

2001

William Anthony Kraatz v. Heritage Imports, a
Utah corporation, dba Heritage Honda, and O.
Bryan Wilkinson, and Jeffrey J. Wilkinson :
Appellant's and Cross-Appellee's Second Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Kraatz v. Wilkinson*, No. 20010598 (Utah Court of Appeals, 2001).
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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,

Plaintiff-Appellant and
Cross-Appellee,

vs.

HERITAGE IMPORTS, a Utah
corporation, dba HERITAGE HONDA,

Defendant-Appellee and
Cross-Appellant,

and O. BRYAN WILKINSON, and
JEFFREY J. WILKINSON,

Defendants.

**APPELLANT'S AND
CROSS-APPELLEE'S
SECOND BRIEF**

Case No. 20010598-CA

Priority No. 15

**APPEAL FROM JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY
THE HONORABLE J. DENNIS FREDERICK**

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FILED
Utah Court of Appeals

July
17 2002

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FILED
Utah Court of Appeals
AUG 07 2002

IN THE UTAH COURT OF APPEALS

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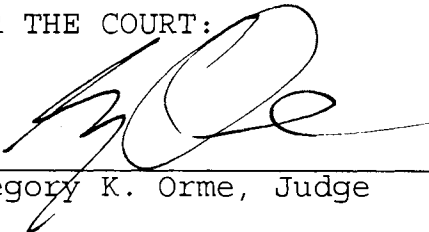
William Anthony Kraatz,)	ORDER
)	
Plaintiff, Appellant and)	Case No. 20010598-CA
Cross-appellee.)	
)	
v.)	
)	
Heritage Imports, a Utah)	
corporation dba Heritage)	
Honda, O. Bryan Wilkinson, and)	
Jeffery J. Wilkinson,)	
)	
Defendants, Appellees)	
and Cross-appellants.)	

This matter is before the court upon the motion filed by appellant and cross-appellee on July 17, 2002, to allow the filing of an over-length brief. Appellee and cross-appellant did not respond or otherwise object to the motion.

IT IS HEREBY ORDERED that appellant and cross-appellee's motion to allow filing of an over-length brief is granted. Appellee and cross-appellant's reply brief shall be filed within thirty (30) days of the date of this order.

Dated this 7th day of August, 2002.

FOR THE COURT:



Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on August 7, 2002, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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Dated this August 7, 2002.

By 
Deputy Clerk

Case No. 20010598-CA

IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,

Plaintiff-Appellant and
Cross-Appellee,

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STATEMENT OF JURISDICTION OVER CROSS-APPEAL

Final Judgment was entered on June 29, 2001 [Addendum B to Appellant's Opening Brief ("Aplt. Add. B"), Record on Appeal ("R.") 5037-39]. Plaintiff William Anthony Kraatz ("Kraatz") timely filed his notice of appeal to the Utah Supreme Court on July 17, 2001 (R. 5047-48), pursuant to *Utah R. App. P.* 4(a) and *Utah Code Ann.* § 78-2-2(3)(j).

Defendant Heritage Imports ("Heritage") timely filed its notice of cross-appeal to the Utah Supreme Court on July 26, 2001 (R. 5051-52), pursuant to *Utah R. App. P.* 4(d) and *Utah Code Ann.* § 78-2-2(3)(j). The Utah Supreme Court transferred this appeal to this Court pursuant to *Utah Code Ann.* § 78-2-2(4). This Court has jurisdiction over Heritage's cross-appeal pursuant to *Utah Code Ann.* § 78-2a-3(2)(j).

STATEMENT OF ISSUES ON CROSS-APPEAL

Issue: Whether the trial court abused its discretion in determining the amount of attorney fees awarded to Kraatz.

Standard of Review: Because the trial court is in a better position than the appellate court to gauge the quality and efficiency of the legal representation and the complexity of the litigation, the amount of a fee award is reviewable only for abuse of discretion. Valcarce v. Fitzgerald, 961 P.2d 305, 317 (Utah 1998). The party appealing from the amount of the fee award must first marshal all of the evidence in support of the amount of the award, and then show why that evidence is legally insufficient. Id.

Where compensable and non-compensable claims are closely related and require proof of the same facts, it is not an abuse of discretion to award fees incurred in proving all of the related facts. Brown v. David K. Richards & Co., 1999 Utah Ct. App. 109, ¶ 20, 978 P.2d 470, *cert. den.*, 994 P.2d 1271 (Utah 1999). It is also not an abuse of discretion to award a fee amount greater than the amount of the damage award. Valcarce, *supra*, 961 P.2d at 317; Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985).

Citation to the Record Showing Preservation of the Issue: As will be shown below, most of Heritage's arguments contesting the amount of the fee award were not made in the trial court, are raised for the first time on appeal, and thus may not be considered by this Court. See, Hart v. Salt Lake County Commission, 945 P.2d 125, 129-130 (Utah App. 1997), *cert. den.*, 953 P.2d 449 (Utah 1997).

STATEMENT OF THE CASE ON CROSS-APPEAL

Kraatz filed his Motion for Determination of Damages and Attorney Fees and Entry of Judgment Pursuant to Remand, a supporting Memorandum and Appendices, and a supporting Affidavit of Michael N. Zundel ("First Zundel Aff.") on September 26, 2000 (R. 4331-4606; 5060-5125). Kraatz sought attorney fees of \$380,180.00 through remand after the first appeal. (R. 5061) This amount included a reduction of \$15,691.50 in non-assessable fees. (R. 5107-08; 4336) The First Zundel Aff. and Volume 3, Appendix C (R. 4331-4606, 5102-5121) set forth the legal basis for the fee award, the nature of the work performed by each attorney, the number of

hours spent to prosecute the case through remand, established the reasonableness of the fees for comparable legal services, and separately stated the hours by persons other than attorneys, for the time spent, work completed and hourly rate billed, all as required by Rule 4-505 of the *Utah Rules of Judicial Administration*.

Heritage did not file an affidavit contesting the reasonableness of Kraatz's attorney fees or a motion to strike the First Zundel Aff. Nevertheless, in response to objections in Heritage's Memorandum in Opposition (R. 4635-41), Kraatz's Reply Memorandum reduced his fee claim by another \$15,146.14, to \$365,033.86.

(R. 4744-47, 4749-50, 4756-57) Heritage's Memorandum in Opposition did not contest the reasonableness of Kraatz's attorney fees incurred on appeal. (R. 4635-41)

Thereafter, Kraatz's counsel submitted supplemental affidavits also complying with Rule 4-505, as to post-remand fees (R. 4782-4810). Again, Heritage filed no opposing affidavits or motions (or any other objection to the post-remand fees). The trial court held an evidentiary hearing on Kraatz's motion on March 26, 2001 [March 26, 2001 Transcript ("Tr."), R. 5059]. At that hearing, Heritage did not offer any evidence in opposition to Kraatz's fee request. (*Id.*) However at the hearing, Kraatz's counsel offered to testify, and Kraatz offered ten additional exhibits in support of his attorney fee claim, which were received into evidence without objection [R. 4811 ("March 26, 2001 Ex."); March 26, 2001 Tr., R. 5059, pp. 2-4]. By that time, Kraatz's attorney fee claim had increased to \$432,941.36 (R. 4948).

On June 13, 2001, the trial court entered Amended Findings of Fact and Conclusions of Law determining that Kraatz was entitled to attorney fees of \$432,941.36, consisting of \$225,210.36 through trial, \$139,823.50 for the first appeal (for a total of \$365,033.86 through the first appeal), and \$67,907.50 post-appeal.¹ (R. 5002, 5008)² On June 29, 2001, the trial court entered a Judgment for Kraatz and against Heritage that included this fee award. (Aplt. Add. B, R. 5037-39)

STATEMENT OF FACTS ON CROSS-APPEAL

On or about October 23, 1992, Mr. Kraatz and the law firm of Jardine Linebaugh & Dunn ("JLD") entered into a written Attorneys Fee Agreement pursuant to which Mr. Kraatz agreed to pay JLD a fee equal to \$10,000.00, plus a contingent fee equal to one-third of his recovery in this case, including recovery of attorney fees awarded under his employment agreement. This agreement was applicable to all

¹March 26, 2001 Ex. 10 erroneously shows the post-appeal fee amount as \$69,284.40, and the total fee amount as \$434,318.26. This is because the exhibit shows Prince, Yeates & Geldzahler's post-remand fees to be \$53,004.40, rather than the \$51,627.50 in Mr. Zundel's supplemental affidavit (R. 4798), accounting for the \$1,376.90 discrepancy. However, the correct \$67,907.50 amount of post-remand fees and \$432,941.36 in total fees are shown in Plaintiff's Proposed Amended Findings and Conclusions (R. 4948) and were awarded by the trial court.

²Although the trial courts' findings and conclusions on attorney fees are not detailed, Heritage's opening brief does not contest the adequacy of the findings and conclusions. Moreover neither detailed findings nor an evidentiary hearing were required in light of Heritage's failure to file affidavits in opposition to the affidavits of plaintiff's counsel, or to offer any other evidence in opposition to the reasonableness of the amount of Kraatz's fee claim. See, Estate of Covington v. Josephson, 888 P.2d 675, 679 (Utah App. 1994), *cert. den.*, 910 P.2d 425 (Utah 1995). See also, Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 622 (Utah 1989) (findings unnecessary if evidence is undisputed).

proceedings through one trial. (March 26, 2001 Ex. 2, ¶¶ 3 and 7) By letter agreement of April 2, 1999 (the "April 1999 Letter"), Mr. Kraatz and JLD modified the original Attorneys Fee Agreement, and Mr. Kraatz agreed to pay JLD an amount equal to one-third of his recovery in this case, or the total amount of attorney fees awarded by the court, whichever is greater. (March 26, 2001 Ex. 3, p. 1)

Following the dissolution of JLD, by letter agreement of March 2, 2000 Mr. Kraatz and the law firms of Prince, Yeates & Geldzahler and Jones, Waldo, Holbrook & McDonough agreed that such firms would continue to represent Mr. Kraatz in this case, by assuming all of JLD's duties and obligations and on the same fee basis as stated in the April 1999 Letter. (March 26, 2001 Ex. 4, p. 1)

The total amount of attorney fees attributable to Kraatz's breach of contract, claim against Heritage, calculated solely on an hourly basis, is \$432,941.36, consisting of the following: (1) \$225,210.36 through trial and (2) \$139,823.50 on the first appeal (for a total of \$365,033.86 through the first appeal), plus (3) post-appeal fees of \$67,907.50 incurred in connection with the determination of Mr. Kraatz's damages, attorney fees, and costs and expenses, on remand. See, n. 1, supra. Of these categories, the fees through trial are broken down into the following subcategories:

<u>Description of Work</u>	<u>Hours</u>	<u>Dollars</u>
Pre-filing Case Assessment	81.30	\$ 9,279.50
Pleading Drafting	28.10	2,883.25
Settlement Negotiation	73.70	10,780.00
Discovery and Analysis Regarding Damages and Nullification of Heritage's "For Cause" Defenses	1,207.97	130,557.75

Pretrial Motions	11.50	1,725.00
Trial Brief Drafting	123.00	11,070.90
Direct Trial Preparation and Trial Presentation	501.05	52,776.75
Post-Trial Findings and Conclusions	<u>74.80</u>	<u>6,037.21</u>
Subtotal	2,101.42	\$225,210.36

(R. 5107-08, 4336, 4756-57, 4948)

The amounts stated for the categories of Pre-Filing Case Assessment, Pleading Drafting, Direct Trial Preparation and Post-Trial Findings and Conclusions are the amounts stated in Mr. Kraatz's Reply Memorandum in the district court on the issues of damages and attorney fees (R. 4744-47, 4749-50), based on Heritage's objections in its Memorandum in Opposition (R. 4635-41). By those adjustments, Mr. Kraatz's original request for fees was reduced by \$15,146.14. (R. 4756-57, 4969-72A) This reduction is reflected in the above numbers.

Heritage chose to defend against this action by making numerous allegations to the effect that Mr. Kraatz was discharged for "cause." In order to prevail against such allegations and also to prove Mr. Kraatz's damages, it was necessary for counsel for Mr. Kraatz to understand, discover and be prepared to present all of the evidence necessary to prevail on the issues of both liability and damages. (R. 5111-15, 4950) Furthermore, it is virtually impossible to segregate the attorney services rendered in prevailing against Heritage's allegations of discharge for cause, from those services devoted to plaintiff's other claims against Heritage and its co-defendants, because the proof overlaps. (R. 1-41, 5107, 4950)

Nevertheless, as indicated above, counsel for Mr. Kraatz properly excluded fees incurred solely in connection with the pursuit of claims for which attorney fees are not recoverable, because they were against the individual defendants, or because they pertained to claims upon which Mr. Kraatz did not prevail. (R. 5107-08, 4336, 4744-47, 4749-50) For example, counsel pro-rated the number of pages in the trial brief devoted to tort claims against individuals and a separate cause of action for bad faith. Six pages of the 33 page trial brief, or 18% of the total pages, represented \$2,430.18 of attorneys' time based on a pro rata distribution of time per page, which was subtracted from the total amount claimed for the brief. (R. 4745)

Counsel for Mr. Kraatz made similar prorations in connection with their work on the post-trial proposed findings of fact and conclusions of law and their trial preparation and trial presentation. For example, counsel reviewed the trial transcript and determined whether a witness's main purpose was to pursue tort claims against the individuals. In one instance, counsel estimated that 50% of J. Wilkinson's 42 pages of testimony, or 21 pages, which is 3.01% of the total 697 pages of trial transcript, should be excluded. (R. 4747) Thus, out of \$58,737.25 in trial preparation and presentation fees, \$1,769.70 (3.01%) was excluded. (Id.) Other amounts based upon similar calculations were also excluded. (R. 5107-08, 4336, 4744-47, 4749-50, 4756-57)

Some specifically identifiable factors giving rise to the extensive legal services provided to Mr. Kraatz through the time of trial are: (a) Heritage's failure to cooperate during the discovery phase in this case, as evidenced by the trial court's Order

Compelling Discovery dated June 2, 1993 (for which attorney fees in an amount to be determined later were ordered as a sanction) (R. 243-46); (b) the numerous unmerited accusations Heritage made against Mr. Kraatz; (c) the aggressiveness of Heritage's attack upon the enforceability of the Contract (*e.g.*, Heritage's attempt to equate the Contract's use of the term "refusal" with "failure"); and (d) the fact that almost all of the available witnesses were biased against Mr. Kraatz because they were: (i) part of the Wilkinson family; (ii) still employed by Heritage at the time of trial, or (iii) business associates of Larry Miller, the majority shareholder of Heritage (R. 5111-12).

