Gorringer was coming back from St. George, so
18 Tony wanted to -- just to have everybody sales manager. It
19 wasn't a demotion.
20 Q But the sales managers no longer answered to you,
21 did they?
22 A Correct.
23 Q They answered directly to Mr. Kraatz?
24 A Yes.
25 Q Okay. You were informed by your father that

1 Mr. Kraatz had been hired as a general manager, were you not?

2 A Yes.

3 Q In a meeting in his office?

4 A I believe so.

5 Q And you were disappointed to hear that he had hired
6 a general manager?

7 A No.

8 MR. ZUNDEL: Let me have Mr. Wilkinson's
9 deposition.

10 Your Honor, I have here with me the original tran-
11 script of Mr. Wilkinson's deposition dated 3-23-94, ask that
12 it be published.

13 MR. WINDER: Which volume, Counsel?

14 MR. ZUNDEL: Volume I. I also have a certified
15 copy for the Court.

16 THE COURT: Very well. All right, Mr. Wilkinson,
17 here is Volume I of your deposition.

18 Q (By Mr. Zundel) Ask you to refer to page 47, line
19 4. "Question: Now, do you remember what he said?

20 "Answer: He said he -- that he's hired a general
21 manager, told us his name, that he lives in St. George, that
22 he feels this is what he needs at this time.

23 "Question: Do you remember what you said?

24 "Answer: I said, quote, well, why? Unquote. He
25 said, quote, that's what the dealership needs, a general

1 manager, unquote, and he felt that's what he wanted to do and
2 at that time he didn't feel that -- that's what he felt the
3 best decision was, I guess.

4 "Question: Did you say anything more than, quote,
5 why, unquote?

6 "Answer: Well, I usually don't question him a
7 whole lot, if he says that's what's going to happen and he
8 explained that's what he felt that he wanted us to talk to
9 him.

10 "Question: Did you express your disappointment?

11 "Answer: Yes, obviously, yes."

12 Was that your testimony on that day?

13 A Yes.

14 Q Were you disappointed?

15 A Probably more surprised.

16 Q Okay. Now, did Mr. Wilkinson tell you what the
17 terms of Mr. Kraatz -- your father, did your father tell you
18 what the terms of Mr. Kraatz's contract were at that time?

19 A No.

20 Q Did he tell you how long Mr. -- he had hired
21 Mr. Kraatz to be the general manager?

22 A I don't remember.

23 Q Did he tell you what your relationship with
24 Mr. Kraatz would be?

25 A Yes.

1 Q What did he say?

2 A He said that he would help train myself to run the
3 dealership.

4 Q And that you would eventually by the general man-
5 ager or the dealer at the dealership?

6 A Yes.

7 Q Mr. Kraatz's term would be for a short time; is
8 that right?

9 A Yes.

10 Q Now, it became necessary for Mr. Kraatz -- well,
11 excuse me.

12 At the same time that Mr. Kraatz came to work, Jeff
13 Gorringer came up from St. George; isn't that right?

14 A I believe so.

15 Q And you were no longer the -- let me back up.
16 Before Mr. Kraatz came, Helen Green was the general manager;
17 is that right?

18 A Yes.

19 Q Did you report directly to Helen Green, or did you
20 have pretty much free access to your father?

21 A I would report to Helen.

22 Q Okay, and after Mr. Kraatz came and you were a
23 sales manager, did you report to Mr. Kraatz or did you have
24 free access to your father?

25 A Mr. Kraatz.

1 Q Now, that would be the proper line of authority in
2 this dealership, you would go to Mr. Kraatz, and Mr. Kraatz
3 to your father on any issues of any importance to the dealer-
4 ship; isn't that right?

5 A Other than he's my father so --

6 Q So if you wanted to go over his head, that was okay
7 because he was your dad?

8 A No.

9 Q Okay. It became necessary from time to time for
10 Mr. Kraatz to, should I say, discipline you for certain con-
11 duct, such as playing games on the computer; is that right?

12 A I believe he -- we talked about it.

13 Q Or looking at employee files, compensation plans?

14 A No.

15 Q Did there come a time when you were called into
16 Mr. Kraatz's office and reprimanded for looking at compensa-
17 tion plans that he'd left on a desk?

18 A Yes.

19 Q And you were quite upset when that occurred; isn't
20 that right?

21 A Yes.

22 Q Do you recall what Mr. Kraatz said to you?

23 A Yes.

24 Q What did he say?

25 A He called me into his office. It was in his

1 office. Chuck Quinn was there. I don't remember when it
2 would have been or what year, but he called me in and he
3 said, "You need to decide if you want to be here or not."

4 Q And how did you respond to that statement by
5 Mr. Kraatz?

6 A I wasn't sure what he was talking about.

7 Q Had you previously told employees that you were not
8 happy with Mr. Kraatz being general manager?

9 A Not that I remember.

10 Q Do you remember you were here and Mr. Terry
11 testified?

12 A Yes.

13 Q And you heard him say that you'd told him that you
14 hated Mr. Kraatz?

15 A I don't remember if I said I hated him, but I may
16 have mentioned it to him.

17 Q Mr. Terry?

18 A Correct.

19 Q Okay, so you don't deny what Mr. Terry said?

20 A I don't know if I said that I hated anybody.

21 Q Mr. Terry said that you told him that you hoped
22 that your father would fire Mr. Kraatz.

23 A I don't remember saying that.

24 Q But you might?

25 A I don't remember saying that.

1 Q But you don't deny it?

2 A I don't remember saying that.

3 Q Okay. Now, you had a pet shop that you owned with

4 your brother-in-law; is that right?

5 A Yes.

6 Q And you had some computer business on the side

7 also; is that right?

8 A Yes, correct.

9 Q And that was during the time that Mr. Kraatz was

10 there?

11 A I believe so.

12 Q And you were sales manager?

13 A Yes.

14 Q And you never asked Mr. Kraatz's permission to have

15 an outside job, did you?

16 A No.

17 Q This pet store was an actual location, a retail

18 location?

19 A Yes.

20 Q And what did you do there at the pet store?

21 A I was one of the partners.

22 Q Did you work there?

23 A Occasionally.

24 Q But you would come in to work when your shift --

25 you'd come into work at Heritage when your shift started and

1 you would leave Heritage immediately when your shift was
2 over; isn't that right?

3 A That's what my schedule was. I don't know if I
4 looked every day, but, yes.

5 Q Was there any communication between you and
6 Mr. Kraatz about your attitude, not being 100 percent for the
7 dealership during his employment?

8 A I don't remember.

9 Q Isn't that what he was referring to when he said
10 you had to decide whether you wanted to be here or not in the
11 meeting we were talking about?

12 A I don't know.

13 Q Now, after this meeting with Mr. Kraatz where he
14 asked you -- told you that you needed to decide whether you
15 wanted to be at the dealership or not, you went to speak with
16 your father at his home; isn't that right?

17 A Yes.

18 Q And that was in the evening that same day?

19 A I'm not sure.

20 Q And you told your dad that Mr. Kraatz had told you
21 that Mr. Kraatz -- or that Mr. Kraatz had told you that your
22 father did not want you in the dealership?

