

2001

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

Utah Court of Appeals

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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.

**REPLY BRIEF OF
APPELLEE/CROSS-APPELLANT**

Case No. 20010598-CA

Priority No. 15

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

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INTRODUCTION

On page 2 of his Second Brief, William Anthony Kraatz (“Kraatz”) sets forth a number of incredible claims, which are then repeated throughout his argument. Kraatz claims “the trial court held an evidentiary hearing on Kraatz’s motion on March 26, 2001.” Nothing could be further from the truth. The trial court’s Minute Entry Ruling (R. 4773) stated a “hearing” was scheduled for March 26, 2001 at 9:00 a.m., not a trial or even an evidentiary hearing. Counsel for Heritage Imports (“Heritage”), consistent with their practice, inquired of the court clerk about the nature of that hearing, and, accordingly, were not surprised when Judge Frederick announced:

THE COURT: Very well. Let me indicate for the record, counsel, I have reviewed the respective submissions in these matters, both in support of and in opposition to the motion, and I will therefore necessarily limit the presentation per side to 20 minutes.

(R. 5059, p. 2).

The hearing concerned not only attorney fees, but all of Kraatz’s damage claims. Kraatz’s counsel did not even argue attorney fees in his opening argument. (*See generally, id.* at pp. 5-15). Instead, counsel focused on the “big issues” of damages. (*Id.* at pp. 6, 11, 12 & 14). In fact, the only mention by counsel for Kraatz of attorney fees was to incorrectly assure the trial court his claim for current fees only represented efforts as to the single cause of action upon which Kraatz prevailed. (R. 5059, pp. 21-22).

Kraatz further incredibly claims Heritage “did not contest the reasonableness of Kraatz’s attorney fees incurred on appeal” (Second Brief, p.2) “did not contest the adequacy of the findings and conclusions” (*Id.*, p. 4 & p. 12, fn. 2), “never offered any specific objection to Kraatz’s post-remand fees” (*Id.* at p. 13), and “never objected in the district court to the amount of the fee reductions.” (*Id.* at pp. 19-20). Heritage filed a Memorandum in Opposition with numerous pages detailing objections to Kraatz’s requested fees. (R. 4635-4641). Heritage’s proposed Amended Findings of Fact and Conclusions of Law, which again objected to the claimed fees (R. 4859, 4874-76), stated: “After considering all relevant factors, Plaintiff is entitled to an attorney fee award of \$41,372.85,” representing one-third of the principal recovered. (R. 4876). Given the abbreviated nature of the proceedings in the court below, it is neither fair or reasonable for Kraatz to make these claims. Additional analysis of these claims is set forth immediately below in Point I.

ARGUMENT

POINT I

HERITAGE CHALLENGED THE ATTORNEY FEES REQUEST BELOW

Throughout his Second Brief, Kraatz argues the “essential” nature of his attorney fees request is un rebuttably set forth in counsel’s affidavits. Counsel’s affidavits, however, are only valid insofar as they lay foundation regarding the amount

of attorney fees (hourly rates, hours, task description), not as to the legal conclusions that the amount of attorney fees were reasonable, necessary or justified—as that determination is for judicial review. A court is not bound by counsel’s self-serving affidavits, even when no motion to strike or counter-affidavits are filed. *See Beckstrom v. Beckstrom*, 578 P.2d 520, 524 (Utah 1978) (“Even though [the reasonableness of the attorney fee] evidence is undisputed, the trial judge was not necessarily compelled to accept such self-interested testimony whole cloth and make such an award.”); *N.A.R., Inc. v. Marcek*, 2000 UT App 300, ¶11, 13 P.3d 612 (holding “[t]he trial court is not bound by the fees requested in the claimant’s affidavit. . . .” “Simply put, the trial court’s award need not incorporate the fees requested by the claimant.”).¹

Although Heritage did not and does not object to the hourly rates charged by Kraatz’s attorneys, Heritage’s Memorandum in opposition filed with the trial court addressed the unreasonableness and excessiveness of the claimed attorney fees request at length.² Counter affidavits are not the only way to challenge attorney fees. The party requesting attorney fees has the burden of proving its request is reasonable. “One who seeks an award of attorney fees, therefore, has the burden of producing evidence to

¹ As the *N.A.R.* Court also observed: “The trial court’s award of reasonable attorney fees must, however, ‘be supported by evidence in the record’.” 2000 UT App at ¶ 10, *N.A.R.*, 13 P.3d at 614.