Because of the complexity of the case, it was necessary to involve multiple attorneys in the representation of Kraatz. The complexity of the case also required a certain amount of repetition, rethinking, brainstorming and experimentation, which was not duplicative or unnecessary. The joint efforts of the attorneys and staff involved in the representation of Kraatz were essential to an effective presentation of his case. (R. 5113, 5115)

The amount in controversy in this case was, in the beginning, \$3,507,980.00 as stated in the Complaint. (R. 8) That amount was reduced over time because Mr. Kraatz was able to mitigate his damages by finding continuously improving employment, and Mr. Kraatz agreed to limit his damages claims to those damages accruing during the initial five year term of the Contract. His claim for damages for lost wages and benefits and stock appreciation rights totaled \$553,485.55 by the time of

trial, after mitigation and exclusive of pre-judgment interest, costs, expenses and attorney fees. (R. 5112)

All of the numerous depositions taken prior to trial were necessary either to ascertain the factual basis, if any, of Heritage's defenses to Mr. Kraatz's contract claims, or to establish a foundation for Mr. Kraatz's contract damage claims, often from out of state witnesses. Heritage identified, in its Second Amended Answer to Plaintiff's Interrogatories, 30 witnesses who had information relevant to this case. Many of the witnesses deposed were persons identified by Heritage as persons having knowledge of facts supporting Heritage's allegations, and were friendly to Heritage. (R. 5117-18) In some instances it was necessary for more than one of Kraatz's attorneys to attend a deposition, and on some occasions more than one attorney for Heritage would also attend a single deposition. (R. 5115)

In prosecuting Mr. Kraatz's claims, it was necessary for his counsel to copy and examine thousands of documents evidencing the cash flows of Heritage over a period of several years prior to and after the discharge of Mr. Kraatz. This was necessary in order to: (a) defend Mr. Kraatz against Heritage's allegations of misfeasance; and (b) establish the true value and earning capability of the dealership, after making the proper adjustments necessitated by Bryan Wilkinson's personal use of corporate financial resources (*e.g.*, R. 2170-71, 2177-78, 2181-82 and Ex. 329, Tab. 2, showing that for the years 1989 through 1992 Bryan Wilkinson took as much as \$281,877.00 out of the

business for his personal benefit, over and above the more than \$240,000.00 reported in W-2 income for him for each of those years). (R. 5112)

At the conclusion of the trial the trial court acknowledged the demonstrated skill and competence of counsel for Mr. Kraatz with the following remark on page 2462 of the record: "I do want to congratulate both counsel. This case has been conducted, in my estimation, in a very professional, competent fashion and I want to commend you all. I say both counsel. I mean all counsel." The reputations of counsel for Mr. Kraatz are very good in the legal community, with Mr. Linebaugh enjoying a rating of AV by Martindale Hubbell, and Mr. Zundel enjoying a rating of BV at the time of trial. Both counsel are experienced attorneys who have been practicing for many years in this community. (R. 5107, 4333)

As to the \$139,823.50 in attorney fees incurred on Mr. Kraatz's appeal, plaintiff offered into evidence his briefs on appeal and the supporting appendices (March 26, 2001 Ex. 5 through 9). Plaintiff's appeal addressed only the issue of Heritage's liability for breach of the express terms of the Contract, and all such fees are recoverable under the Contract. (Id.) The factual issues on appeal were complex, requiring counsel to painstakingly marshal all of the evidence in the record. Also, it was necessary to involve more than one of Kraatz's attorneys in this process. (R. 5113) The legal issues on appeal were also complex. (March 26, 2001 Ex. 5 through 9)

The \$67,907.50 in post-remand fees (all of which are recoverable under the Contract) were broken down into the following subcategories:

Time spent by the firm of Prince, Yeates & Geldzahler:

<u>Description of Work</u>	<u>Hours</u>	<u>Amount</u>
Communications with client re status of case and settlement discussions with client and opposing counsel	18.30	\$ 3,359.50
Breakout attorney fees into categories	15.00	2,382.00
Draft Motion and Memorandum for Determination of Damages, Attorney Fees and Supporting Affidavits	126.70	21,676.50
Assemble Appendices to Motion	40.40	4,988.00
Draft Reply Memorandum	40.60	7,860.00
Assemble and analyze costs and expenses recoverable under the contract	19.40	2,045.00
Research pre-judgment interest issues	19.50	2,523.50
Research alternative CPI adjustment of damages	6.10	1,076.50
Draft Proposed Findings and Conclusions	30.90	5,716.50
Subtotal	316.90	\$ 51,627.50
Time spent by the firm of Jones, Waldo Holbrook & McDonough through 3/3/01	61.70	12,280.00
Time spent by the firm of Jones, Waldo Holbrook & McDonough after 3/4/01	17.00	3,400.00

Estimated post-hearing time to be devoted to finalization of Findings and Conclusions and preparation of Judgment	<u>3.00</u>	<u>600.00</u>
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Total	398.60	\$ 67,907.50
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(R. 4335-4489, 4756-57, 4782-92, 4790-4810, 4949-50)

As shown by the summaries and the computer generated reports of time spent, which were kept by counsel for Mr. Kraatz contemporaneously with the services provided, counsel provided a total of 3,911.80 hours of service to Mr. Kraatz through the March 26, 2001 hearing on damages, and attorneys fees and costs, although only 3,493.60 of these hours are included in Mr. Kraatz's statement of attorney fees. The average billing rates listed by counsel for Mr. Kraatz over the life of this case range from between \$90.00 and \$169.00 per hour for attorneys, and between \$45.00 and \$60.00 per hour for clerks and paraprofessionals. These hourly rates are well within the range of reasonableness for this community. (R. 4784, 4796, 4951)

Heritage presented no evidence that the fees claimed in the affidavits of Mr. Zundel (R. 5102-21, 4793-4810) and Mr. Linebaugh (R. 4782-92) and the supporting Appendix (R. 4331-4606), as amended in plaintiff's reply memorandum on the issues of damages and fees (R. 4744-47, 4749-50, 4756-57), were unreasonable. Further Heritage did not move to strike or otherwise object to the admissibility of those affidavits. In addition, Heritage did not offer any evidence at the March 26, 2001 evidentiary hearing, or object to the evidence Kraatz offered at this hearing (March 26, 2001 Tr., 5059, pp. 2-4). Heritage never argued that Kraatz's appeal fees were

excessive. (R. 4635-41; March 26, 2001 Tr., R. 5059) Heritage also never offered any specific objections to Kraatz's post-remand fees, but only generally argued that they were excessive (March 26, 2001 Tr., R. 5059, pp. 19-20).

Thus, there was no evidence rebutting the evidence that Kraatz's fees were reasonable, based upon the experience and expertise of the attorneys involved, the legal work actually performed, the difficulty of the litigation, the time spent, the amount involved and results obtained, the efficiency of the attorneys and staff involved, and fees charged by reputable attorneys for comparable services in the Salt Lake area. (R. 5110-11, 4784, 4796; March 26, 2001 Tr., R. 5059, p.4)

SUMMARY OF ARGUMENT ON CROSS-APPEAL

The amount of the fee award to Kraatz was not an abuse of discretion. As set forth above, there was ample evidence in the record to support the amount of the award. Heritage's opening brief failed to marshal that evidence. Also, Heritage failed to offer any evidence in the district court attacking the reasonableness of the fees.

Kraatz's compensable and non-compensable claims were closely related and involved a great deal of overlapping proof. Nevertheless, Kraatz did allocate his attorney fees, and in his Reply Memorandum in the district court Kraatz reduced the amount of his fee claim through trial, based on objections Heritage raised in its Memorandum in Opposition.

No allocation was required as to appeal or post-appeal fees, all of which applied to Kraatz's claim against Heritage for breach of the express terms of the Contract. In

addition, Heritage made no specific objections in the district court to the amounts of the appeal and post-appeal fees.

Heritage makes several arguments in its opening brief that Heritage did not make in the district court. These arguments are raised for the first time on appeal, and should not be considered by this Court.

Under Utah law the amount of Kraatz's damage award is not an upper limit on his fee award. Also, the amount in controversy in the district court was far greater than Kraatz's fee award, and if Kraatz prevails on the main appeal, he will receive an award of damages, expenses, and pre-judgment interest far greater than his fee award.

Heritage cites no Utah law in support of his arguments that settlement negotiations are in any way relevant to the amount of Kraatz's fee award. Also Heritage's characterization of these negotiations is misleading, incomplete and not supported by evidence in the record.

Thus, the trial court's fee award should be affirmed, and Kraatz should also be awarded his costs, expenses and reasonable fees incurred on this appeal, in amounts to be determined by the district court on remand.

ARGUMENT ON CROSS-APPEAL

THE AMOUNT OF ATTORNEY FEES THE TRIAL COURT AWARDED TO KRAATZ WAS NOT AN ABUSE OF DISCRETION

A. HERITAGE HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE AMOUNT OF THE FEE AWARD, WHICH WAS UNREBUTTED

As discussed above, and as conceded in Heritage's opening brief, a party contending that the trial court abused its discretion as to the amount of the attorney fee award must first marshal all of the evidence in support of the amount, and then show why that evidence is legally insufficient. Valcarce, *supra*, 961 P.2d at 317. The facts supporting the amount of the fee award here are set forth in the Statement of Facts on Cross-Appeal above.

Heritage's opening brief at pp. 11-13 devotes less than two pages to a purported marshaling of the evidence. However, the only evidence Heritage references is the fee reductions Kraatz made in response to Heritage's objections in its Memorandum in Opposition.

Heritage ignores all of the other evidence supporting the fee award, discussed above, including the duration, difficulty and complexity of the litigation (including the first appeal, and the post-remand damage issues), the overlapping nature of the compensable and noncompensable claims, Heritage's aggressive (to say the least) defense of the case, the evolving nature of the amount in controversy, the necessary financial analysis of Heritage, the reasons for the number of depositions taken, the

experience and expertise of Kraatz's counsel, the necessity of involving multiple attorneys in Kraatz's representation, and the overall reasonableness of the fee award. (R. 5107-5115, 5117-18, 4784, 4796; March 26, 2001 Tr., R. 5059, p.4) Thus, the amount of the fee award must be upheld based on Heritage's failure to marshal the evidence in support of that amount.

Although conceding that marshaling is required, and purporting to marshal (albeit unsuccessfully), Heritage appears to suggest that the marshaling requirement is somehow affected by the fact that no live testimony was taken, and by a false allegation that no evidentiary hearing was held. However, the fact that testimony supporting the fee award came in by affidavit, rather than live testimony, is irrelevant to the marshaling requirement. Also, an evidentiary hearing on fees was held, at which Heritage's counsel declined to examine Mr. Kraatz's attorneys regarding the fees incurred.

Affidavits are the typical way of presenting evidence in support of the reasonableness of attorney fees. See, Rule 4-505 of the *Utah Rules of Judicial Administration* [with which the affidavits of Kraatz's counsel and the supporting appendix complied (R. 4331-4606, 4782-4810, 5102-21)]. An un rebutted affidavit provides an ample evidentiary basis for a fee award. Estate of Covington v. Josephson, supra, 888 P.2d at 679.

Here, Heritage offered no affidavits or other evidence to controvert the reasonableness of the amount of the fees Kraatz claimed, as proven by the affidavits of

Kraatz's counsel and the supporting appendix. (R. 4331-4606, 4782-4810, 5102-21)

In its Memorandum in Opposition, Heritage objected to certain portions of the fee request (through trial only) (R. 4635-41), and in its Reply Memorandum, Kraatz reduced his fee request in response to some of those objections. (R. 4744-47, 4749-50, 4756-57) Heritage now argues that the amount of the fee reduction was insufficient. However, Heritage presented no evidence in the trial court that the amount of the fees Kraatz claimed, either before or after Kraatz's fee reductions, was unreasonable.

Heritage argues that the First Zundel Aff. contained inadmissible argument and legal conclusions, citing (incompletely at p. 11 of its brief) Capital Assets Fin. Services v. Lindsay, 956 P.2d 1090, 1094 (Utah, App. 1998), *aff'd.*, 2000 UT 9, 994 P.2d 201. However, Heritage never objected in the district court to the affidavits of plaintiff's counsel, by a motion to strike or otherwise. Without a motion to strike, objections to the admissibility of evidence in affidavits are waived. See, Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah App. 1988).

In Capital Assets, unlike here, the party objecting to the affidavits filed a motion to strike, thereby properly preserving its objections. 956 P.2d at 1092. Like several other arguments discussed herein, Heritage improperly raises its objections to the affidavits of Kraatz's counsel, for the first time on appeal. See, Hart, supra.

Because the affidavits of Kraatz's counsel were unrebutted, there was no need for an evidentiary hearing (or detailed findings of fact). Estate of Covington v. Josephson, supra, 888 P.2d at 679. Nevertheless, contrary to Heritage's contention,

there was an evidentiary hearing in the district court on March 26, 2001, at which Heritage chose not to present any evidence.