23 A I don't believe that's what he told my father, no.

24 Q You told your father that Mr. Kraatz had indicated
25 to you that Mr. Kraatz didn't want you in the dealership.

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1 overruled.

2 Q (By Mr. Zundel) Your father gave you assurances
3 that everything would be okay and he wanted you around?

4 A I believe that's what he said, yes.

5 Q And you got into a conversation with your father on
6 that occasion as to whether or not Tony was training you
7 properly; isn't that right?

8 A I don't remember.

9 Q Did you tell your father that Tony was not training
10 you?

11 A I believe I did.

12 Q Did you ever tell your father that you just
13 couldn't get the hands-on training that you needed with Chuck
14 and Tony in the way as being general sales manager and gen-
15 eral manager?

16 A I don't remember what I said.

17 Q You might have said that to him?

18 A I said -- I don't remember what I said.

19 Q Okay? Before Mr. Kraatz came to the dealership --
20 well, when Mr. Kraatz came to the dealership, he wanted you
21 to get some more training in the F&I department, finance and
22 insurance; isn't that right?

23 A I believe we had an opening, somebody transferred
24 out and I ended up there.

25 Q At Mr. Kraatz's request?

1 A Yes.

2 Q Over your objection?

3 A No.

4 Q Mr. Kraatz wanted you to be in finance and insur-
5 ance so you could learn that department better, didn't he?

6 A He might have.

7 Q Didn't he tell you that?

8 A I don't remember what he said to go in there, but I
9 believe he said that you can learn this, yes.

10 Q But you said you would go only if it were for three
11 months and not longer.

12 A No, that's what he said.

13 Q He gave you that assurance, it would only be three
14 months?

15 A Yes.

16 Q Because you objected to going there?

17 A No.

18 Q Just offered that?

19 A Yes.*

20 Q You asked to be transferred from F&I before that
21 three-month period expired.

22 A No.

23 Q Okay. Let me draw your attention to September of
24 1992. At that time you were subordinate to Mr. Kraatz, is
25 that right, before his termination?

1 A No.

2 Q Why not?

3 A I was the president.

4 Q Okay. Before Mr. Kraatz was terminated, you became
5 the president?

6 A Yes.

7 Q Now, you heard your father testify yesterday that
8 you did not become the president until September 16th, didn't
9 you?

10 A Yes.

11 Q And you disagree with that?

12 A Yes.

13 Q So you thought you were the president before Tony
14 Kraatz was terminated?

15 A Yes.

16 Q Do you have any corporate documentation to show
17 that at all?

18 A No.

19 Q And how did you become president of the
20 corporation?

21 Let me ask this. When did you become president?
22 Do you know the day?

23 A I can't tell you the exact day to tell you about.

24 Q You can't tell me the day that you became presi-
25 dent; is that right?

1 A I can't tell. I can tell you real close.

2 Q Real close, and when do you think you became
3 president?

4 A The very end of August.

5 Q Now, there was no general announcement made to the
6 dealership that you had been made president before Tony
7 Kraatz was terminated, was there?

8 A I don't remember.

9 Q You don't remember any general announcement that
10 was made?

11 A I don't remember.

12 Q Okay. You were still officed in whatever office
13 you had as a sales manager at the time Mr. Kraatz was termi-
14 nated, right?

15 A That's correct.

16 Q Okay. You hadn't assumed any other responsibili-
17 ties other than sales manager, assuming you were president
18 before Mr. Kraatz was terminated; is that right?

19 A Correct.

20 Q Okay, so you were the president, but with the
21 responsibilities of the sales manager.

22 A I would say the responsibilities of the president,
23 I should say.

24 Q Okay, but you can't think of any specific responsi-
25 bilities that you assumed on a day-to-day basis between the

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1 undersigned directors hereby elect -- " Woops. Excuse me.

2 Yes. "The undersigned, being all the directors of
3 Heritage Imports, hereby elect and appoint the following
4 individuals as officers of said corporation, said individuals
5 to replace the existing officers of the corporation and to
6 serve in their respective offices listed below until their
7 replacements are subsequently elected and acting. Dated this
8 16th day of September, 1992."

9 Isn't that when you became president?

10 A No.

11 Q Okay. Now, you prepared a schedule for Mr. Kraatz
12 to work which has been marked previously in this case as
13 Exhibit No. 1. It's probably there on the desk. It might be
14 easier for you to look at my copy.

15 You remember that document?

16 A Yes.

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

19 A Correct.

20 Q Okay, and did you hear your father testify yester-
21 day -- well, you scheduled Mr. Kraatz to work every Saturday
22 during the month of September; is that right?

23 A It appears so.

24 Q Did you hear your father testify yesterday that he
25 didn't ask you to do that?

1 A I believe he said that not necessarily every
2 Saturday, but Saturdays.

3 Q But you scheduled Mr. Kraatz for every Saturday,
4 right?

5 A According to the schedule, yes.

6 Q Okay, and you handed this schedule to Mr. Kraatz
7 when?

8 A It would have been before it became effective, so
9 it would have had to be before this schedule started. I
10 can't tell you the date.

11 Q Before September 7th?

12 A I believe so. I don't remember the date that I
13 handed it to him.

14 Q Okay. Could have been September 7th?

15 A I don't remember the date.

16 Q I know, but you said it would have been before it
17 became effective.

18 A I assume so. I don't know. I don't remember the
19 date that I gave it to him.

20 Q So it could have been after September 7th?

21 A I said I don't remember.

22 THE COURT: Well, just a minute, just a minute.

23 Counsel, he's indicated, has he not, that he provided a copy
24 to the Plaintiff here before the effective date of the
25 schedule?

1 MR. ZUNDEL: But I think what he said, Judge, is
2 that he now can't remember, and I want to make it clear that
3 it could be either way, before or after the schedule was --

4 THE COURT: Well, hasn't he now twice indicated
5 that he can't remember? If it wasn't before, he can't remem-
6 ber when it was, even if it was or it wasn't before.

7 MR. ZUNDEL: Your Honor, I simply wanted to
8 clarify.

9 THE COURT: Well, you can ask him what date it was
10 to the best of his knowledge. Then let's move on.

11 Q (By Mr. Zundel) The question I have for you, sir,
12 is you're not certain that this was given to him before
13 September 7th or even on, it could have been after.

14 A I don't remember the date.

15 Q Okay. Now, you had never prepared a schedule for
16 Mr. Kraatz before this time, had you?

17 A Correct.

18 Q And in fact, you had prepared schedules before but
19 they were always for your subordinate salesmen.

20 A No.

21 Q Or equals.

22 A No.

23 Q All right, but you'd never prepared a schedule for
24 the general manager.

25 A Correct.

1 Q All right, and so when you handed this to
2 Mr. Kraatz, how did he respond?

3 A I told him that my dad wanted --

4 Q No. How, when you handed this to Mr. Kraatz, how
5 did Mr. Kraatz respond?

6 A He said it would not work.

7 Q Okay.

8 A That he can't work the schedule.

9 Q And did he tell you that he would prepare a
10 schedule for you?

11 A I believe he did.

12 Q And he actually did prepare such a schedule.

13 A I believe so.

14 Q And that's been previously admitted, I believe, as
15 Exhibit No. 2. May I look and see?

16 A Sure.

17 Q Is that right?

18 A I believe so.

19 Q And you refused to work his schedule; isn't that
20 right?

21 A No.

22 Q Well, let me refer you to your deposition tran-
23 script page 85. Do you see it? Beginning at line 2.

24 "Question: So you refused the schedule he had
25 given you?