² At the hearing before the trial court, counsel for Heritage also addressed the excessive nature of post-remand attorney fees. (R. 5059, p. 19). A vivid example of this excessive nature is Kraatz’s 6.10 hours and \$1,076.50 for researching alternative CPI adjustments to damages, where it was not provided for under the contract and not presented at trial or even in his first appeal.

buttress the requested award.” *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992). The opposing party then can challenge the fee request by *affidavit or brief*. *Walton v. Massanari*, 177 F. Supp.2d 359, 361 (E.D. Pa. 2001) (“The objecting party has the burden to challenge, through affidavit or brief . . .”). Heritage challenged Kraatz’s fee request in its Memorandum and proposed Amended Findings and Conclusions opposing damages on remand.

Heritage’s Memorandum addressed the excesses and unreasonableness of Kraatz’s fee because it: (1) did not allocated between successful and unsuccessful claims against Heritage, (2) must be reduced for failed claims against O. Bryan Wilkinson (“B. Wilkinson”) and Jeff J. Wilkinson (“J. Wilkinson”), (3) was not reduced for time spent pursuing extracontractual claims, (4) requested excessive fees, (5) should be sharply reduced for failure to accept reasonable settlement offers in excess of what the trial court eventually awarded, and (6) because it did not meet all the factors required under Utah law, including consideration for the results obtained. (R. 4635-4641). In fact, in direct response to the issues raised in Heritage’s Opposing Memorandum, Kraatz conceded certain fee reductions. (R. 4756, 4970-71). Obviously, Heritage raised relevant and specific issues that persuaded Kraatz to recognize some excessive and unreasonable time entries in his fee request. Given the objections and analysis contained in Heritage’s Memorandum and Amended Findings and Conclusions, Kraatz’s argument that no objection to attorney fees was made by

Heritage falls flat.

Contrary to Kraatz's assertions, counsel for Heritage did not stipulate to the reasonableness of the attorney fee requests, nor did Kraatz's counsel offer to take the stand concerning their fee affidavits. Rather, Heritage's counsel only stipulated to foundation of certain supplemental exhibits, some of which were sprung on Heritage at the hearing itself. There was no stipulation as to Affidavits filed by Kraatz's counsel. (R. 4811). What actually occurred at that hearing regarding the stipulation was as follows:

THE COURT: What are the exhibits designated?

* * *

MR.LINEBAUGH: Attorney's fees supplemented through today and beyond. That's just a quick schedule that I can put in and testify about. We'd like to put in the original attorney's fee agreement that was entered into between the client and Jardine, Linebaugh & Dunn. Then there was a supplemental agreement that was entered into after Jardine, Linebaugh & Dunn dissolved, and both firms ended up being the representative of the plaintiff. We would want to put that in.

We also wanted to put in the briefs that went up on appeal to show you the quality of the work we've done on the appeal, because that's an issue in this matter. Then we finally, because of these adjustments and fezes [sic] and so on, to help you, we've prepared another summary of the total amount of principal we're asking for, including all of these attorney fee supplements. We thought that would be helpful to you.

Also, one other thing which was the - not only the briefs that went up on appeal but our resistance to the writ of cert on appeal. We just wanted to put all of those in so the record is complete, and you can review them at your leisure, and by way of foundation I can put myself on with respect to my time since March 4th. Mr. Zundel can give you a foundation to all of the rest

of these, but—

THE COURT: I assume, Mr. Winder, you would concede to the proffer being made, that if Mr. Linebaugh were to take the stand—

MR. WINDER: Of course.

THE COURT: He would testify that the services rendered were reasonable, and in his opinion, required under the circumstances. All right. Then the documents—and you can have them marked later (inaudible) may be received, counsel. (R. 5059, p. 3-4).

Thus, counsel for Heritage only stipulated to foundation for the certain supplemental exhibits that were sprung at the hearing. (R. 4811). Kraatz's assertion Heritage is bound to pay all of his requested attorney fees because Heritage did not file a counteraffidavit or call witnesses attacking Kraatz's fee affidavits in the brief hearing set forth above is simply wrong.