At the March 26, 2001 hearing, Kraatz offered ten exhibits into evidence, without objection from Heritage. (R. 4811; March 26, 2001 Tr., R. 5059, pp. 2-4) Kraatz's counsel also offered to take the stand, an offer that Heritage's counsel declined to accept.³ (March 26, 2001 Tr. R. 5059, p. 4) Also, as indicated above, Heritage never objected at any time in the district court to Kraatz's appeal fees, or made any specific objections to his post-remand fees.

Thus, the amount of the trial court's fee award must be affirmed because the evidence in support of the reasonableness of the amount was unrebutted by any contrary evidence, and because Heritage has failed to marshal that evidence on appeal.

B. KRAATZ PROPERLY ALLOCATED HIS ATTORNEY FEES

All of Kraatz's claims against Heritage and its co-defendants, the principals in Heritage, arose from the same factual nexus, Heritage's wrongful termination of its employment agreement with Kraatz, the reasons for that termination (whether for

³At the beginning of the March 26, 2001 hearing, the trial court indicated it would limit the presentations to twenty minutes per side. (March 26, 2001 Tr., R. 5059, p. 2) However, if Heritage felt it needed more time, such as to cross examine Kraatz's counsel or to present testimony of its own as to the reasonableness of Kraatz's fees (or fee reductions), Heritage should have objected to the trial court's limits on its presentation and/or asked for a continuance. By failing to do so, Heritage again has waived any objections to the adequacy of the March 26, 2001 hearing. See, Betts v. Crawford, 965 P.2d 680, 685 (Wyo. 1998). Further, the only arguments Heritage made as to attorney fees at this hearing were that the post-remand fees were excessive (without pointing to any specifics), and that the court should take a "broad brush approach to the issue of attorney's fees." (March 26, 2001 Tr., R. 5059, pp. 19-20).

cause, within the meaning of the agreement, or for other reasons), and Kraatz's resulting damages. (Complaint, R. 1-41) Indeed the damages Kraatz sought in each of these claims (but one) were identical⁴ (except for punitive damages on the tort claims against the individual defendants). (*Id.*) Thus, proof of the compensable claim, the First Cause of Action against Heritage for breach of the express terms of the employment agreement, necessarily overlapped with proof of the non-compensable claims, eliminating the need to allocate attorney fees between the compensable and non-compensable claims. Brown v. David K. Richards & Co., *supra*, 1999 Utah Ct. App. 109, ¶ 20.

Nevertheless, counsel for Kraatz was able to allocate some fees as solely related to non-compensable claims, and did not seek an award of those fees. For example, at the time counsel filed the motion seeking fees, counsel excluded \$15,691.50 in fees as being non-assessable, most of which related to claims against the individual defendants. (R. 5107-08, 4336) Later, in response to objections in Heritage's Memorandum in Opposition (R. 4635-41), Kraatz's Reply Memorandum reduced his claim by an additional \$15,146.14, most of which also related to non-compensable claims. (R. 4744-47, 4749-50, 4756-57)

Heritage now argues that those fee reductions were insufficient. However, Heritage never objected in the district court to the amount of the fee reductions

⁴Kraatz's measure of damages on his Second Cause of Action, against Heritage for breach of the implied covenant of good faith and fair dealing, was different. (*Id.*)

(March 26, 2001 Tr., R. 5059), and therefore is precluded from doing so now, for the first time on appeal. See, Hart, supra. Similarly, Heritage did not raise in the district court the specific time entries that Heritage now argues contain references to non-compensable claims.⁵ [Compare Heritage's Memorandum in Opposition (R. 4635-41) with pages 45-46 and Tab 4 of Heritage's opening brief]

That Kraatz did not reduce his claim of \$130,557.75 in fees for Discovery and Analysis Regarding Damages and Nullification of Heritage's "For Cause" Defenses, merely reflects the overlapping facts underlying the compensable and non-compensable claims. Also, Heritage again did not complain in the district court about this fee component, and the trial court had the discretion to adopt the fee reductions Kraatz proposed.⁶ See, Valcarce, supra, 961 P.2d at 317 (amount of fee award is discretionary with trial court).

Heritage's argument that Kraatz should have allocated fees incurred on the first appeal is without merit. That appeal was devoted exclusively to the compensable claim that Heritage breached the express terms of the employment agreement (March 26, 2001 Ex. 5 through 9), a claim on which Kraatz prevailed.

⁵Heritage also did not complain in the district court about alleged "lumping" together compensable and non-compensable time entries. Also, as evidenced by the reductions counsel made, counsel was able to segregate such entries.

⁶Heritage does not explain why it contends that the allocation of fees for Direct Trial Preparation and Trial Presentation, based on the number of trial transcript pages for certain witnesses, was inappropriate, and again raises this argument for the first time on appeal.

Kraatz also was not required to allocate post-remand fees, because those fees related exclusively to damages, attorney fees, costs and expenses awardable on the compensable breach of contract claim. Heritage's argument that Kraatz is not entitled to fees in pursuing "extra-contractual damages" is nonsense. This Court's precedent regarding allocation of fees refers to allocation among liability claims and among parties, not among elements of damages. In any event, all of the damages Kraatz sought post-remand were breach of contract damages, either expressly provided for in the employment contract, or consequential damages arising from breach of that contract. See, Heslop v. Bank of Utah, 839 P.2d 828, 840-41 (Utah 1992) (consequential damages available for breach of contract).

Similarly nonsensical is Kraatz's argument that this Court's decision on the first appeal [1999 Utah Ct. App. 70, Supplemental Appendix ("Aplt. Supp. Add.") A hereto], somehow limited the scope of Kraatz's contractual damages on remand, and that this is now the law of the case. As indicated elsewhere herein, the only issue decided on the first appeal was whether the trial court erred in determining that Heritage had "cause," within the meaning of the contract, to terminate Mr. Kraatz's employment. Because of the trial court's erroneous finding that Heritage had cause to terminate the contract, there was no damage award from which either party could have appealed. Thus, neither Kraatz's briefs nor this Court's decision, on the first appeal, addressed or could have properly addressed, the scope of Kraatz's damages once a

breach was found (March 26, 2001 Ex. 5 through 9, Aplt. Supp. Add. A), and Kraatz is entitled to all of his attorney fees incurred on his damage claims.

Accordingly, Kraatz properly allocated his attorney fees.

**C. THIS COURT SHOULD NOT CONSIDER ARGUMENTS
HERITAGE RAISES FOR THE FIRST TIME ON THIS APPEAL**

As indicated elsewhere herein, Heritage makes numerous arguments that it did not make in the district court and that are raised for the first time on appeal. This Court should not consider those arguments. See, Hart, supra.

Additional arguments that Heritage makes for the first time on appeal are that Kraatz's fee request should be reduced by the amount of time spent analyzing Judge Frederick's reversal rate (prior to the first appeal), by (local) travel time and by time allegedly spent by two or more attorneys on the same task. (R. 4635-41; March 26, 2001 Tr., R. 5059) Of the attorney conferences Heritage complains about on appeal, only those occurring on November 6, November 10, November 18, December 10 and December 16, 1992 were raised in the district court. (R. 4638, n. 12)

Moreover, the mere fact that trial courts have exercised their discretion to reduce fees in the foregoing categories, does not mean that the trial court here abused its discretion in allowing the fees Kraatz claimed in these categories. Heritage cites no case in which a trial court was found to have abused its discretion in awarding fees included in any of the above categories.⁷ Paragraphs 30, 31 and 34 of the First Zundel

⁷One of the cases Heritage cites in support of reducing Kraatz's fee award is U.S. v. Self, 818 F. Supp. 1442 (D. Utah 1992). Self is distinguishable because it

Aff., which again is unrebutted, establish the reasonableness of involving more than one attorney in this case. (R. 5113, 5115)

Thus, this Court should ignore Heritage's arguments that were not made in the trial court.

D. THE AMOUNT OF KRAATZ'S DAMAGE AWARD IS NOT A CEILING FOR THE AMOUNT OF KRAATZ'S ATTORNEY FEE AWARD

At pages 48-49 of its opening brief, Heritage states: "All authorities prompt the conclusion that only under exceptional circumstances (not present here) should a 'reasonable' attorney fee exceed the principal amount recovered."⁸ That statement is not supported by the cases upon which Heritage relies (none of which are from Utah), and is directly contradicted by Utah law.

One of the cases that Heritage cites in support of the above statement is Diamond D Enterprises USA, Inc. v. Steinsvaag, 979 F.2d 14 (2nd Cir. 1992), *cert. den.*, 508

involves fees awarded under the Criminal Justice Act, 18 U.S.C. § 3006A ("CJA"). Under the CJA, private attorneys are appointed to represent indigent defendants in federal criminal cases. In Self the court noted that appointments under the CJA, '... are neither to be sought nor made for the purpose of providing income to attorneys. Indeed, acceptance of such an appointment is tantamount to acceptance of public service.' (Id., at 1446, citation omitted)

⁸Heritage also raises this issue for the first time on appeal. The trial court determined the fee award at the same time it determined the damage award. Nevertheless, Heritage argued to the trial court that Kraatz should be awarded only \$37,602.82 in damages (*i.e.*, that Kraatz should be awarded nothing for stock appreciation). (R. 4620, 4629-30, 4651) However, Heritage never argued in the trial court that Kraatz's attorney fee award could not exceed this amount, or any other amount the court might award. (R. 4635-41)

U.S. 951 (1993). However, Diamond D makes it clear that under New York law it is the amount in controversy not the amount of the damage recovery, that may limit an attorney fee award. Id. at 19-20. Diamond D affirmed an award of attorney fees of almost \$41,000.00, where the damage award was \$17,000.00.⁹

With respect to Utah law, the Utah Supreme Court has stated that, ". . . although the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor." Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988). In Cabrera, supra, the Court held (directly contrary to the above quote from Heritage's brief): "The amount of the damages awarded in a case does not place a necessary limit on the amount of attorneys fees that can be awarded." 694 P.2d at 625. Cabrera affirmed an attorney fee award of \$19,000.00 where the damage award was \$11,350.00. See also, Valcarce, supra, affirming a fee award of \$42,000.00 where the damage award was only \$10,000.00.

Here, as indicated above, the original amount in controversy was over \$3,500,000.00 (R. 8). That amount was reduced over time as Kraatz mitigated his damages through subsequent employment, and limited his damage claim to the initial five year term of his contract. At the time of trial, his damage claim was \$553,485.55 (after mitigation, and not including prejudgment interest, costs, expenses and attorney

⁹In another case Heritage cites for a different proposition, the court awarded \$89,987.25 in fees to a plaintiff who accepted an offer of judgment for \$50,000.00. Webb v. James, 967 F. Supp. 320, 322, 324 (N.D. Ill. 1997), *aff'd.*, 147 F.3d 617 (7th Cir. 1998).

fees) (R. 5112), and he had incurred only \$225,210.36 of his total fee claim. (R. 5107-08, 4336, 4756-57, 4948) Moreover, if he prevails on the main appeal, Kraatz will be entitled to damages far exceeding the fee award (to date).

Thus, the amount of Kraatz's damage award (to date) does not justify reducing the amount of his fee award.

E. SETTLEMENT NEGOTIATIONS PROVIDE NO BASIS FOR REDUCTION OF KRAATZ'S FEE AWARD

Heritage cites no Utah law in support of its argument that the trial court should consider settlement negotiations in determining the amount of a fee award. The factors Utah courts do consider are set forth in Cabrera, supra, as quoted on p. 47 of Heritage's opening brief (*i.e.*, difficulty of the litigation, efficiency of attorneys, reasonableness of hours, fees customarily charged in the locality, amount involved, result obtained and expertise and experience of attorneys). Settlement negotiations are not among these factors, and Kraatz's evidence on the factors that are relevant was un rebutted by any evidence from Heritage.

Even if settlement negotiations were relevant, Heritage's characterization of the negotiations is misleading. The two settlement letters that Heritage cites (Appendix 1 and 2 of its opening brief) speak for themselves. Heritage's characterization of the August 23, 1996 meeting referenced in the second letter is not supported by any evidence in the record and is incomplete. Heritage fails to point out that it promised

Kraatz that Bryan Wilkinson would be at the meeting, so meaningful negotiations could be held, and that Wilkinson never showed up. (R. 4748)

At the time of Heritage's \$308,000.00 offer (at the beginning of the case), Kraatz's claim exceeded \$3,500,000.00, because he had not yet been able to mitigate his damages. At the time of Heritage's \$325,000.00 offer (right before trial), Kraatz had incurred almost \$225,210.36 in attorney fees, some \$80,000-90,000 in costs (R. 4231, 4313), in addition to the \$553,485.55 principal amount of his damage claim at that time (after mitigation) (R. 5112), along with pre-judgment interest. It is also misleading for Heritage to focus on only two settlement offers, where the undisputed evidence is that, prior to trial, Kraatz's counsel spent over 70 hours trying to settle the case. (R. 4336)

It is also undisputed that Heritage never made an offer of judgment under *Utah R. Civ. P. 68*. Even if it had, failure to accept a Rule 68 offer greater than the ultimate judgment does not stop the offeror's liability for attorney fees (as opposed to costs) from continuing to accrue. See, Nelson v. Newman, 583 P.2d 601, 604 (Utah 1978).

Thus, settlement negotiations are not a proper basis for reducing Kraatz's fee award.