1 "Answer: Yes.

2 "And asserted that he would work the schedule that
3 you had given him?

4 "Answer: Yes."

5 Correct?

6 A Yes. That's not the question you asked before.

7 Q The question is, I said, did you refuse to work his
8 schedule?

9 A I did not refuse to work his schedule, no.

10 Q Well, are we miscommunicating? You refused to work
11 the schedule set forth in Exhibit 2, right?

12 A This schedule?

13 Q Yes.

14 A No.

15 Q Well, the question I asked you in your deposition,
16 are we talking about Exhibit 2? So you refused the schedule
17 he had given you?

18 A I think you're asking different questions or I'm
19 misunderstanding you.

20 Q I think I'm asking the same question. So tell me
21 what two questions you think I'm asking.

22 A I believe you're asking me if I refused to work his
23 schedule which was not asked in my deposition. The question
24 you asked was, "So you refused the schedule he had given
25 you?" I don't believe that that says that I refused to work

1 the schedule.

2 Q How's that different?

3 A The schedule was for more than one party.

4 Q You were included?

5 A Correct.

6 Q And you refused the schedule?

7 A I refused the schedule.

8 Q All right, and you told him that he would work the
9 schedule you had prepared for him?

10 THE COURT: Well, just a minute. Mr. Wilkinson,
11 are we to believe here that what you did was you told Tony
12 you did not want the schedule but nevertheless you would work
13 it?

14 THE WITNESS: No.

15 THE COURT: Well, then, why don't you tell us what
16 you did.

17 THE WITNESS: Okay. I'm sorry. I don't believe
18 the issue of me refusing to work anything was even in ques-
19 tion. I think*the schedule was the issue in general for the
20 people that needed to work it besides myself. I don't think
21 my hours were even the question here. I think he's confusing
22 my refusal to work the schedule with Tony's refusal to work
23 the schedule.

24 THE COURT: Well, I don't want us to get side-
25 tracked in semantical distinctions that are without any

1 substance. As I understand it, Counsel is simply asking you
2 if you agreed to or if you did not agree to work the schedule
3 that Tony had provided you. Yes or no? Did you agree to it
4 or not?

5 THE WITNESS: No.

6 THE COURT: All right. Let's move on.

7 Q (By Mr. Zundel) And you went to your father and
8 told him, "Tony won't work my scheduled that I prepared for
9 him"?

10 A I said, "Tony won't work with the schedule you
11 asked me to prepare."

12 Q Okay, but the schedule you'd given Tony wasn't the
13 schedule that your dad had even asked you to prepare under
14 your own testimony, is it?

15 A That's not true.

16 Q Well, your father and you just -- your father
17 didn't tell you to make -- ask Tony to work every Saturday,
18 did he?

19 A He told me that he wanted the general manager to
20 work nights and Saturdays.

21 Q Now, Tony had, even when he responded to you when
22 you handed him the schedule, he said to you that he couldn't
23 work all of the Saturdays, some of them were not good and
24 some evenings were not good, right?

25 Let me direct your attention to Exhibit -- page 85,

1 line 15.

2 "Do you remember where he was when you told him?
3 We're talking about your father, right?

4 "Answer: He would have been at the dealership.

5 "Question: In his office?

6 "Answer: Yes.

7 "Question: Do you remember what you said and what
8 he said?

9 "Answer: I don't recall exactly.

10 "Question: Do you remember the substance?

11 "Answer: I remember that I told him that I gave
12 Tony the schedule, that he said he wouldn't work for, that
13 some of the Saturdays and some of the evenings just wouldn't
14 work with his calling at a bishopric. That's what I
15 communicated.

16 "What did your father say to you?

17 "Answer: I remember his being upset. He said he's
18 going to work, that's what he said he'd do and that's what
19 he's going to do, and he said he would talk to him about it.

20 "Question: Do you know what your father was refer-
21 ring to when he said that, what Tony said he would do?

22 "Answer: I believe his -- "

23 MS. FALK: Your Honor, I object. I can't tell if
24 this is impeachment or if Mr. Zundel is testifying to see if
25 that refreshes his recollection.

1 MR. ZUNDEL: I don't have to do either one, Judge.
2 This is his testimony.

3 THE COURT: I believe that so far the examination
4 is acceptable, but that's about it, if you're planning on
5 reading any more.

6 MR. ZUNDEL: Couple lines.

7 THE COURT: All right. Two more lines.

8 MR. ZUNDEL: Thank you.

9 THE COURT: All right.

10 Q (By Mr. Zundel) Now, I have to know where I left
11 off.

12 Question at line 9. "Do you know what your father
13 was referring to when he said that's what Tony said he would
14 do?

15 "Answer: I believe he was referring to Tony's
16 exclusive commitment to the dealership in his employment
17 agreement."

18 Right? Is that what happened?

19 A I believe so.

20 Q Okay. Did you ask your father to terminate Tony?

21 A No.

22 Q Did you tell your father that you were going to
23 terminate Tony as the president?

24 A No.

25 Q Had your father given you a copy of Tony's

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1 Q Did you read in the contract Mr. Kraatz's stock
2 appreciation rights?

3 A I read the whole agreement.

4 Q Do you remember reading that?

5 A I believe so.

6 Q And was there any discussion between you and your
7 father as to the termination of Tony Kraatz's employment
8 before he was terminated?

9 A Not that I ever remember.

10 Q Not that you remember now?

11 A Not that I remember.

12 Q Did you tell Matt Wilkinson, your brother, that --
13 did you hear Matt Wilkinson -- excuse me.

14 Did you hear Mr. Terry testify that Matt Wilkinson
15 had told him that you and he were going to go to your father
16 and ask that your father terminate Mr. Kraatz?

17 A I heard Larry Terry say that.

18 Q Is that true?

19 A No.

20 Q Now, let me show you what's been marked as Exhibit
21 No. 31. I think it's on your desk here. It's this document.

22 Do you recognize that document?

23 A Yes.

24 Q What is this document?

25 A It's just some notes from a meeting with myself,

1 Jeff Gorringer, Matt Wilkinson and Lynlee Wilkinson.

2 Q And what was the purpose of that meeting?

3 A We were going to buy the dealership from my father,
4 so we reviewed some things to see what we may want to do in
5 connection with buying the dealership.

6 Q And the price that you were going to pay your
7 father was \$30,000 a year for 20 or 30 years; isn't that
8 right?

9 A Roughly.

10 Q And at the meeting did you discuss how you were
11 going to come up with the \$30,000?

12 A We hadn't gotten that far yet other than the
13 dealership would pay for it.

14 Q Okay. Did you ask your father to terminate Chuck
15 Quinn?

16 A Not that I remember.

17 Q Did you hear your father testify yesterday that you
18 had asked him to?

19 A I think he said it was in a memo that we had
20 written but we had never written my dad a memo that said
21 anything about firing Chuck.

22 Q Okay. You just said it to him verbally?

23 A No.

24 Q You were upset when Tony Kraatz hired Chuck Quinn
25 to be general manager, remember that? Or general sales

1 manager.