REPLY ARGUMENT ON MAIN APPEAL

POINT I

THE TRIAL COURT'S FINDING OF FACT REGARDING THE VALUE OF THE DEALERSHIP IS CLEARLY ERRONEOUS

In reviewing the challenged findings of a trial judge, this Court does not give the same amount of deference it would give to factual determinations made by a jury. See, Alta Industries Ltd. v. Hurst, 846 P.2d 1282, 1283 n. 2 (Utah 1993). In other words, "an appellate court does not, as a matter of course, resolve all conflicts in the evidence in favor of the appellee." Id. Nonetheless, Kraatz acknowledges that in order to overturn the findings of fact made following a bench trial, he must still demonstrate that the trial court's findings are "clearly erroneous." Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990), remanded on other grounds, 806 P.2d 198 (Utah 1991). In Utah, findings of fact are clearly erroneous if they are without adequate evidentiary foundation, if they are induced by an erroneous view of the law, or if there is no evidence in the record to support a particular finding. Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs., 881 P.2d 929, 931 (Utah App. 1994); Larson v. Larson, 888 P.2d 719, 725 (Utah App. 1994).

With respect to the valuation of 100% of Heritage's stock, Heritage has not shown any deficiency in Kraatz's marshaling of the evidence. Rather, Heritage argues that despite the actual evidence, the trial court's findings should be sustained based upon impermissibly remote evidence of the value of the dealership's stock (referring to

the Contract's "initial value"), inaccurate recitals of what the witnesses actually said at trial (demonstrated below) and flawed legal arguments (discussed below).

As a matter of law, the stock's "initial value" of \$2,500,000.00 agreed to in Kraatz's Contract is insufficient evidence to support the trial court's finding of the fair market value of the stock 27 months later, under Glezos v. Frontier Investment, 896 P.2d 1230 (Utah Ct. App. 1995). Heritage's brief provides no meaningful basis to distinguish this precedent. The "initial value" of \$2,500,000.00 is no evidence at all that the stock was worth \$3,100,000.00 27 months later as found by the trial court.

Alternatively, the evidentiary value of the dealership's "initial value" is without legitimate persuasive force in light of the overwhelming weight of other unrefuted evidence [such as (1) Larry Miller's actual purchase price of \$3,000,000.00 to \$3,100,000.00 for 60% of the stock, (2) his contemporaneous offer to buy the other 40% for \$1,200,000.00 in December 1992, and (3) his unrecanted admission that the stock was worth approximately \$200,000.00 more in September of the same year]. The contract's "initial value" provides "no evidence" to support the Court's implicit finding that the 40% of the stock remaining, after Mr. Miller's purchase of the other 60%, had no value. Neither of the witnesses who testified concerning the value (Mr. Miller and Dr. Schmitz) relied on the contractual "initial value" in forming their opinions of value.

With respect to Heritage's historic losses, these losses were considered by both Mr. Miller and Mr. Schmitz, and both men considered them not to be predictive of Heritage's future economic performance, and made adjustments accordingly. (Ex. 329,

Tabs 2 and 3; R. 2237, 2556-60, 2071) The issue of whether the dealership's net book value had decreased between January 1990 and December 1992, by 50% or something less, is completely subsumed by the undisputed fact that the adjusted book value of Heritage, as of December 1992, was approximately \$1,100,000.00 (R. 2217-18). In the opinion of both side's valuation witnesses, the "book value" of the dealership was a smaller part of the overall valuation than was the value of the dealership's future expected profits or "blue sky." (R. 2225-26.) Thus, Heritage's historic losses are "no evidence" that the 40% of the stock remaining, after Larry Miller's acquisition of the other 60%, had no value.

In its brief, Heritage does not cite to any evidence relevant to valuation of Heritage's stock that was not marshaled by Kraatz in his opening brief. However, Heritage does, repeatedly, misrepresent what the evidence actually was regarding this issue.

At trial, Larry Miller did not "explain" away his deposition testimony concerning his opinions of the value of 100% of Heritage's stock as of September 1992 and as of December 1992. At most, Mr. Miller merely weakly recanted his prior admissions without relevant explanation as to why the prior admissions should not bind him and his company, Heritage.

Mr. Miller's testimony on this issue at trial was previously quoted in Appellant's opening brief at pages 27-29. He did not assert that the remaining 40% of the stock was worthless because of a "minority discount" as represented at p. 10 of Defendant's

Brief, citing pages 2216 through 2222 of the Record. Mr. Miller did not ever refer to a "minority discount" in his testimony, much less a discount so great as to render the remaining 40% of Heritage's stock worthless. Rather, he failed to answer his counsel's leading question regarding this subject as demonstrated by the following excerpt from the Record (previously quoted in Appellant's opening brief at p. 28):

MR. WINDER: And why—if you bought, Mr. Miller, if you bought 60% of the stock for \$3 million to \$3,100,000—why does that equate to the value of the dealership? Or how does it equate to the value of the dealership?

MR. MILLER: Well, if the corporation pays 100% of the obligations reflected in the formula that we've gone through earlier, then I pick up 60% of that and I think that clearly establishes in real numbers, not any theory, but in real numbers what was paid in the transaction.

MR. WINDER: So you paid 60% or you paid \$360,000.00 for 60% of the stock?

MR. MILLER: Correct.

MR. WINDER: And every other amount that you paid to Mr. Wilkinson was paid by the company from 100% of the stock?

MR. MILLER: That's correct.

(R. 2217)

Mr. Miller's explanation that he personally paid \$360,000.00, but had his newly-acquired company, Heritage, pay the remainder of the total purchase price of \$3 million to \$3.1 million for 60% of the stock, has nothing to do with the value of the remaining 40%. Mr. Miller's answer does not refer to the remaining 40%. That Mr.

Miller structured his stock purchase as a leveraged buyout of 60% of the stock is not evidence that the remaining 40% was worthless.

Mr. Miller did not ever testify that the remaining 40% of the stock was "not a significant factor," as misrepresented at p. 19 of Defendant's Brief, citing pages 2201 through 2202 of the Record. Rather, Mr. Miller testified at those pages that he offered to pay \$1,200,000.00 to the 40% minority shareholders for their stock. He admitted that had his offer been accepted by the minority shareholders he, in fact, was willing to pay \$4,200,000.00 for 100% of the stock as of December 1992, and that the stock was \$194,000.00 more valuable in September 1992, when Mr. Kraatz's employment was terminated. (R. 2201-02.)

Mr. Miller never testified that the remainder of Mr. Miller's purchase price over \$360,000.00 was allocated to such things as a noncompete agreement and a deferred compensation agreement with Bryan Wilkinson, as misrepresented at p. 19 of Defendant's Brief (referring to pages 4073-76 of the Record and exhibits 86 and 88). Rather, at trial Mr. Miller candidly admitted that all of the \$3,000,000.00 to \$3,100,000.00 paid to Bryan Wilkinson was properly attributable to the value of the 60% of Heritage's stock he purchased, irrespective of how the purchase price was broken up in the purchase documents:

MR. ZUNDEL: All right. Now, you had various forms of this compensation to -- Mr. Wilkinson took various forms, a non-compete agreement, a deferred compensation agreement, a stock purchase agreement, and some benefit that he got under the management agreement that was signed in December of 1992, right?

MR. MILLER: Yes, that's correct.

MR. ZUNDEL: All right, and there wasn't -- there isn't any separate value to Bry's agreement not to compete, is there?

MR. MILLER: Real value in it, you mean?

MR. ZUNDEL: Right, real value. It's all part of the good will of the corporation?

MR. MILLER: I would say that's basically correct.

MR. ZUNDEL: All right, so we don't have to worry about splitting them up. We can just deal with all of them as a fair market value of the corporation, right?

MR. MILLER: I agree with that.

(R. 2187-88) Defendant's attempt to raise this smokescreen is not proper because the issue was conceded at trial. (Id.) The Court's findings also do not adopt this suggested allocation of the purchase price.

Mr. Miller never testified that 100% of Heritage's stock "was not worth \$4.2 million in September of 1992," as misrepresented at p. 20 of Defendant's Brief (referring to pages 2200 through 2202 of the Record). Rather, at the referenced pages, Mr. Miller temporarily refused to readmit (as he had admitted in deposition) that as of September 1992, 100% of Heritage's stock was worth \$4,400,000.00, but then admitted that Bryan Wilkinson and his family "would have gotten" (R. 2202) \$4,200,000.00 if the 40% minority shareholders had sold their stock at the same time as the majority 60% interest was sold in December 1992. Mr. Miller's immediately following vague statement that "[i]f you talk about the value of the stock, I still say it

comes back to \$3 million" (R. 2202) can only be reconciled with his contemporaneous testimony as a reference to the 60% of the stock he purchased, and a refusal to address the value of the remaining 40%. Thus, there is simply no evidentiary basis for the Court's implicit finding that the 40% of the stock Mr. Miller did not buy had no value at all.

Despite Mr. Miller's protestations, it is not "mixing apples and oranges" (R. 2201) to add to Miller's actual purchase price for 60% of the stock, what Miller undisputedly simultaneously offered to pay for the remaining 40%, in order to determine the minimum value of 100% of the stock as of December 1992. Miller's claim that Kraatz's counsel was trying to "cut, paste and glue this deal and try and come up with the biggest number," (R. 2209) was not in reference to the calculation referred to in the preceding sentence, but rather was in reference to Kraatz's counsel's questions regarding prior offers made by Miller for the Heritage stock that, had they been accepted, establish an even higher value than the \$4.4 million urged by Kraatz's expert, Dr. Schmitz (R. 2209, 2237).

The fact that Heritage was at one time audited by the IRS has nothing to do with the valuation of Heritage's stock at the time Kraatz was fired. It is also wholly irrelevant to the valuation issue that American Honda never objected to Heritage's accounting methods. American Honda was never asked to render an opinion of the value of 100% of Heritage's stock. American Honda's apparent (due to silence) satisfaction with the accuracy of the accounting records for its own purposes was not,

and could not have been, relied on by the Court or any of the experts as an indication of the value of the stock. Both Mr. Miller (R. 2071, 2084-85) and Dr. Schmitz (R. 2238, 2318-19) reviewed and made adjustments to Heritage's historic books and records for the purpose of projecting future income and valuing the stock.

The evidence Heritage accurately refers to in its opening brief is irrelevant evidence on the issue of valuation, and does not support the Court's implied finding that the remaining 40% of Heritage's stock had no value. Thus, by marshaling the evidence, Kraatz has demonstrated the trial court's finding that the value of 100% of the stock of Heritage was \$3.1 million, based on Mr. Miller's purchase of 60% of the stock for that amount, is so lacking in support as to be against the clear weight of the evidence and thus clearly erroneous.

POINT II

THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO AWARD KRAATZ CONSEQUENTIAL DAMAGES ARISING FROM HERITAGE'S BREACH OF THE EMPLOYMENT CONTRACT

Mr. Kraatz's opening brief disposes of most of the factual and legal arguments Heritage makes in contending that Kraatz is not entitled to consequential damages (which Heritage mischaracterizes as "extra-contractual damages") for Heritage's breach of the employment contract. While Mr. Kraatz will not unnecessarily repeat the points he made in his opening brief as to the trial court's legal errors in refusing to award consequential damages (such as lost contributions to Kraatz's mandatory retirement

plan, Christmas bonuses, income from the sale of warranty contracts and the like), certain arguments Heritage makes in its opening brief on this issue require further response.

Heritage misstates the applicable standard of review. The issue is not the adequacy of the damage award, *i.e.*, the amount of the award, because the trial court awarded Kraatz nothing for consequential damages. The issue is whether the trial court applied the wrong measure of damages, *i.e.*, excluded an entire category of damages (consequential damages) to which Mr. Kraatz is entitled. The issue of the correct measure of damages is a legal issue subject to de novo review on appeal. Lysenko v. Sawaya, 2000 UT 58, ¶¶ 15-17, 7 P.3d 783.

By repetitive use of the phrase "extra-contractual damages," Heritage apparently hopes to convince this Court, by subliminal suggestion, that Kraatz's claim for "consequential damages" for breach of contract is something new and unprecedented. Heritage does not, however, directly attack the precedent Kraatz relies upon for his claim to consequential damages arising from the wrongful termination of his employment, *i.e.*, Heslop, supra, 839 P.2d at 840-41.

Rather, Heritage suggests (and the trial court agreed), without any citation to authority, that a form of the parol evidence rule should apply to exclude evidence of Kraatz's consequential damages because "if extrinsic evidence cannot be used to determine whether there was cause for termination . . ." (Page 23 of Heritage's opening brief) it should not be allowed to show the full extent of Kraatz's damages.

This argument has no merit for a number of reasons, chief among them being that the parol evidence rule does not apply to subsequent (as opposed to prior and contemporaneous) statements and other evidence regarding the terms of a contract. Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201, 1205 (Utah 1983). In addition, proof of consequential damages, as opposed to benefit of bargain damages, almost always involves "extrinsic evidence." Beck v. Farmers Ins. Exchange, 701 P.2d 795, 801 (Utah 1985). Nothing in this Court's ruling in the prior appeal suggests otherwise.

This Court's Memorandum Decision filed March 11, 1999 (Aplt. Supp. Add. A) is devoted exclusively to considering whether evidence was properly adduced at trial sufficient to justify the trial court's ruling that Kraatz was fired for "cause." After a careful review of the entire record this Court wrote, at p. 4:

Our review of the record reveals no evidentiary basis for terminating Kraatz for cause. We therefore reverse and remand for a determination of Kraatz's damages under the contract, including reasonable attorney fees.

To suggest, as Heritage does, that this language was intended by this Court to limit the amount of Kraatz's damage recovery is simply without basis. There was no discussion in this Court's opinion of limiting Kraatz's damages on remand, and no rationale has been articulated by Heritage to justify such an odd result. Such a limitation would be contrary to the pronouncement of the Utah Supreme Court in Heslop that a wrongfully terminated employee is entitled to a broad range of general and consequential damages. Heslop, 839 P.2d at 840-41.

Kraatz has not raised in this appeal any issue that was not presented to and decided by the trial court on remand, regarding the type and amount of damages to which Kraatz is entitled. Heritage's suggestion that somehow these damage issues addressed on remand by the express command of this Court cannot now be reviewed in this appeal is specious.

Similarly, Heritage's reliance on selected paragraphs in the trial court's original findings in support of its reversed judgment dismissing Kraatz's claims is not proper. It is well settled, and only logical, that "the doctrine of the law of the case cannot be applied ...to factual questions which were expressly remanded for determination by the trial court." 5 Am. Jur. 2d § 610. As stated by the Utah Supreme Court in the case of Phebus v. Dunford, 198 P.2d 973, 974 (Utah 1948), "[o]ur decision was without limitation as to how much of the lower court's decision was set aside. It set it all aside."

So too, this Court's Memorandum Decision was without limitation as to what portions of the trial court's original Findings and Conclusions were set aside. While the trial court was certainly free after remand to make whatever findings and conclusions were appropriate based on the evidence and the law, it was not bound by the prior reversed findings. Neither is this Court, nor Kraatz on this appeal, so bound in assessing whether the trial court properly decided the damage issues remanded after the first appeal. As indicated above, the errors that the trial court made in refusing to award consequential damages were legal ones, involving 'rules or principles uniformly

applied to persons of similar qualities and status in similar circumstances.' Lynsenko, supra, 2000 UT 58, ¶ 17. These legal errors included injecting the concept of consideration into a consequential damage analysis, and ignoring Mr. Kraatz's undisputed compensation history establishing that his claims for consequential damages were not speculative. See, Boothby v. Texon, Inc., 414 Mass. 468, 609 N.E. 2d 1028 (1993).

The reliance of Heritage and the trial court (R. 5016) on Namad v. Salomon, Inc., 147 A.D. 2d 385 (N.Y. App. Div. 1989), *aff'd.*, 543 N.E.2d 722 (1989), as to so-called "discretionary" compensation is also misplaced. In Namad the employee had never received the discretionary compensation he sought as damages. Here, of course, Kraatz did receive the allegedly discretionary compensation during his employment, as did his successor thereafter, so there is no reason to believe this compensation would not have continued, but for Heritage's wrongful termination of Kraatz.

With respect to the foreseeability of Kraatz's consequential damages, the trial court's errors were also legal ones. The trial court did not attempt to weigh the evidence as to foreseeability, which was undisputed, and thus made no findings of fact on the issue. Instead, the trial court concluded, as a matter of law, that foreseeability was not established, for four erroneous legal reasons (R. 5017):

- (1) That the compensation enhancements were discretionary.

However, as discussed above, this is irrelevant in light of the undisputed facts that Kraatz actually received those enhancements, as did his successor.

(2) That Heritage had no obligation to provide these enhancements under the four corners of the agreement. The trial court erred as a matter of law in using the parol evidence rule as a basis for refusing to consider evidence supporting an award of consequential damages.

(3) That the damages had to be foreseeable at the time the contract was consummated. However, as argued in Kraatz's opening brief, the compensation enhancements became foreseeable at the time they were added to the contract. Also paragraph 3.2 of the original contract (Aplt. Add. C) expressly contemplated the payment of "additional compensation."

(4) That the damages were speculative. However, as discussed above, Kraatz's undisputed compensation history is sufficient evidence of the consequential damages claimed, in order to make a finding of "speculative" legally unsupportable. A damage claim is only speculative if there is no evidence to support it.

With respect to some of Heritage's factual assertions on consequential damages in its opening brief, Kraatz asserts numerous times in his opening brief that the testimony of his expert accountant Bruce Wisan was not challenged as far as his calculations, methodology or, on numerous occasions, his conclusions, with respect to the value of various items of benefits and the so-called "extra-contractual" compensation. At page 7 of its opening brief, Heritage asserts that Wisan's calculations were challenged by "extensive cross examination" (citing Wisan's

testimony at R. 2125-40, Aplt. Supp. Add. B hereto). However, Kraatz stands by his assertion with respect to the particular items of damages stated, in detail, in his opening brief.

An examination of the above pages of the record reveals only that during Mr. Wisan's cross-examination he merely repeated his assumptions, methodology and calculations. No admissions or concessions were obtained and no other evidence was adduced to rebut Mr. Wisan on the issues addressed in Kraatz's opening brief. Heritage asks this Court to assume that the cross-examination somehow compromised Mr. Wisan, which simply did not occur. Cross-examination alone, without gaining any concession or exposing any articulable weakness of assumption or methodology, is hardly impeaching, but rather is often bolstering of an adverse expert witness' testimony, as is the case here. The point is, Heritage has not shown any instance when Mr. Wisan's testimony was impeached or even challenged by cross-examination or another expert.

Heritage also misrepresents in its brief at page 7 that Mr. Wisan's testimony was "challenged" by "Heritage's two accountants," citing pages 2177-80, 2400-04 & Exhibit 333 of the record. However, again, if the cited pages are examined, one will see that Mr. Wisan is not challenged at all by the testimony of the accountants. Indeed, pages 2177-80 (Aplt. Supp. Add. C hereto) are the testimony of Mr. Christian (Heritage's accountant) being questioned by Mr. Winder (Heritage's attorney) on cross-examination, after Mr. Christian was called by Mr. Kraatz to testify about Bryan

Wilkinson's excessive spending and doctoring of Heritage's books to hide such spending. Mr. Wisan's testimony is not even mentioned in the entire examination, and the examination has nothing to do with Mr. Wisan's calculation of Mr. Kraatz's lost compensation and benefits.

Similar, but more amusing, is the testimony at pages 2400-04 of Mr. Jensen (the other Heritage accountant) (Aplt. Supp. Add. D hereto). He was called back to the stand by Mr. Winder to confess that he had made an error in one of his calculations regarding the performance of the dealership (in support of Heritage's failed attempt to show that Kraatz was properly fired for lack of profitability of the operations--not in support of any damage issue) and to say that he had corrected the error. Mr. Jensen was then re-crossed by Mr. Zundel (Kraatz's attorney) who elicited the confession that the calculation was still wrong and of no relevance (R. 2403). Again, Mr. Wisan's testimony was not even mentioned or at issue during any of the examination cited.

Thus, the facts and expert opinions establishing the foreseeability and amounts of Mr. Kraatz's consequential damages are undisputed in the record. The errors the trial court made in refusing to award any consequential damages were legal ones, requiring reversal with directions to award on remand consequential damages in the amounts already proven by Kraatz.

POINT III

THE TRIAL COURT ERRED AS A MATTER OF LAW IN APPLYING RULE 54(d) STANDARDS TO EXPERT WITNESS AND DEPOSITION EXPENSES AWARDABLE BY CONTRACT

Heritage fails to address the argument in Kraatz's opening brief (at pp. 43-44) that the reason the trial court erred in refusing to award expenses for experts who did not testify at trial, and for depositions of deponents who did not testify at trial, is because the court applied *Utah R. Civ. P. 54(d)* standards to expenses awardable by contract. Similarly, Heritage totally ignores the controlling authority of this Court's holding in Chase v. Scott, 2001 Ut. Ct. App. 404, ¶ 20, 437 Utah Adv. Rep. 20, that expenses awarded by contract "should not be limited by case law interpreting Rule 54(d)."

That the trial court here erroneously applied Rule 54(d) standards is evidenced by its Conclusions of Law, in which it cited Board of Commissioners of the Utah State Bar v. Petersen, 937 P.2d 1263, 1272 (Utah 1997); Sinclair v. Ins. Co. of North America, 609 F. Supp. 397, 409 (E.D. Pa. 1985), *aff'd*, 782 F.2d 1029, 1031 (3d Cir. 1986); and Ellis v. University of Kansas Medical Center, 2000 W L 1310508 (D. Kan. Aug. 31, 2000) in support of denying the above costs (R. 5018-19). Petersen applied Rule 54(d) standards in refusing to award certain deposition costs. In denying expert witness fees, Sinclair appears to have applied cost standards under federal statute, which similarly would not apply to costs awardable by contract. See, North Drive-In Theatre Corp. v. Park-In Theatres, Inc., 248 F.2d 232, 238-239 (10th Cir. 1957). Ellis

also applies to costs under federal statute, not by contract.¹⁰ Heritage repeats the trial court's error by relying on these same cases.

Heritage's interpretation of the contract is also erroneous. As to costs, the contract states:

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

(Aplt. Add. C, R. 4065, emphasis added) The expansive nature of the obligation to pay "all costs and expenses incurred . . . including but not limited to . . ." defeats Heritage's argument that the word "reasonable" was intended to modify not only "attorney's fees," but also "expert witness fees" and "deposition costs."

Heritage's argument at page 28 of its opening brief that "reasonable" was intended to modify all these categories of costs and expenses because, ". . . in this case, 'reasonable' precedes 'expert witness fees' [and] is set off by commas . . ." (emphasis added) is just wrong. "Reasonable" is not set off by commas, and the sentence at issue is not structured in a fashion that would lead one to believe that "reasonable" was intended to modify anything other than "attorney's fees."

¹⁰After discussing Ellis on page 32 of its opening brief, Heritage launches into a diatribe about Kraatz's photocopy costs, ignoring the fact that neither Kraatz nor Heritage is appealing from the amount of the copy cost award.

Moreover, even assuming a reasonableness standard applies, it is contrary to the contractual language to tie that standard to whether the expert witness or deponent testified at trial. The contract imposes liability for costs and expenses, "whether incurred through legal action or otherwise." Thus, for example, Kraatz could have retained an expert for purposes of assessing his contract damage claim before ever filing suit, and Heritage would be liable for the costs of retaining that expert.¹¹

In arguing that Kraatz should not be awarded costs of depositions needed to establish its claim for damages based on loss of warranty income, Heritage repeats its same baseless argument that these damages are "extra-contractual" and not part of Kraatz's contract claim. As discussed above, these damages are consequential damages for breach of contract under Heslop, supra.

Thus, the trial court applied the wrong legal standard in denying expenses for non-testifying experts, and for depositions of non-testifying deponents. Application of the correct standard requires an award to Kraatz of an additional \$12,684.17 in expert witness fees, and an additional \$9,369.90 in deposition costs and witness fees.

¹¹Sinclair, supra, is also distinguishable from the present case in that in Sinclair, the experts provided absolutely no benefit to the plaintiff's case, whereas here, the un rebutted First Zundel Aff. establishes both the necessity of the assistance provided by the non-testifying experts on damage issues (R. 5106), as well as the necessity of the depositions of the non-testifying deponents (R. 5117-18).

POINT IV

KRAATZ IS ENTITLED TO PRE-JUDGMENT INTEREST, EITHER BECAUSE THE PRINCIPAL AMOUNTS OF ALL OF HIS DAMAGES WERE CALCULABLE WITH THE REQUISITE CERTAINTY, OR AS ADDITIONAL CONSEQUENTIAL DAMAGES FOR THE LOSS OF THE USE OF THESE AMOUNTS OVER TIME

Kraatz's opening brief presented two arguments as to why it should have been awarded pre-judgment interest on the principal amounts as to which the trial court refused to award pre-judgment interest. First, each of these amounts was calculable with the required degree of certainty. Second, to the extent certain amounts could not be so calculated, Kraatz should be awarded pre-judgment interest as another form of consequential damages, based on the loss of the use of these amounts over time.

Heslop, 839 P.2d at 840-41 (wrongfully terminated employee entitled to broad range of consequential damages). Under the second argument, Heritage is not being penalized if it cannot calculate the amount it owed Kraatz, because it has had the benefit of the use of the money during the pendency of Kraatz's claim.

A. CALCULABLE WITH THE REQUISITE CERTAINTY

With regard to the first argument, and as argued in Kraatz's opening brief (and not rebutted by Heritage), there was no dispute at trial over how to calculate Kraatz's damages based on the loss of the Sports Mall membership, Christmas bonuses, Jazz tickets, retirement contributions, St. George home mortgage reimbursements and

income from warranty service contracts. While Heritage may dispute liability, it has not disputed the amounts.¹²

As to Kraatz's loss of the right to a 10% share of annual profits over \$280,000.00, the only dispute is over whether to make the accounting adjustments Kraatz seeks. Once the appropriateness of the adjustments is determined, the profit calculation is undisputed. See, Jack B. Parson Constr. Co. v. State of Utah, 552 P.2d 107, 109 (Utah 1976) (pre-judgment interest awarded where principal amount due under contract was ascertainable by calculation, and only the method of calculation was uncertain).

As to valuation of the dealership at the time of Kraatz's wrongful termination, for purposes of awarding his 15% share of the increase from his date of employment, that valuation is established by Larry Miller's own testimony, above, that in December 1992 he purchased 60% of the dealership for \$3 million, and offered to purchase the other 40% for \$1.2 million, for a total of \$4.2 million.¹³ Thus, Heritage cannot dispute that this amount was fixed and known to Heritage in December 1992.

As to expert witness expenses, these amounts were also fixed and known at the time Kraatz "incurred" them [*i.e.*, became liable for them, See, Webster's New

¹²Similarly, as to the country club membership, while Heritage now disputes the basis for Mr. Wisan's damage calculation, it did not do so at trial.

¹³Again, Kraatz does not waive his claim to the additional \$200,000.00 in value at the time of his wrongful termination in September 1992. The \$4.2 million is used only as the liquidated value of the dealership for purposes of awarding prejudgment interest beginning in December 1992.

Collegiate Dictionary (G. & C. Merriam Co. 1977)]. Under Section 5.6 of the contract, Heritage is liable for expert witness fees "incurred" by Kraatz. Thus, it does not matter what arrangements Kraatz had with his experts regarding interest on their charges. Heritage became liable to Kraatz (not the experts) for expert charges at the times Kraatz incurred them (not when he paid them). Because Heritage did not pay Kraatz, it is liable for interest on the amounts it owed Kraatz (not the experts),¹⁴ from the time Heritage's payments were due, *i.e.*, at the time Kraatz incurred these costs.