2 A Yes.

3 Q And you were upset because now you had another
4 layer of management between your goal of dealer.

5 A I don't know if that's why I was upset or not.

6 Q Is it your testimony that you never asked your
7 father to fire Chuck Quinn or you just don't remember whether
8 he did or not?

9 A I don't remember asking him for that. I don't
10 remember.

11 THE COURT: Mr. Zundel, how much longer do you
12 anticipate with this witness?

13 MR. ZUNDEL: It won't be -- 10 minutes, Judge.

14 THE COURT: Well, we're not going to finish before
15 we have to take our noon recess anyway, so I'm going to
16 recess us at this point until 1:30 this afternoon, at which
17 time then you can finish with this witness.

18 We'll be in recess until 1:30.

19 (Whereupon, a recess was taken.)

20 THE COURT: Mr. Zundel, you may continue with your
21 examination.

22 MR. ZUNDEL: Thank you, Judge.

23 Q (By Mr. Zundel) Let me direct your attention once
24 again to Exhibit 31, the memo that was given to your father
25 September 7th. You never gave that document to Mr. Kraatz,

1 did you?

2 A No.

3 Q Let me show you what's been marked as Exhibit 9.

4 Do you recognize that document?

5 A Yes.

6 Q This would require you as the general sales manager

7 to control expenses so that each department's expense profile

8 is in line with industry guidelines, thereby maximizing each

9 department's net profit; is that right?

10 A That's what it says, yes.

11 Q And industry guidelines were a goal at the

12 dealership.

13 A Yes.

14 Q All right. Let me show you what's been marked as

15 Exhibit No. 14. Do you recognize that document?

16 A Yes.

17 Q This is a document which spells out your responsi-

18 bilities as sales manager as of December 2, 1991.

19 A Correct.

20 Q It says, "All advertising expenditures will be

21 directed by Bry Wilkinson." Do you see that?

22 A Yes.

23 Q Your father took responsibility for those

24 expenditures?

25 A It appears so.

1 Q And others, as well?

2 A It says advertising.

3 MS. FALK: Excuse me. Where is that, Mr. Zundel?

4 MR. ZUNDEL: Top of page 14.

5 Q (By Mr. Zundel) I'm going to show you what's been
6 marked as Exhibit 18. Do you recognize that as also setting
7 forth your responsibilities as a sales manager?

8 A Yes.

9 Q As of August 1?

10 A Correct.

11 Q Your father was still in charge all advertising
12 expenses?

13 A It appears so.

14 Q In connection with Exhibit No. 31, the memorandum,
15 you were aware, were you not, that your father had insurance
16 policies that were quite expensive for the dealership?

17 A Yes, there was more policies. We had some also.

18 Q Your father's carrying about \$5 million worth of
19 insurance for the benefit of his family.

20 A I don't know the amount.

21 Q Costing the dealership approximately \$4,000 a month
22 for his personal policies; do you remember that?

23 A I'm not sure of the amount. I know there was
24 policies that the dealership had for all of us to protect the
25 stock. I don't know the amounts.

J. WILKINSON DIRECT EXAMINATION
(BY M.N. ZUNDEL)
R.2380-81

1 Q How many times were you disciplined for playing
2 video games?

3 A I can only remember of Tony talking about it one
4 time.

5 Q How many times were you disciplined for looking at
6 papers, compensation plans?

7 A Once.

8 Q Where were those compensation plans when you looked
9 at them?

10 A They were left by Tony in the sales tower.

11 Q And where's the sales tower?

12 A It's at the front of the dealership. It's just
13 behind the receptionist. It's where all the sales managers
14 would work their dealers, receptionists, other employees come
15 in and out of there, sales people and so forth.

16 Q What did you do with those papers?

17 A They were left on the counter. As I sat down, I
18 picked them up, I looked at them, I scanned over them, real-
19 ized what they were, and I put them on Tony's desk.

20 Q Earlier you testified with Mr. Zundel that you were
21 put into F&I for training; is that correct?

22 A Yes.

23 Q Did Mr. Kraatz ever train you to be in the F&I
24 department?

25 A No.

1 Q Did he ever move you to the position of office
2 manager?

3 A No.

4 Q Parts manager?

5 A No.

6 Q Service manager?

7 A No.

8 Q So you received no training at any of those areas?

9 A That's correct.

10 Q Now, the schedules we've talked about as Exhibits 1
11 and 2, one of those you testified was prepared by you because
12 of your father asking you to; is that correct?

13 A Yes.

14 Q And what was your father at the time in terms of
15 Heritage Honda? Was he above the general manager?

16 A Yes.

17 Q Earlier Mr. Zundel asked you to read from your
18 deposition; do you recall that?

19 A Yes.

20 Q And he had you read from page 53 and 54. Would you
21 please turn to that? On page 54, line 13, do you see that?

22 A Yes.

23 Q I'm going to read the question and I would like you
24 to give the response.

25 A Okay.

R.2400

P. NICHOLAS DIRECT EXAMINATION
R.2407-11

1 MR. ZUNDEL: Very well.

2 THE COURT: All right, you may step down,
3 Mr. Wilkinson. Thank you.

4 Call your next witness.

5 MS. FALK: I call Pat Nicholes.

6 PAT NICHOLLES,

7 called as a witness by and on behalf of the Defendants,
8 having been first duly sworn, was examined and testified as
9 follows:

10 THE WITNESS: My name's Pat Nicholes. Last name,
11 N-i-c-h-o-l-e-s. First name's P-a-t.

12 DIRECT EXAMINATION

13 BY MS. FALK:

14 Q Mr. Nicholes, will you state your place of current
15 employment?

16 A Larry H. Miller Honda.

17 Q What's your position there?

18 A Service manager.

19 Q And how long have you been employed at Heritage
20 Honda dba Larry Miller Honda?

21 A Eleven years.

22 Q Were you present at an employment meeting where Bry
23 Wilkinson introduced Tony Kraatz?

24 A Yes, it was a sales meeting.

25 Q Did you hear Bry say at the meeting that Tony had

1 a, quote, unquote, no-cut contract?

2 A No.

3 Q Have you ever heard Bry say that Tony Kraatz had a
4 no-cut contract?

5 A No.

6 Q Describe for the Court your morale at Heritage
7 Honda as an employee before Tony Kraatz was general manager.

8 MR. ZUNDEL: Objection, Judge. Question is vague.
9 The relevance of the morale before Tony Kraatz was general
10 manager is not relevant and this witness is -- I'd like to
11 voir dire the witness as to whether or not he's -- what his
12 position was then, whether he's competent to testify to this
13 issue.

14 THE COURT: Well, as to the issue of relevance, at
15 this point the question of the morale having been adversely
16 affected while the Plaintiff was at the business has been
17 raised. Consequently, I believe if there's sufficient foun-
18 dation for it, it may well be pertinent and germane to the
19 issues.