Also, Heritage does not contend that the amounts charged by the experts (even the non-testifying experts) were unreasonable. Heritage only disputes its liability for the charges of the non-testifying experts.

Kraatz withdraws his claim to pre-judgment interest on his attorney fees, other than the \$10,000.00 he was required to pay under paragraph 3 of the October 23, 1992 fee agreement (March 26, 2001 Ex. 2, Aple. App. 3), because the balance of the fee is contingent.

However, Kraatz is entitled to pre-judgment interest on the \$10,000.00 from October 23, 1992, the date this fee obligation was incurred. See, First Security Bank

¹⁴Unlike other litigation expenses, Kraatz, not his lawyers, was responsible for payment of expert charges under paragraph 5 of his October 23, 1992 fee agreement with his lawyers [March 26, 2001 Ex. 2, Appendix ("Aple. App.") 3 to Heritage's opening brief]. However, Kraatz withdraws his claim to pre-judgment interest on other litigation costs and expenses, because under the provisions of the fee agreement quoted in Heritage's opening brief, the liability Kraatz "incurred" to repay his attorneys for these other costs and expenses is contingent until there has been a recovery against Heritage.

of Utah v. J.B.J. Feedyards, Inc., 653 P.2d 591, 600 (Utah 1982). Any policy that one panel of the Utah Court of Appeals should not overrule another panel is overcome by the Court's duty to follow Utah Supreme Court decisions. See, State v. Menzies, 889 P.2d 393, 399, n. 3 (Utah 1994), *cert. den.*, 513 U.S. 1115 (1995). While the panel in James Constructors, Inc. v. Salt Lake City Corp., 888 P.2d 665 (Utah App. 1994), may not have agreed with J.B.J. Feedyards, or felt it was poorly reasoned, the panel was obligated to follow that decision, and it was clearly erroneous for the panel not to do so. See, State v. Menzies, 889 P.2d at 393, n.3 (lower courts are required to follow even 'judicial dicta' of higher courts). Moreover, even absent J.B.J. Feedyards, Heritage does not and could not contend that the \$10,000.00 portion of Kraatz's attorney fee was unreasonable.

B. AWARDABLE AS ADDITIONAL CONSEQUENTIAL DAMAGES

Heritage barely addresses Kraatz's second argument, that it does not matter whether the principal damage amounts are readily calculable, because loss of the use of those amounts is simply another form of consequential damages. While Heritage briefly addresses Funkhouser v. J.B. Preston Company, Inc., 290 U.S. 163, 168-169 (1933), and Restatement (Second) of Contracts, § 354(2), it ignores the line of cases from several jurisdictions (discussed at pages 53-54 of Kraatz's opening brief), indicating that, for purposes of a consequential damage analysis, it does not matter

whether the principal amount is readily calculable, because the defendant has had the use of that amount, and plaintiff has not, during the pendency of the litigation.¹⁵

Heritage also ignores the Utah Supreme Court decisions in Farnworth v. Jensen, 217 P.2d 571 (Utah 1950), holding that pre-judgment interest is part of plaintiff's damages in a breach of contract case, and Ong Int'l. (U.S.A.) v. 11th Ave. Corp., 850 P.2d 447, 457 (Utah 1993), affirming an award of the reasonable rate of return on restitutionary damages. The broad range of consequential damages referred to in Heslop ought to, in light of Farnworth and Ong, include pre-judgment interest on damages determined at trial, even if these damages are not calculable with certainty prior to trial.

Thus, Kraatz is entitled to pre-judgment interest on all of his damage claims, on his expert witness costs, and on the non-contingent \$10,000.00 in attorney fees he has incurred.

¹⁵Under this analysis, the cause of any delay in the litigation is irrelevant, because defendant has had the benefit of the money during such delay (as well as after the rejection of any settlement offers). Also, Heritage's argument about delay after the first appeal is misleading, since it does not take into account Heritage's petition for certiorari, or the parties' post-appeal settlement negotiations.

POINT V

THE INCREASE IN THE CONSUMER PRICE INDEX IS MERELY AN ALTERNATIVE MEASURE OF KRAATZ'S CONSEQUENTIAL DAMAGES RESULTING FROM THE LOSS OF THE USE OF THE PRINCIPAL AMOUNT OF HIS DAMAGE AWARD OVER TIME

Heritage argues that there is only one case, from another jurisdiction, allowing an increase in a damage award based on the increase in the Consumer Price Index over time. This argument is irrelevant.

Heritage does not and cannot dispute that Kraatz has been damaged by the loss of the use of the principal amount of his damage award over time, that such loss was foreseeable, or that Heritage has benefitted by being able to use Kraatz's money during the pendency of this litigation. Statutory pre-judgment interest is one way of measuring the value of this loss. The increase in the CPI is merely an alternative measure of this item of consequential damages.

As noted above, the Utah Supreme Court has approved alternative ways of measuring the value of the loss of the principal amount of a damage award over time. In Ong Int'l. (U.S.A.), *supra*, the prevailing party put on evidence of the reasonable rate of return that could have been expected if that party had been able to invest its restitutionary damage award. The Court affirmed an additional award based on this evidence.

Here, Kraatz put on evidence of the increase in the CPI during the pendency of this litigation (R. 4605-06, 5105), and that evidence was undisputed. To the extent pre-

judgment interest is not awarded here, this alternative measure of Kraatz's consequential damage from the loss of the use of his principal damage award over time is entirely appropriate under Ong Int'l. (U.S.A.).

CONCLUSION AND REQUESTED RELIEF

The amount of the attorney fee award to Mr. Kraatz should be affirmed. The trial court did not abuse its discretion in determining that amount, which was supported by substantial, unrebutted evidence in the record, which Heritage failed to marshal. Mr. Kraatz should also be awarded his costs, expenses and reasonable attorney fees incurred on this appeal, in amounts to be determined by the trial court on remand.

For the reasons argued in this brief and in Mr. Kraatz's opening brief, the other damage issues should be remanded to the trial court, with instructions to increase the award by the amounts set forth in the conclusion to Mr. Kraatz's opening brief. In addition, the trial court should be instructed to award pre-judgment interest on all of the damage amounts (including the non-contingent \$10,000.00 in attorney fees, and the non-contingent expert witness fees, "incurred" by Mr. Kraatz, but excluding contingent attorney fees and litigation expenses "incurred" by Mr. Kraatz).

As an alternative to pre-judgment interest, Mr. Kraatz's damage award should be increased by the 20.09% increase in the Consumer Price Index-Urban. This adjustment should be applied to all damages, including the \$10,000.00 in attorney fees, and the expert witness fees.

DATED this 17th day of July, 2002.

PRINCE, YEATES & GELDZAHLER
A Professional Corporation

By: 

Michael N. Zundel

By: 

James A. Boevers

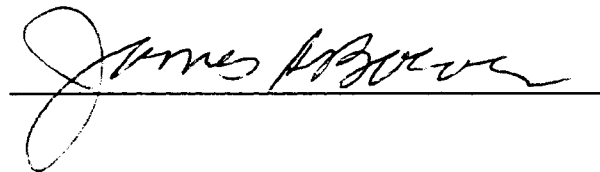
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2002, I caused two copies of the foregoing Appellant's and Cross-Appellee's Second Brief to be mailed, first class postage thereon, to:

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File No. 13407-1



FILED

MAR 11 1999

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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William Anthony Kraatz,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff, Appellant, and)	
Cross-appellee,)	
)	Case No. 971044-CA
v.)	
)	
Heritage Imports, a Utah)	F I L E D
corporation dba Heritage)	(March 11, 1999)
Honda; O. Bryan Wilkinson; and)	
Jeffrey J. Wilkinson,)	
)	1999 UT App 070
Defendants, Appellees,)	
and Cross-appellants.)	

Third District, Salt Lake Department
The Honorable J. Dennis Frederick

Attorneys: Kent B. Linebaugh, Michael N. Zundel, and Jennie B.
Garner, Salt Lake City, for Appellant
Donald J. Winder and Jennifer L. Falk, Salt Lake
City, for Appellees

Before Judges Bench, Billings, and Davis.

BENCH, Judge:

When interpreting a contract, the court first determines, as a matter of law, whether the contract is ambiguous. See Interwest Constr. v. Palmer, 923 P.2d 1350, 1358 (Utah 1996). "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" Id. at 1359 (quoting Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991) (quoting Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983))). The court may consider extrinsic evidence only if the contract is ambiguous. See id.

Here, the trial court determined that the contract was "ambiguous as to the skills and experience [Kraatz] was to provide as general manager of the Dealership to develop and maintain the dealership." The trial court then heard extrinsic evidence "to clarify the intentions of the parties with respect

to the skills, personality traits and management skills [Kraatz] was to provide as general manager." However, in the recitals of the agreement, the parties recognized that Kraatz already possessed all the necessary skills and traits to be a general manager: "WHEREAS, [Kraatz] has skills, personality traits and management skills, which are conducive to development and maintenance of such interpersonal relations, management of personnel, financing and sales and operating an automobile dealership." (Emphasis added.) Thus, the trial court did not need to hear extrinsic evidence to determine whether Kraatz had the requisite skills, personality traits, and management skills to manage the business.

Furthermore, in Article I of the contract, the parties detailed Kraatz's duties as general manager:

(a) [Kraatz] shall be employed as General Manager . . . and shall provide day-to-day management over the operations of the Dealership [Kraatz] shall have responsibility and authority over all aspects of the daily operations.

(b) The duties of [Kraatz] shall include, but not be limited to, the responsibility to provide management training to persons selected by [Heritage] to enable said persons to become qualified dealers or managers acceptable to American Honda, Incorporated. . . .

(c) [Kraatz] shall contribute his best professional skill to perform the Services at all times for the business and benefit of [Heritage.]

In view of the clear provisions of the contract, we hold that the trial court erred in determining the contract is ambiguous.

When "the language of the contract is unambiguous, 'then the parties' intentions must be determined solely from the language of the contract.'" Taylor v. Hansen, 958 P.2d 923, 928 (Utah Ct. App. 1998) (quoting Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995)). Also, "'the ordinary and usual meaning of the words used is given effect.'" The ordinary meaning of contract terms is often best determined through standard, non-legal dictionaries." Warburton v. Virginia Beach Fed. Sav. & Loan, 899 P.2d 779, 782 (Utah Ct. App. 1995) (quoting Berman v. Berman, 749 P.2d 1271, 1273 (Utah 1988)).

Here, the contract obligated Heritage to pay Kraatz for five years. Article II of the contract provides that Heritage could

terminate Kraatz only for fraud, dishonesty, refusal "to fulfill his employment responsibilities described in Article I of this Agreement," or disability. The trial court concluded that "given the language [in Article I] requiring the performance of the service, the interpretation of refusal consistent with this paragraph is that [Kraatz]'s failure to perform the services under the Agreement is a breach of the Agreement and constitutes cause for termination." We disagree. Under its plain meaning, "refuse" means "to show or express a positive unwillingness to do or comply with." Webster's Third New Int'l Dictionary 1910 (1986). Kraatz did not refuse to do anything specified in Article I. Although the trial court found that Heritage fired Kraatz for his "refusal to work Saturdays when scheduled by B. Wilkinson," the contract expressly provided that Kraatz "shall have responsibility and authority over all aspects of the daily operations." Nothing in the contract suggests that anyone other than Kraatz would have authority to set work schedules. Thus, Kraatz's refusal to work Saturdays is not cause for his termination.

Our conclusion remains the same even if we depart from the plain meaning of "refuse" and accept the trial court's interpretation that "refuse" means "fail." "Failure" means "omission of performance of an action or task; [especially]: neglect of an assigned, expected, or appropriate action." Id. at 815. The trial court found that Heritage fired Kraatz for numerous failures. For example, the trial court determined that Heritage fired Kraatz for "failure to make a profit." However, the contract provides simply that the general manager "shall provide day-to-day management over the operations of the Dealership" and "shall have responsibility and authority over all aspects of the daily operations." The duties of a general manager, as specified in the contract, do not include making a profit.

The trial court stated that Kraatz admitted that his duties included making a profit. A close reading of the record, however, shows that Kraatz's response to the profitability question was consistent with his contractual duties as general manager.

Q: [The general manager is] responsible for the production of income from the dealership, right?


A: Overseeing those people that generate the sales within the dealership, I think it's his responsibility, yes.

Thus, the contract does not authorize Heritage to terminate Kraatz for cause for failing to make a profit.

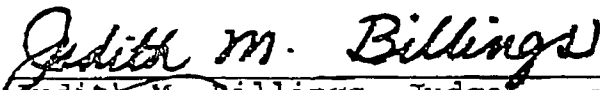
The trial court also found that Heritage fired Kraatz for his "failure to train J. Wilkinson and Jeff Gorringer." The contract expressly provides that "[t]he duties and responsibilities of [Kraatz] shall include, but not be limited to, the responsibility to provide management training to persons selected by [Heritage] to enable said persons to become qualified dealers or managers acceptable to American Honda, Incorporated." The record contains no evidence suggesting that J. Wilkinson or Jeff Gorringer were unacceptable to American Honda, Incorporated. Further, even if Kraatz had, up to that point, failed to train the named individuals according to Honda's standards, he still had thirty-three months left on his contract to complete the training. Although the record shows that J. Wilkinson may have been difficult to train, it does not reflect that Kraatz failed to train him during the contract term. Thus, failure to train is not cause for termination.