20 As to the question of foundation, if you wish to
21 voir dire the witness in that regard, you may do so.

22 MR. ZUNDEL: Thank you, Judge.

23 THE COURT: All right.

24 *

25 *

1 VOIR DIRE EXAMINATION

2 BY MR. ZUNDEL:

3 Q Mr. Nicholes, in 1990, what was your position at
4 Heritage?

5 A During the year I had three different positions.

6 Q Tell me what they were.

7 A Service dispatcher, service --

8 Q Service dispatcher. What's a service dispatcher?

9 A Assigns work to the technicians throughout the
10 shop.

11 Q What you're down here on this line someplace, an
12 advisor.

13 A It's equal to an advisor, so to speak. The work
14 that advisors write, they give them to the dispatcher. The
15 dispatcher in turn dispatches work to the technicians.

16 Q So you give the -- you dispatch -- what's the chain
17 here, down here?

18 A I assigned the work to the technicians.

19 Q Okay?

20 A Okay, that was written.

21 Q And did you have a supervisor?

22 A Did I? Yes, I did.

23 Q Who was your supervisor?

24 A At the time was Randy Broughton.

25 Q And Randy Broughton's up here at service manager?

1 A Yes, sir.

2 Q Now, you were never the service manager at Heritage
3 while Mr. Kraatz was there, were you?

4 A No, sir.

5 Q You were always an advisor or something else below
6 Mr. Broughton; isn't that right?

7 A Yes.

8 Q All right. And how old were you at the time in
9 1990, sir?

10 A Twenty -- I would have been 24.

11 Q Okay. How long had you been with Heritage at the
12 time?

13 A 1990 would have been five years.

14 Q You hadn't had any other experience then anyplace
15 else as a service advisor?

16 A No, sir.

17 Q You'd never been a general manager?

18 A No, sir.

19 Q Never^{*} been a service manager?

20 A No, sir.

21 MR. ZUNDEL: No further questions, Judge.

22 THE COURT: All right, Ms. Falk, you may continue.

23 DIRECT EXAMINATION RESUMED

24 BY MS. FALK:

25 Q What was your morale as an employee at Heritage

1 Honda before Tony was general manager?

2 MR. ZUNDEL: Objection, Judge. This man's morale
3 is not relevant.

4 THE COURT: I believe it is, Counsel. I'm going to
5 allow him to testify.

6 THE WITNESS: The morale beforehand was good, yes.

7 Q (By Ms. Falk) What was your morale during the time
8 that Tony Kraatz was general manager?

9 A It slowly went downhill.

10 MS. FALK: No further questions.

11 THE COURT: All right. If there's nothing further
12 -- do you have any examination of the witness at this point?

13 MR. ZUNDEL: No, Judge.

14 THE COURT: All right. Mr. Nicholes, then, you may
15 step down. You're free to go. Thank you.

16 Call your next witness.

17 MR. WINDER: And our last witness, Judge, we'll
18 call Larry Miller. If I might have a moment, he's in the
19 hallway.

20 THE COURT: Mr. Miller, you're already under oath,
21 sir, if you'd just take the stand. Thank you.

22 LAWRENCE WARREN MILLER,
23 having been previously sworn, resumed the stand and testified
24 further as follows:

25 *

L. MILLER DIRECT EXAMINATION
(BY D.J. WINDER)
R.2418-19

1 Honda before Tony was general manager?

2 MR. ZUNDEL: Objection, Judge. This man's morale
3 is not relevant.

4 THE COURT: I believe it is, Counsel. I'm going to
5 allow him to testify.

6 THE WITNESS: The morale beforehand was good, yes.

7 Q (By Ms. Falk) What was your morale during the time
8 that Tony Kraatz was general manager?

9 A It slowly went downhill.

10 MS. FALK: No further questions.

11 THE COURT: All right. If there's nothing further
12 -- do you have any examination of the witness at this point?

13 MR. ZUNDEL: No, Judge.

14 THE COURT: All right. Mr. Nicholes, then, you may
15 step down. You're free to go. Thank you.

16 Call your next witness.

17 MR. WINDER: And our last witness, Judge, we'll
18 call Larry Miller. If I might have a moment, he's in the
19 hallway.

20 THE COURT: Mr. Miller, you're already under oath,
21 sir, if you'd just take the stand. Thank you.

22 LAWRENCE WARREN MILLER,
23 having been previously sworn, resumed the stand and testified
24 further as follows:

25 *

1 Q That's how you grew up in the car business, right?

2 A That's right. It's my background, kind of my first
3 love in the business, by the way. We call that the fixed
4 operation, parts and service, that's the fixed operation.
5 Sales is the variable operation. The fixed operation is
6 generally considered to be more developed, to be developed
7 more slowly, but I did feel that that dealership was somewhat
8 underdeveloped in its fixed operation, and that we could do
9 some things to bring it along, but it doesn't come as quick.
10 It's something you have to do month after month, year after
11 year, where with retail vehicle sales, you can spend a lot of
12 money advertising and have a lot of inventory and make big
13 gains quickly if you're willing to roll the dice and have the
14 money with advertising so you could make a bigger impact in
15 the variable operation, but still the fixed was something we
16 wanted to try to fix this store, if you will, on all five of
17 the fronts I described, and so we did set out to work on the
18 fixed operation, as well.

19 Q And how did it work on fixed operations? What did
20 you do?

21 A Well, in that store, even though it was in finan-
22 cial distress on December 9th, I still made the decision to
23 go in what I'm going to call gently and try to learn where
24 the strengths, the human strengths in the store were relative
25 to the positions that the employees filled, and not just come

1 in and tear everything out and start over. That proved to be
2 very painful. We lost \$85,000 in December. We lost 90,000
3 in January. It was clear by mid-February we were going to
4 lose a comparable amount again, which turned out to be
5 seventy-nine thousand, I think, eight hundred something, but
6 close to \$80,000, and I thought at that point, I think it was
7 February 17th or 18th, I thought I've had all the fun I can
8 stand and all the patience that I can apply has been applied,
9 so we had a meeting on or about the 18th of February where we
10 basically said, look, we've come in and we've tried not to
11 ruffle feathers and hurt feelings, but we can no longer
12 afford that luxury. We need to go straight to the management
13 techniques that I've applied in our other dealerships that
14 have made them successful and we need to do it now, and those
15 of you that can do that and feel good about it, here, and
16 those of you that can't, let's part company friends, but we
17 are going to explain the rules and go forward on that basis.
18 In other words, implement the policies and procedures that
19 I've been successful with in other businesses.

20 We -- I think we explained that fairly, completely
21 and kindly. I don't recall anybody jumping up and running
22 out of the meeting, but we just made it clear at that point
23 that we all had to go forward in the same direction, and if
24 there were any that couldn't support that, that now might be
25 a good time to depart.

CLOSING ARGUMENT
(D.J. WINDER)
R.2453-63

1 Mr. Winder?

2 MR. WINDER: Thank you, your Honor.

3 May it please the Court, Counsel, I'd like to start
4 off, Judge, by attempting to answer the question you had
5 about what the parties contracted. Does the Court have any
6 other questions that you want to direct at me, what the con-
7 tract between the parties meant? Are there any others?

8 THE COURT: No, I don't, Mr. Winder. It seems to
9 me at least preliminarily, without having gone back over
10 these exhibits, that the contract does speak to the issue of
11 termination and it sets forth, if you follow the statement of
12 Mr. Zundel or his argument that the term "include" is to be a
13 limiting factor, that the categories of dishonesty and
14 refusal are the two remaining potential categories for which
15 Mr. Wilkinson allegedly terminated the Plaintiff, and I
16 suppose if the real issue here has to do with the -- how
17 realistic is it to assume that Mr. Wilkinson terminated this
18 man for the reasons that he specified in his testimony versus
19 the claim that Mr. Kraatz bit off a situation where he was
20 coming into the middle of a family and his ability to control
21 that family from the middle was something that he ought to
22 have been aware of and realized probably wouldn't work, and
23 therefore, the termination was a contrived expression of that
24 circumstance rather than a just cause termination. That's
25 the troubling issue.

1 MR. WINDER: Okay, and I agree with the Court, if I
2 might address that, I think there are a couple of factors
3 that speak to that. The first factor, Judge, that speaks to
4 that is the agreement itself and we have, Judge, not just
5 Exhibit 38 but we have Exhibit 589 which is the agreement
6 that was initially proposed, and that is in evidence and
7 there is a significant -- I think that's a very significant
8 starting point for what the relationship between the parties
9 is because there is in Article 2 -- I have a copy --

10 THE COURT: 589?

11 MR. WINDER: 589.

12 THE COURT: Well, I don't have anything in my
13 binder for 589.

14 MR. WINDER: Your Honor, this was introduced the
15 first day and I have a copy for the Court.

16 What happened, as the Court will recall, is there
17 was a cover letter and a privilege log that was attached to
18 our exhibit. We pulled that off so this is 589, but the
19 exhibit tab isn't on because of that adjustment.

20 THE COURT: Okay. I have now come across my copy
21 of that, so I do have 589.

22 MR. WINDER: So if you'll turn to page 2 of the
23 additional draft, which is the first document, Article 2,
24 Term of Contract, we don't have the language in here, refusal
25 to fulfill his duties. What we have in here is what

1 Mr. Kraatz said, a no-cut contract. This would be my idea of
2 pretty close to a no-cut contract, fraud, dishonesty, dis-
3 regard for safety, accepting other employment, and being
4 disabled. There's nothing in here about fulfilling his
5 duties as outlined in the contract.

6 The question then becomes one for the Court of what
7 that language means, and I have my own chart which is simply
8 Article 2 enlarged.

9 What Plaintiff would have the Court say is there
10 must be a literal refusal. The Plaintiff must be asked some-
11 thing specifically and refuse to do it.

12 Now, there is some testimony of that. He was asked
13 to perform under Schedule 1 to come work Saturdays and week-
14 ends. He didn't do that, but what we would submit, Judge, is
15 that this has to be taken in context of the contract.
16 Refusal by employee to fulfill his employment responsibili-
17 ties. And what are his employment responsibilities? And
18 they're the same whether you look at the draft or at the
19 final agreement. He has the responsibilities to provide day-
20 to-day management including managing new and used car sales
21 department, service department, parts department, financing
22 and insurance department. He also has the duty to train
23 certain people designated, and I think there's no evidence,
24 Judge, except that he breached that. I mean, J. J. said he
25 wasn't trained. Bry said he didn't get trained and he didn't

1 train. That's paragraph B. He also has to use his best
2 professional skill to perform the services at all times for
3 the business and benefit of the company and, of course, in
4 the recitals to this agreement it says he has the skills,
5 personality traits and management skills which are conducive
6 to development and maintenance of interpersonal relations,
7 management of personnel, financing and sales, and operating
8 an automobile dealership.

9 Now, the Court asked the question, did he get into
10 the middle of something that he couldn't handle. The testi-
11 mony out of his mouth as to expenses is, "I knew that going
12 in. I was warned in Mesquite, Nevada, at a dinner going in."
13 His testimony out of his own mouth is also that this store
14 should have made a million dollars a year and his experts
15 said a Honda franchise is a license to kill, so I think what
16 it boils down to, Judge, is not the analogy that Mr. Zundel
17 proposed, but rather the following analogy. Bry Wilkinson is
18 the owner or like an owner of a professional baseball club
19 and he hires Mr. Kraatz to be his coach. Now, Judge, it's
20 true that maybe as to a particular trade his coach came to
21 him and said, I think we ought to trade and I think we ought
22 to trade Comerica for Key Bank, and maybe the owner supported
23 him in that decision, or maybe he acquiesced in that deci-
24 sion, but the coach called the shot and what we've had in
25 this case and what's happened in this case is we've ignored

1 the bottom line. There is no question when we're through
2 with red, white and blue charts or whatever Plaintiff's
3 experts want to come up with, there is no question but that
4 this dealership lost substantial money in 1990, it lost sub-
5 stantial money in 1992, and the profit in '91 was \$5,169, and
6 so what you're left with, Judge, drawing back to this analogy
7 of the team owner and the coach in a professional baseball
8 club, what's been happening in this courtroom is we've been
9 analyzing each and over trade that's happened. We've been
10 saying the coach said we ought to trade our first base person
11 for somebody else, the first base person gets traded, he goes
12 somewhere else, his batting average goes up. Who we got in
13 here comes in and his batting average goes down, and so we've
14 been analyzing little, tiny components and pieces and what
15 we've ignored is the one lost record. That's how a coach of
16 a baseball club ultimately gets measured and that's how a
17 general manager gets measured, and when you say there's a
18 dispute in the testimony about the control issue, maybe there
19 is, but wasn't Mr. Hartmann's testimony very revealing? "Bry
20 Wilkinson told me that Tony Kraatz was his man. He had com-
21 plete control. He could even fire his kids," and I talked to
22 Tony and Tony told me the same thing.

23 And so I think it's a different analogy, Judge, and
24 submit that to the Court.

25 Now, in terms of burden of proof, the other thing,

1 Judge, that I submit, and we filed a trial brief on this,
2 this is not a wrongful termination case in the terms of the
3 cases Plaintiff cited. This is not a race discrimination
4 case. This is not a sexual harassment case. This is not a
5 case of wrongful termination for public policy. It is not
6 even a case of wrongful termination where there's an alleged
7 implied contract, whether implied in fact or implied in law.
8 There's an agreement. This case may be an employment case,
9 but it's no different than any other contract case and the
10 Plaintiff has the burden of proof in proving the breach.
11 This is simply a contract case.

12 Now, we had some talk, Judge, about this employee
13 handbook and some allegations that this was or wasn't part of
14 the evidence. I submit to you, Judge, that what's happened
15 here is Plaintiff wants it all ways and all instances that
16 favor them. He admitted that he'd never seen this before he
17 signed this, but he claims the benefits of it. Then he says
18 he turned his handbook in and he was the one that went to the
19 Twenty Group meeting and he told Beverly to write a letter to
20 everybody, to turn it in, but he still claimed some benefits
21 under this, and of course, this says it's employment with or
22 without cause.

23 I would submit, Judge, that this case ought to be
24 viewed in terms of the agreement between the parties, Exhibit
25 38, the circumstances leading up to that, and the draft which

1 is 589.

2 Did I attempt to answer the Court's question? I
3 know I put some parts in it --

4 THE COURT: Yes, you've addressed my concerns, as
5 did Mr. Zundel. I mean, I think it's apparent to all of us
6 here, at least in a general sense, what the disputed issues
7 are and I guess that I'm coming at it from the perspective
8 that we do have a contract that was negotiated and it is
9 alleged in the first, I believe, cause of action of the
10 Complaint that this is a breach of contract case and that's
11 the way I view it. The issue is factually whether or not the
12 breach has been established, but that's my problem.