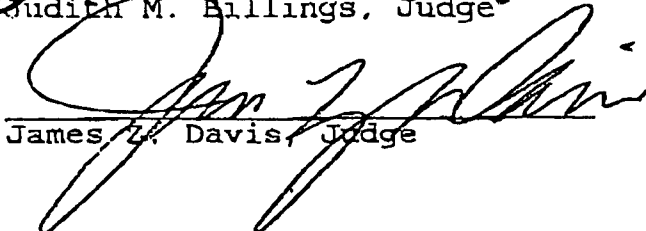
We have considered Heritage's cross-appeal and the other reasons mentioned as cause for termination, and conclude, as a matter of law, that they have no merit. See Duncan v. Howard, 918 P.2d 888, 895 (Utah Ct. App. 1996) (noting court may decline to address arguments without merit on appeal).

We hold that the trial court erred in considering extrinsic evidence because the language of the contract is unambiguous. Our review of the record reveals no evidentiary basis for terminating Kraatz for cause. We therefore reverse and remand for a determination of Kraatz's damages under the contract, including reasonable attorney fees.


Russell W. Bench, Judge

WE CONCUR:


Judith M. Billings, Judge


James Z. Davis, Judge

ADDENDUM B

ADDENDUM B

1 here. We're doing questions and answers.

2 Mr. Zundel, if you're finished with the witness,
3 you may be seated.

4 You may cross-examine.

5 MR. WINDER: Thank you.

6 CROSS-EXAMINATION

7 BY MR. WINDER:

8 Q Now, let's start with your first sheet. Expected
9 compensation per contract. You got that in front of you?

10 A I do.

11 Q Profit sharing. Are you with me?

12 A I am.

13 Q Okay. Now, when Tony was the GM, there was no
14 profit to pay him under this column, right?

15 A In 1992 we have no profit.

16 Q And you're aware that the dealership made 5,000
17 bucks in '91 and lost a bunch of money in '90, right?

18 A I don't have those numbers.

19 Q You did not go back?

20 A Didn't go back.

21 Q Okay, but as far as '92 is concerned, there's no
22 profit to pay because the dealership, Heritage Honda, didn't
23 make any money, right?

24 A Correct.

25 Q Okay. Now, what you've done here is you made an

1 assumption that what Larry H. Miller did with the dealership,
2 Tony could do with the dealership, right?

3 A Yes.

4 Q Okay. Now, Miller bought Heritage Honda, right?

5 A Sixty percent.

6 Q Okay, and the name changed. It's Larry H. Miller
7 Honda, right?

8 A I don't know the exact name.

9 Q It's not Heritage Honda anymore.

10 MR. ZUNDEL: Well, objection, Judge.

11 THE COURT: The witness doesn't know, he said.

12 MR. WINDER: Okay, thank you.

13 Q (By Mr. Winder) Now, this is a \$108,000 item that
14 your brother-in-law under your calculation ought to be enti-
15 tled to, right?

16 A Yes.

17 Q Now, what you've done on the schedule is you've
18 taken the deal Miller cut, and I'm talking about A-1.2 which
19 is your backup schedule to this, you've taken the deal that
20 Larry made and you've made adjustments to it, right?

21 A Yes.

22 Q So you want the benefit of Miller's running the
23 dealership, but you don't want the deal he made, right?

24 A We felt those adjustments were appropriate under
25 the circumstances. I'm not sure I agree with your

1 conclusion, Counsel. We took the actual numbers and adjusted
2 them for the rent which we felt was excessive and for the
3 purchase agreement so yes, we took the actual numbers, but we
4 made two adjustments.

5 Q Okay. Larry Miller didn't think the rent was
6 excessive, did he?

7 A Well, I don't know that he has commented on the
8 rent. I can't answer what he thought was excessive. He may
9 have been doing that for tax planning purposes, for estate
10 planning purposes. I'm not sure for what purpose.

11 Q When he took over he charged the dealership 48,000
12 a month in rent. He raised it, right?

13 A Yes.

14 Q Okay, and you're saying I don't agree with Larry
15 did.

16 A That's right.

17 Q Okay. My question to you, sir, was, you want the
18 benefits, the fruits of what Larry Miller produced, i.e., the
19 profit, but you don't want the deal he made, right?

20 A That's your conclusion.

21 Q All right. Now, he raised the rent again to
22 53,000. You see that on your spreadsheet A-1.2?

23 A Yes, and I've already commented on that.

24 Q No, I didn't ask if you've commented on it. I
25 asked if you saw it.

1 A And I said yes.

2 Q And you're aware that what Larry Miller did is he
3 went in and bought additional acreage next to his West Valley
4 used car location; you're aware of that?

5 A I'm aware of that.

6 Q And you're aware that through additional acreage he
7 increased the inventory on his West Valley lot; did you know
8 that?

9 A I don't know that he increased the inventory.

10 Q Okay, and do you know that because he increased the
11 inventory because he had more land, he made more money sell-
12 ing used cars; did you know that?

13 A I did not check that.

14 Q But you don't want to recognize Larry Miller's
15 determination of what the rent ought to be on your schedule,
16 right?

17 A No, and I've already indicated why.

18 Q Okay. Now, let's talk about these adjustments at
19 the bottom of A-1.2, deferred compensation, noncompete agree-
20 ment.

21 A Does Counselor mean A-1.7?

22 Q No, A-1.2. Same sheet we're on.

23 A Okay.

24 Q Your adjustments.

25 A A-1.21?

1 Q Right. Your adjustments. Larry Miller agreed to
2 pay deferred compensation and a noncompete to Bry Wilkinson,
3 right?

4 A Yes.

5 Q And you've decided that the interest he's paying
6 ought to be adjusted out, right?

7 A Yes.

8 Q Okay, and you've also adjusted out an alimony pay-
9 ment to one of Bry's wives, right?

10 A Yes.

11 Q Okay. Now, let's just look at the year 1994 for a
12 minute, and you made a couple of other adjustments and an
13 amortization adjustment and a BMW car allowance. I'd like to
14 assume for a minute that you don't make these adjustments and
15 it's up to his Honor to decide whether or not these adjust-
16 ments are acceptable, but just assume for a minute you don't
17 make these.

18 Tony's 10 percent of any profit over 280,000 in
19 1994 without these adjustments would be \$4,000. If you need
20 a calculator, I had an advantage. I ran the numbers before I
21 asked it, but if you'd like a calculator or whatever, I'd
22 like you to either agree or disagree with me.

23 A Well, then, give me a calculator.

24 Q Okay. How fancy do you want it? I just have one
25 -- oh, here, here's an accountant type calculator.

1 A Never mind, I have my own.

2 Now, are you talking about backing out the business
3 purchase adjustments, or are you talking about backing out
4 all adjustments?

5 Q I'm talking about backing out all of the
6 adjustments.

7 A Including the rent?

8 Q That you have -- no, not just your adjustments at
9 the bottom of the schedule, deferred comp, noncompete, ali-
10 mony, and then the amortization and the car allowance. I
11 think you've got some totals there.

12 A Yeah, I do. What I need is a pencil.

13 I come up, without those adjustments, I come up
14 with a \$12,559 adjustment.

15 Q And if we put the rent in, it's going to be even
16 lower. I don't want you to do that. It's not going to be a
17 very big number, is it?

18 A No.

19 Q Okay, so if you compare the deal Miller made with
20 the profits that Miller made, your brother-in-law gets a few
21 thousand dollars for '94, right?

22 A Depending upon your -- if we use your calculations,
23 that's correct.

24 Q We don't make your adjustments, sir.

25 A That is correct.

1 Q Thank you. Now, let's go back to your first
2 spreadsheet, and let's talk about the Sports Mall. The
3 agreement, your brother-in-law's agreement is attached to
4 your work papers. You have in your second Sports Mall column
5 an amount of usage, right, 137.50 per month?

6 A That's family usage.

7 Q Family usage. You're aware, are you not, that the
8 agreement, Schedule A of the agreement says the company shall
9 pay membership fees, monthly dues and monthly charges relat-
10 ing to business use for the membership, right?

11 A Yes.

12 Q Okay, and what you put in here is family usage.

13 A Yes.

14 Q All right. Now, Hidden Valley, in the summertime
15 \$457 a month is six rounds of golf, right?

16 A I have my work paper that shows the rounds of golf
17 and cart fees.

18 Q Three rounds, two people, six rounds, one person,
19 right?

20 A Well, do you want me to return to the work paper?

21 Q If you'd like, if you're having any doubt about it.

22 A Okay.

23 Q Six rounds of golf.

24 A Let me just make sure. That was three golf trips
25 taking two guests and renting a cart?

1 THE COURT: Was there a provision for tees? Did we
2 omit tees?

3 Q (By Mr. Winder) You're aware that the contract
4 Schedule A says company shall pay membership fees, monthly
5 dues and monthly charges related to business use of the
6 membership, right?

7 A Yes.

8 Q Are you aware that Mr. Kraatz never in the 27
9 months he was with Heritage ever used that country club for
10 business purposes?

11 MR. ZUNDEL: Object to the question, Judge. The
12 form of the question is argumentative.

13 MR. WINDER: It is, it is argumentative.

14 THE COURT: Well, this is cross-examination,
15 Counsel. The form of the question is acceptable to me. It's
16 cross. Overruled.

17 Q (By Mr. Winder) Are you aware of that?

18 A My understanding is that Mr. Kraatz did use the
19 club and did play golf with customers, bankers, et cetera,
20 for business purposes.

21 Q And you have that understanding how?

22 A From Mr. Kraatz. Now, he did not use -- he did not
23 obtain the membership, but he would either be with
24 Mr. Wilkinson or other bankers playing golf probably on their
25 memberships.

1 Q And that's something that Mr. Kraatz told you?

2 A Yes.

3 Q And is that reflected in your work paper schedule?

4 A Well, the information in terms of the number of
5 golf trips and guests and everything came from conversations
6 with Mr. Kraatz, yes.

7 Q And is it reflected in your work papers?

8 A That conversation?

9 Q Yes.

10 A No.

11 Q Now, St. George house reimbursement. You're aware,
12 are you not, that in the 27 months that Mr. Kraatz worked at
13 Heritage, the home in St. George was not sold?

14 A Let me respond to your previous question. In my
15 work papers it says per discussion with Tony Kraatz, addi-
16 tional usage fee incurred monthly for green fees were the
17 average and we go from there, so we have indicated that it
18 was per discussion with Mr. Kraatz.

19 Q But my question, what we were talking about is his
20 usage. What your work papers say is additional usage in the
21 summer. My question to you is, did you have a discussion
22 with Mr. Kraatz in which he told you what his business usage
23 was at Hidden Valley Country Club?

24 A I did not personally, but I'm assuming my staff
25 did. I have not indicated that on that work paper.

1 Q Thank you. Now, St. George, \$2,210.53, not a big
2 number considering all these numbers, but house reimburse-
3 ment, you've calculated. You're aware, are you not, that the
4 contract that deals with St. George in Schedule C says -- and
5 I'm at paragraph 6 -- commencing on the date on which the new
6 residence being constructed for employee is available for
7 occupancy and continuing thereafter for a period of not to
8 exceed six months, duplicate housing expenses incurred by
9 employee prior to the sale of employee's residence in
10 St. George, Utah. You're aware of that language?

11 A Yes.

12 Q And for 27 months Mr. Kraatz received this while at
13 Heritage and you've calculated it to continue for another
14 almost four months after his employment, right?

15 A Yes.

16 Q Okay. Now, there's nothing in his agreement, this
17 employment agreement that says he gets over 30 months of
18 payment on his house in St. George, right?

19 A Correct.

20 Q Now, it does say in his employment agreement, going
21 over to your column health costs, that he's to get certain
22 health costs, right? That is in there up to five grand
23 unreimbursed medical per year.

24 A Yes.

25 Q Are you aware that Mr. Kraatz had discussions with

1 Mr. Wilkinson in which Mr. Wilkinson said, "We can't afford
2 to pay the medical reimbursement part"? Are you aware of
3 that?

4 A My understanding of that conversation is a little
5 bit different. My understanding was that although the
6 dealership would not pay it at that time, that they would
7 make it up down the road.

8 Q Who told you that?

9 A Mr. Kraatz.

10 Q When?

11 A I can't recall.

12 Q Is that reflected anywhere in your work papers?

13 A I don't believe so.

14 Q Okay, so Mr. Kraatz gets the benefit on St. George
15 of something that isn't in the contract for 30 months, but he
16 doesn't want to suffer the detriment of something that isn't
17 in the contract, i.e., we're not going to pay medical reim-
18 bursement, right?

19 A Doesn't want is a subjective, Counselor, but I've
20 already told you my understanding of that conversation.

21 Q All right. Christmas bonus, maybe the smallest
22 number of all, 500 bucks. What's the basis for the Christmas
23 bonus in here?

24 A Past history.

25 Q Excuse me?

1 A Past history.

2 Q And does that relate to your knowledge to the
3 employee handbook?

4 A Relates to conversations with Mr. Kraatz.

5 Q And did those conversations say that the basis for
6 this is the employee handbook, this claim?

7 A I don't recall him in the conversation referring to
8 the employee handbook.

9 Q Okay. Now, from Jazz tickets to retirement contri-
10 butions to -- well, starting with Christmas bonus, none of
11 those items past there on your spreadsheet are referred to in
12 the employment agreement, right?

13 A Correct.

14 Q Okay, now, you prepared a Schedule E-2 on Universal
15 Warranty income that takes actual sales of warranties made by
16 Larry H. Miller, right?

17 A Well, I've indicated on the work paper exactly
18 which actual sales I've taken.

19 Q Okay. If you want to look, and I don't want to put
20 words in your mouth --

21 A Okay. We've taken May of '92 through November of
22 '92, yes.

23 Q Now, there's nothing in the employment contract
24 that says that Mr. Wilkinson can't sell his dealership,
25 right?

1 A I didn't see anything in there that referred to
2 that.

3 Q And there's nothing in his contract that says that
4 anybody who purchases the dealership has to continue any
5 benefits that are not contained in that agreement, right?

6 MR. ZUNDEL: Your Honor, I object at this point.
7 The question assumes facts not in evidence and facts that are
8 contrary to undisputed facts. The dealership wasn't sold.
9 The stock was sold. The dealership is the same corporation
10 as it was when Mr. Kraatz was employed. It's got a different
11 name, that's all, but the legal entity's the same and this is
12 something that assumes that the dealership itself has been
13 sold. It's got a new --

14 THE COURT: Well, whatever the question assumes,
15 I'm not sure that it's helpful to me to know what this wit-
16 ness's observations are about the effect of a sale.

17 MR. WINDER: I'll move on.

18 THE COURT: All right.

19 Q (By Mr. Winder) Let's turn, Mr. Wisan, to your
20 alternative study. Do you have that in front of you?

21 A Work paper K.

22 Q J. J. W. income analysis.

23 A Yes.

24 Q Work paper K.

25 A Yes, I have that in front of me.

1 Q All right. Now, under the column "Percentage of
2 Gross Profit," when you get to the bottom there's a grand
3 total of a hundred and sixty-two thousand bucks; you see
4 that, right?

5 A Okay.

6 Q All right. What percentage of the gross profit was
7 J. J. entitled to?

8 A This information was taken right off of the actual
9 pay records, so I'm assuming that this is the amount that he
10 was entitled to.

11 Q And my question to you, sir, was what percentage is
12 that? You're drawing.

13 A It's a -- it's a little bit of a computation. It
14 was -- it's approximately 10 percent, but it was after the
15 dealership profit and then there was an adjustment and I
16 believe it was Mrs. Green -- or I'm not sure of her name,
17 salary was taken out of that and then the calculation turned
18 out to be in essence a 10 percent calculation.

19 Q Okay, so what we've done here is on the one hand we
20 have Tony Kraatz and he has an employment agreement that says
21 I get 10 percent after 280,000, right?

22 A Correct.

23 Q Okay, and on the other hand, we have an agreement
24 for Jeff Wilkinson that he gets a flat 10 percent subject to
25 Helen Green adjustments, right?

1 A Yes.

2 Q And you're comparing those two?

3 A It is what it is.

4 Q Okay, and it's also under Larry Miller's operation,
5 right?

6 A Yes.

7 Q Okay. Now, you have in here car bonus. Can you
8 tell me, to get a car bonus at Larry H. Miller Honda, do you
9 have to be a stockholder?

10 A I don't know. I did not inquire of Larry H.
11 Miller's employees.

12 Q Can you tell me, to get a warranty bonus whether
13 you have to be a stockholder?

14 A I don't know.

15 Q Can you tell me, to get the LHM leasing amounts
16 whether you have to be a stockholder.

17 A Don't know.

18 Q Can you tell me, whether to get the other amounts
19 you have to be a stockholder?

20 A Don't know.

21 Q J. J. is and was a stockholder; you know that?

22 A Yes.

23 Q Tony was not?

24 A Yes.

25 MR. WINDER: I have no other questions.

1 THE COURT: All right. Is there any redirect,
2 Mr. Zundel?

3 MR. ZUNDEL: A little.

4 THE COURT: Pardon me?

5 MR. ZUNDEL: A little.

6 THE COURT: Okay.

7 REDIRECT EXAMINATION

8 BY MR. ZUNDEL:

9 Q Mr. Winder asked you, he said you're assuming that
10 Tony Kraatz would run the dealership as well as Larry Miller.
11 Doesn't this calculation really assume that Tony Kraatz can
12 run the dealership as well as J. J. Wilkinson?

13 MR. WINDER: Objection, leading.

14 THE COURT: Sustained. He's your witness,
15 remember?

16 MR. ZUNDEL: Yeah.

17 Q (By Mr. Zundel) Who's the general manager of
18 Heritage?

19 A My understanding is it's Jeff Wilkinson.

20 Q And Larry Miller isn't the general manager, is he?

21 A No.

22 Q These assumptions in this that you made, did you
23 assume that the corporate entity has not changed?

24 A Yes.

25 Q Except in name only.

1 Q That is not a proper entry for the \$200,000 the way
2 it is, is it?

3 A It would probably be better reflected as receivable
4 as opposed to an advance.

5 Q Because a bank or anybody looking at a financial
6 statement might want to know whether it's a loan to a princi-
7 pal or a loan to a third-party or a disinterested party;
8 isn't that right?

9 A Yes.

10 MR. ZUNDEL: I have no further questions for this
11 witness, your Honor.

12 THE COURT: Very well. You may cross-examine,
13 Mr. Winder.

14 MR. WINDER: Thank you.

15 CROSS-EXAMINATION

16 BY MR. WINDER:

17 Q Mr. Christian, let's start where the examination
18 finished off. We're talking about the financial statement
19 line item 297. Do you know if this 200,000 was repaid?

20 A Yes, it was repaid.

21 Q By whom?

22 A It was repaid by Bry Wilkinson.

23 Q Does putting the 200,000 on line item 297 in any
24 way distort the bottom line picture?

25 A No, because it's included in the same subcaption,

1 total other assets. It would be if it were included above.

2 Q You were asked, Mr. Christian, about a -- you
3 talked about an IRS audit. Tell me for when the dealership
4 was audited, what years.

5 A Dealership was audited for 1989 and 1990.

6 Q And out of that dealership or out of those two
7 audits, what adjustments, if any, did the IRS ask to be made?

8 A As I recall, they were three items which we
9 addressed as a resulted of that audit. The audit was quite
10 extensive. At that time an automobile specialty group was
11 created and Gordon Stewart was the head of that, so we spent
12 a lot of time, but as I recall, the only three items that
13 were ultimately adjusted were a \$33,333 payment which was
14 paid to FSLIC, I believe, in 1990. The issue on that amount
15 centered on whether or not it was legitimately deductible by
16 the dealership. The other two amounts, as I recall, were a
17 small amount of legal fees. I don't remember what the number
18 was, and my recollection is it was in the \$2,000 range, and
19 then an adjustment for personal entertainment types of items,
20 personal expense type items that hadn't been properly treated
21 on Mr. Wilkinson's return, and I believe that amount was
22 about \$3500.

23 Q Now, as to the FSLIC, before the IRS audit, had you
24 expressed any opinion as financial counsel for the company as
25 to whether or not that payment could be deducted by the

1 company?

2 A Yes, I had.

3 Q And what was your opinion?

4 A My feeling was it was legitimately deductible by
5 the company.

6 Q And in the IRS audit, with did the IRS say?

7 A The IRS took the position -- I should back up and
8 say we took the position that Mr. Wilkinson was representing
9 the dealership and in fact sold cars as a result of his
10 involvement on the board of directors of FSLIC -- or on the
11 board of directors of State Savings. The IRS argued be that
12 as it may, he was still acting personally, that he'd received
13 a couple hundred dollars from director's fees which he
14 received personally and that the payment of that expense was
15 personal as opposed to a dealership expense.

16 Q And did you contest the IRS position?

17 A Well, we discussed it with them. Frankly, we ended
18 up conceding it because it was a situation where from a tax
19 standpoint, we received a better benefit by conceding it.

20 Q Why is that?

21 A Well, when it was deducted by the dealership,
22 Mr. Wilkinson was the only one of the stockholders in a
23 fairly high tax bracket. When it was deducted by the dealer-
24 ship, he only received sixty some -- I think it was 68 per-
25 cent of that deduction. By conceding the deduction, they

1 turned around and adjusted Mr. Wilkinson's return and gave
2 him a hundred percent of the deduction personally as opposed
3 to 68 percent that came to the dealership, so from an IRS
4 negotiating point of view, it was not an amount we really
5 lost on. It was of no consequence.

6 MR. WINDER: Thank you. Nothing further.

7 MR. ZUNDEL: Thank you.

8 REDIRECT EXAMINATION

9 BY MR. ZUNDEL:

10 Q Just quickly, Mr. Christian, better to have the
11 money than the deduction, right?

12 A Well, certainly.

13 Q Okay. You said it was of no consequence. You were
14 talking about tax wise, but the \$33,000 payment made to the
15 FSLIC on Mr. Wilkinson's behalf affected the dealership
16 dollar for dollar \$33,000.

17 A That's correct.

18 Q All right. Now, how about the -- you talked about
19 the IRS being an extensive audit, having done an extensive
20 audit. They missed Banner Life in 1990, didn't they?

21 THE COURT: Well, he said extensive. He didn't say
22 necessarily accurate.

23 MR. ZUNDEL: That's my point.

24 THE COURT: All right.

25 Q (By Mr. Zundel) You listed three things. They

1 (Whereupon, Daniel J. Hartmann, was placed under
2 oath and testified, which testimony has been previously tran-
3 scribed and is contained within a separate transcript
4 volume.)

5 THE COURT: You can call your next witness.

6 MR. WINDER: Yes. Jeff Jensen. I need to go get
7 him, Judge.

8 JEFFREY BOB JENSEN,
9 called as a witness by and on behalf of the Defendants,
10 having been first duly sworn, was examined and testified as
11 follows:

12 THE WITNESS: My name is Jeffrey Bob Jensen,
13 J-e-f-f-r-e-y B-o-b J-e-n-s-e-n.

14 DIRECT EXAMINATION

15 BY MR. WINDER:

16 Q Mr. Jensen, where are you employed?

17 A At Jensen, Barrett & Keddington.

18 Q What's your profession?

19 A As a certified public accountant.

20 Q Do you practice that profession for the Larry H.
21 Miller Group?

22 A Yes, I do.

23 Q At my request have you prepared a summary off of
24 the 13th month statements for Heritage Honda for the years
25 1985 through 1995?

1 A Yes, I have.

2 Q And what's the 13th month statement?

3 A Thirteenth month statement is the dealer's finan-
4 cial statement that is prepared after the normal December
5 31st statement that has year-end adjustments. It's used to
6 prepare tax returns and financial statements.

7 THE COURT: We already have, Mr. Winder, this docu-
8 ment received as Exhibit 208.

9 MR. WINDER: Well, we had a problem yesterday at
10 the close of business that's necessitated the calling of this
11 witness. It will only take a minute to correct math on three
12 items and that's all I'm going to ask him to do.

13 THE COURT: This gentleman was not in that regard,
14 then, identified yesterday as one of the proposed witnesses,
15 but this is for a technical correction?

16 MR. WINDER: It is.

17 THE COURT: All right, then, go ahead.

18 Q (By Mr. Winder) Show you what's been marked as
19 Exhibit 593, Mr. Jensen, and that is the compilation, the
20 summary that you've prepared?

21 A Yes, it is.

22 Q Are there any errors that you discovered on this
23 summary?

24 A Yes, there are.

25 Q The errors are in which column and row?

1 A If you go to row -- or the column that says 1993 --

2 Q Right.

3 A The total expenses per car down towards the bottom,
4 second to the last line, should be calculated at \$1744.

5 Q For what year?

6 A For 1993. For 1994 it should be \$1633, and 1995 it
7 should be \$1840.

8 MR. WINDER: I have no further questions.

9 THE COURT: Very well. Mr. Zundel?

10 MR. ZUNDEL: Thank you.

11 CROSS-EXAMINATION

12 BY MR. ZUNDEL:

13 Q Mr. Jensen, there's also an error in the upper
14 figures regarding gross profit per unit, isn't there?

15 A Gross profit per unit?

16 Q Yes.

17 A I don't believe so.

18 Q Well, let me show you the 1993, for example. 1993
19 December 13th statement, should we look at that? Which I
20 believe is attached -- well, it's Exhibit 298.

21 Are you quickly making a calculation?

22 A I am making a calculation.

23 Q You realize what the error was is that you, in
24 determining the number of units, the denominator, you
25 asserted that you were using all of the units, meaning retail

1 used cars and wholesale used cars, that's the assertion, but
2 in fact, you goofed and only used the retail cars, right?

3 A As I look at it now, yes, you are correct.

4 Q All right. Are you prepared to make the changes
5 on --

6 A I can make the changes if you would like.

7 Q This Exhibit 593 has no value whatsoever as a
8 comparison with that error in it, does it?

9 A For the used car sales I would -- as it stands, I
10 would agree.

11 Q All right, and the error on the total expenses per
12 car, once you look at it, there's no particular conclusion to
13 be drawn from that, kind of the same from year to year, even
14 before or after Larry Miller took over.

15 MR. WINDER: Objection, your Honor, beyond the
16 scope. I didn't ask him to draw any conclusions from the
17 numbers.

18 THE COURT: Well, I will allow the witness to
19 answer that question just in keeping with establishing the
20 reasons why he's been called here.

21 You may respond if you're able, Mr. Jensen.

22 THE WITNESS: The total expenses per car would be
23 correct based on the correction that I have made per car.

24 MR. ZUNDEL: Okay. I have no further questions,
25 Judge.

1 THE COURT: Very well. Is there anything further,
2 Mr. Winder?

3 REDIRECT EXAMINATION

4 BY MR. WINDER:

5 Q Mr. Jensen, how long would it take to make the
6 adjustment on the used cars?

7 A Less than five minutes.

8 MR. ZUNDEL: Your Honor, we -- I'm happy to give it
9 to you sometime. We don't have to take the time --

10 MR. WINDER: You've got it? Give us the numbers.

11 MR. ZUNDEL: I'll put these back.

12 THE COURT: Well, then, if there's nothing further
13 of this witness, we'll release him at this time, gentlemen.

14 MR. WINDER: Sure.

15 THE COURT: Mr. Jensen, you're free to go, sir.
16 Thank you.

17 Call your next witness.

18 MR. WINDER: Okay.

19 MS. FALK: I call J. J. Wilkinson, Jeffrey
20 Wilkinson.

21 JEFFREY JOSEPH WILKINSON,
22 having been previously sworn, resumed the stand and testified
23 further as follows:

24 THE COURT: You're still under oath, Mr. Wilkinson.

25 THE WITNESS: Yes.