13 MR. WINDER: If I might, if the Court doesn't want
14 to hear any more about that issue, I'd like to briefly
15 address damages.

16 THE COURT: Yes, you may.

17 MR. WINDER: Okay. Now, in terms of damages,
18 Judge, a slight variation in Plaintiff's opinion witness on
19 damages has a multiplier of 6.67 percent and Plaintiff's
20 opinion witness said that. If we take simply the issue of
21 Ida Jean's alimony payments, 48,000 a year, Mr. Wilkinson
22 said, "I pay that myself." Plaintiff's opinion witness said
23 he deducted that in coming up with his earnings. That makes
24 a \$320,000 difference in the valuation at a 15 percent cap
25 rate. I simply point that out to the Court because the only

1 way that Plaintiff's opinion witness gets any value in this
2 is by making adjustment after adjustment, assumption after
3 assumption as to what the financial statement should be in
4 his opinion, not what it was, because there is no profit to
5 take a 15 percent cap rate and multiplier, too.

6 In terms of value of the business, we have the
7 testimony of Mr. Miller. "Business is worth three million to
8 three million one. That's how I valued it. I did the deal
9 and that's my opinion."

12b 10 The problem I have, Judge, with Plaintiff's damages
11 is that I think they attempt to double up. What they're
12 saying is, I get the wages I would have gotten had I worked
13 for Larry Miller and they have all these calculations based
14 on what would have happened there, and I get the stock appre-
15 ciation rights from Larry Miller, and, of course, what
16 happened, Judge, is Plaintiff was terminated. The Court has
17 to decide the reasons, but I don't think just cause has any-
18 thing to do with it, simply whether it happened under the
19 contract or not, whether there was a breach, but is he enti-
20 tled to get both his stock appreciation benefit and wages as
21 though he's there working to earn them, as though he's there
22 contributing?

23 There's another problem with damages that
24 Plaintiffs want. I have brief on the issue for your Honor.
25 I have a courtesy copy and original for the Court. It deals

1 with prejudgment interest. As this Court knows, prejudgment
2 interest is only allowable if the damages figures can be
3 calculated with mathematical certainty, and I think it's
4 abundantly clear, Judge, that if there are any damages here,
5 it takes a whale of a lot of mixing of facts and law to come
6 up with what amounts may be damages. This is not a case
7 where you go back and you look at hospital bills from Holy
8 Cross Hospital and there's the numbers and those are the kind
9 of cases that you get prejudgment interest on.

10 I submit that if the Court is inclined to find
11 against us and award damages, prejudgment interest does not
12 apply.

13 One final point, Judge, it deals with the indi-
14 vidual Defendants. We made a motion at the end of
15 Mr. Zundel's case about the individual Defendants that are
16 named in here for a bunch of tortious causes of action for
17 which punitive damages are sought. I would only add one
18 thing to what Ms. Falk said in terms of the motion for
19 directed verdict. If you look at Plaintiff's Exhibit 31,
20 which is the memo that's prepared September 7th of '92, it
21 says in number seven, "Eliminate the, parentheses, \$500 sub-
22 sidy on Tony Kraatz' St. George home." The kids weren't out
23 to get him fired at that point in time. Nobody was out to
24 get him fired at that point in time, and I would submit,
25 Judge, that -- and this doesn't say fire him. This doesn't

1 say -- it simply talks about the St. George home.

2 I would submit, Judge, that the individual
3 Defendants ought to be let out of this case.

4 Unless the Court has other questions of me, I thank
5 you, Judge.

6 THE COURT: All right, thank you, Mr. Winder.

7 Counsel, I know in the normal course of events the
8 Plaintiff would have the opportunity at rebuttal, but I've
9 heard from you gentlemen throughout this case on a number of
10 occasions, including motions for summary judgment and so on,
11 and I believe that I am quite familiar with the respective
12 theories of the law and your view of the evidence. Conse-
13 quently, I now am going to take the matter under advisement.
14 I will notify you of my decision when I am prepared to rule.

15 I will have to wade through more of these exhibits
16 and I will notify you when I'm ready to rule. However I come
17 down on this, I do want to congratulate both Counsel. This
18 case has been conducted, in my estimation, in a very profes-
19 sional, competent fashion, and I want to commend you all. I
20 say both Counsel. I mean all Counsel. You've made my job
21 extraordinarily difficult.

22 We'll be in recess.

23 (Whereupon, the proceedings were concluded.)

24 * * *

25


REPORTER'S CERTIFICATE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, ANNA M. BENNETT, do hereby certify:

That I am a Certified Shorthand Reporter, License No. 22-106796-7801, and one of the official court reporters of the State of Utah; that on the 30th day of August, 1996, I attended the within matter and reported in shorthand the proceedings had thereat; that later I caused my said shorthand proceedings to be transcribed into typewriting, and the foregoing pages, numbered from 1 to 64, inclusive, constitute a full, true and correct account of the same, to the best of my ability.

DATED AT SALT LAKE CITY, UTAH, this 24th day of January, 1997.


ANNA M. BENNETT, C.S.R.
Notary Public, State of Utah

Oral Findings and Conclusions

ORAL FINDINGS AND CONCLUSIONS
R.2464-72

FILED DISTRICT COURT
Third Judicial District

SEP 23 1996

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

WILLIAM ANTHONY KRAATZ,

Plaintiff,

vs.

HERITAGE IMPORTS ET AL,

Defendants.

Case No. CIV 930900312 CN

REPORTER'S TRANSCRIPT
OF JUDGE'S RULING

REPORTER'S TRANSCRIPT OF JUDGE'S RULING

THE HONORABLE J. DENNIS FREDERICK

Friday, September 20, 1996

APPEARANCES:

For the Plaintiff:

MICHAEL N. ZUNDEL

Attorney at Law

JARDINE, LINEBAUGH & DUNN

370 East South Temple #400

Salt Lake City, Utah 84111

532-5700

For the Defendants:

DONALD J. WINDER

JENNIFER L. FALK

Attorneys at Law

WINDER & HASLAM, P.C.

175 West 200 South #4000

Salt Lake City, Utah 84110

322-2222

ANNA M. BENNETT, CSR

License No. 22-106796-7801

240 East 400 South

Salt Lake City, Utah 84111

535-5203

2 THE COURT: We are reconvened in the matter of
3 William Anthony Kraatz versus Heritage Imports, et cetera,
4 case number C-93-312. I note that counsel are present, as
5 are the parties. I appreciate your presence here today,
6 counsel and parties.

14 The gravamen of the plaintiff's Complaint is for
15 a breach of contract of employment executed on May 31 of
16 1990 by Heritage Imports and the plaintiff. The initial term
17 of the contract was from June 15th of 1990 for five years with
18 termination limited to specified cause. Article 3, paragraph
19 2.1 of Exhibit 38.

23 The plaintiff alleges his termination was for
24 other than just cause and seeks damages under various
25 theories, namely, breach of contract, breach of implied

1 covenant of good faith, for a determination that Heritage
2 Imports, hereinafter Heritage, was merely the alter ego of
3 Bryan Wilkinson, for a determination that both Bryan
4 Wilkinson and his son Jeff Wilkinson induced the contract
5 breach and each interfered with plaintiff's prospective
6 business advantage.

7 The essential evidence was seriously disputed.
8 The parties' interpretation of the pivotal provisions of
9 Exhibit 38 and specifically paragraph 2.1 is at odds.
10 The plaintiff claims that that provision, the so-called for
11 cause provision, limits the for cause analysis to the
12 specified terms contained in clauses A through D of
13 paragraph 2.1 and that the defendants have the burden of
14 proof to establish cause, while defendants claim, on the
15 other hand, the clauses A through D are merely examples
16 included within the concept of cause and that the burden is
17 on the plaintiff to show contract breach.

18 If the evidence establishes sufficient cause for
19 termination within the rubric of clauses A through D of
20 paragraph 2.1, from whatever source produced, these concerns
21 become moot.

22 Given the hotly disputed conflicts in the evidence,
23 this Court is left, therefore, to assess the credibility of
24 the witnesses' testimony. That I have done, and in my
25 view, the more credible, persuasive evidence establishes by

1 a preponderance the following.

2 Heritage is a Utah corporation, and during the
3 pertinent time frame was owned essentially by Bryan
4 Wilkinson, except for eight percent of the stock owned by
5 his four children. It had for years operated a Honda
6 automobile dealership located in Murray, Utah. The opera-
7 tion was essentially a family run business with Bry
8 Wilkinson functioning as the owner and at least three of
9 his four children and his son-in-law working for the
10 corporation.

11 During the time frame of 1989 to 1990 the long-
12 time general manager of Heritage left to go to California.
13 Bry Wilkinson commenced negotiations with the plaintiff to
14 become the new general manager. These negotiations
15 culminated in the execution on May 31 of 1990 of the
16 employment agreement, Exhibit 38. The principal thrust of
17 the negotiations was that the dealership must return to
18 profitability. The owner's children were to be trained
19 in management duties to ultimately assume control, and the
20 plaintiff would be the day-to-day manager of the business
21 and allow Bry Wilkinson to semi-retire, in exchange for
22 which the plaintiff was to receive considerable remunera-
23 tion.

24 Plaintiff had been part owner and general manager
25 of a dealership in St. George, Utah, but was dissatisfied

1 and was looking for a lucrative management position, even
2 if it necessitated a move to Salt Lake, and even if it
3 entailed moving into a general manager position of
4 authority over children of the owner who were stockholders,
5 directors and management personnel in their own right of
6 the corporation.

7 Plaintiff, before executing the contract of
8 employment, which defined the relationship, was given
9 access to the financial data of the corporation and
10 represented to Wilkinson he had the requisite experience,
11 skills and abilities to make the corporation profitable.
12 Indeed, he said, during the negotiations with Wilkinson,
13 he could turn the operation around and make one million
14 dollars per year, that the gross margin per car received
15 was low and he could increase it.

16 Plaintiff was to devote his best skill full-time
17 to the business. During the plaintiff's tenure from June 1
18 of '90 through 9-11 of '92 he enjoyed or engaged in the
19 following significant activities.

20 He demoted Jeff Wilkinson twice. He refused to
21 comply with a work schedule Jeff had prepared, Exhibit 1,
22 at the direction of the owner, Bry Wilkinson. Plaintiff's
23 claim that his hands were tied because of under capitaliza-
24 tion was not established by the evidence. Indeed,
25 plaintiff's expert -- or defendant's expert Larry Miller

1 persuasively testified that his examination of the
2 corporate financials indicated that the dealership was
3 not undercapitalized.

4 The plaintiff threatened the owner's son with
5 termination. He failed to properly train the owner's
6 children and indeed, created severe resistance to his
7 control. The plaintiff refused to work Saturdays and
8 evenings when his visibility was required as it inter-
9 fered with his personal activities. Profitability
10 continued to lag and was discussed each 30 days at the
11 accountability meetings. Plaintiff allowed at least on
12 one occasion against company policy for a title to be
13 distributed without payment. He manipulated and/or
14 modified the balance sheet by disguising the age of
15 inventory units which should have been returned and/or
16 sold but were not.

17 Some of his purchases at auction were disadvan-
18 tageous to the corporation. Some customers complained
19 that the general manager was unavailable or would not talk
20 to them. Morale problems were created as the plaintiff
21 was unable to bring together the so-called management
22 team. The plaintiff unilaterally switched banks which
23 strained Heritage's relationship with its long-time
24 lender Comerica, resulting in additional payment of
25 monies, some \$114,000, to reestablish the relationship.

1 The corporate net worth declined to approximately
2 one-half from June 1 of '90 to August of '92. The gross
3 income per unit declined during the same period. The
4 plaintiff did not take advantage of opportunities to
5 exploit cash available and thus failed to manage the
6 business cash. The store should have generated profits
7 as plaintiff represented at the outset that it would, but
8 it did not. Compare Exhibits 208 and 333.

9 On September 11, 1992, Bry Wilkinson told plaintiff
10 he wanted his resignation due to lack of profitability and
11 the failure to train the kids and plaintiff's lack of
12 candor in certain accounting activities. Bryan Wilkinson
13 sent a letter of termination, Exhibit 64, at the plaintiff's
14 request.

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

20 Mr. Winder, the Findings of Fact, Conclusions of
21 Law that you have submitted will be designated as received.
22 In addition, though, I want you to submit to this Court a
23 judgment and we will proceed under the language of Rule
24 4-504 of the Code of Judicial Administration, and the
25 Findings will be deemed received no earlier than today to

1 allow opposing counsel to submit, if they choose,
2 objections to the Findings of Fact that are now deemed
3 to be submitted as of today's date.

4 MR. WINDER: Thank you.

5 MR. ZUNDEL: Your Honor, may I have an extension?
6 I'm scheduled to go out of town tomorrow. May I have 30
7 days to respond to the Findings?

8 THE COURT: Let's, Mr. Zundel, do this. We will
9 commence the time frame of 4-504 running from the date
10 that the judgment is submitted and received by this Court
11 which has not been received today. That will give you some
12 additional time.

13 MR. ZUNDEL: Thank you, Judge.

14 THE COURT: All right. If there's nothing
15 further, we'll be in recess.

16 MR. WINDER: Thank you, Judge.

17 (Whereupon, the proceedings were concluded.)

18 * * *

1
2 REPORTER'S CERTIFICATE
3
4

5 STATE OF UTAH)
6) ss
7 COUNTY OF SALT LAKE)

8 I, ANNA M. BENNETT, do hereby certify:

9 That I am a Certified Shorthand Reporter, License
10 No. 22-106796-7801, and one of the official court reporters
11 of the state of Utah; that on the 20th day of September,
12 1996, I attended the within matter and reported in short-
13 hand the proceedings had thereat; that later I caused my
14 said shorthand proceedings to be transcribed into typewriting
15 and the foregoing pages, numbered from 2 to 8, inclusive,
16 constitute a full, true and correct account of the Judge's
17 Ruling, to the best of my ability.

18 DATED AT SALT LAKE CITY, UTAH, this 23rd day of
19 September, 1996.
20
21

22 
23

24 ANNA M. BENNETT, CSR
25