POINT II

KRAATZ'S CAUSES OF ACTION DO NOT OVERLAP

Kraatz cites *Brown v. Richards*, 1999 UT App 109, 978 P.2d 470, *cert denied*, 994 P.2d 1271, for the proposition that Heritage is responsible for his attorney fees spent on unsuccessful causes of action because the elements of proof overlap or are inextricably tied together. In *Brown*, the overlapping claims were breach of warranty, negligent and fraudulent misrepresentation, and the defense of failure to substantially perform. *Id.* at 475. The *Brown* court, however, concluded that rescission was not closely related to the other claims and disallowed attorney fees for rescission.

In the instant case, Kraatz brought claims against Heritage, B. Wilkinson, and J. Wilkinson for breach of contract,³ breach of duty of good faith & fair dealing,⁴ alter ego,⁵ inducement of breach,⁶ and interference with prospective business relationships.⁷ The breach of contract and breach of the duty of good faith and fair dealing have similar elements that overlap. However, those elements are not inextricably tied together with the tort causes of action for alter ego, inducement of breach and interference with prospective business relationships.

Alter ego does not address whether a party has failed to fulfill an obligation. It

³ Breach of Contract. The plaintiff must prove the defendant breached an obligation under the contract by failing to [describe performance required of the defendant]. MUJI 26.22.

⁴ Duty of Good Faith. Whether expressed or not, every contract imposes upon each party a duty of good faith and fair dealing with respect to dealings between the parties. The parties to a contract must deal fairly and honestly with each other. MUJI 26.30.

⁵ Alter Ego. [I]n order to disregard a corporate entity, there must be a concurrence of two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow. *Salt Lake City Corp. v. James Constrs.*, 761 P.2d 42, 46-47 (Utah Ct. App. 1988).

⁶ Inducement of Breach. No cases adopting a cause of action for inducement of breach could be found in Utah. Tennessee recognizes this cause of action and requires: "The plaintiff must prove that there was a legal contract, that the wrongdoer had sufficient knowledge of the contract, and she intended to induce its breach. Further, that the wrongdoer acted maliciously, and the contract was, in fact, breached, and the alleged act was the proximate cause of the breach, and damages resulted from that breach." *TSC Industries, Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987).

⁷ Interference with Prospective Business Relationships. To find interference the plaintiff must prove the defendant intentionally interfered with the plaintiff's existing or potential economic relations, for an improper purpose or by improper means, thereby causing economic injury to the plaintiff. MUJI 19.1.

concerns whether there is a “unity or ownership” such that the corporate veil should be pierced to avoid sanctioning a fraud, injustice or inequity, requiring a different constellation of facts to establish. Additionally, if it even exists in Utah, inducement of breach requires proof of malicious intent and action, which goes far beyond what is required for breach of contract. Besides, inducement of breach and interference with prospective business relationships are not even applicable in this case. *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 301 (Utah 1982) (“It is settled that one party to a contract cannot be liable for the tort of interference with contract for inducing a breach by himself or the other contracting party.”). Thus, either the tort causes of action pursued by Kraatz do not “overlap” or are not “inextricably tied” with the breach of contract causes of action, or they do not apply to this case. All fees in pursuit of the tort theories and against the individual defendants should be disallowed.

Foote v. Clark, 962 P.2d 52, 55-56 (Utah 1998)⁸ involved a suit for breach of contract and other noncontract, tortious interference claims. The contract at issue in *Foote* included a provision for attorney fees, and the plaintiff submitted an affidavit of fees for the breach of contract claim, as well as the other tort claims. The trial court awarded all requested fees. On review, the Utah Supreme Court noted the attorney fee affidavit did not properly categorize between the successful breach of contract claim and unsuccessful tort claims. Because the contract only provided for attorney fees for

⁸ *Foote* was cited in Heritage’s Opening Brief. Kraatz chose not to mention it in his Second Brief.

enforcing the contract, the Court disallowed the attorney fees for time spent pursuing the “tortious interference” claims. *Foote* held:

The language of the contract does not permit assessing fees against the [defendant] that relate to the non-contract claims against either [defendant]. These tort-based actions were not brought to ‘remedy’ a default in the purchase agreement by the ‘defaulting party,’ as required by the contract, but to recover the alleged improper profit of [defendants]. It would violate the contract to require the defaulting party to pay attorney fees accrued in pursuing these claims when the work done did not tangibly relate to the breach of contract claim as well.

* * *

‘When a plaintiff has a substantial claim against one defendant, he should not have a free ride to assert claims against other defendants with the expectation that the target defendant will end up paying all attorney’s fees,’ *even when those claims factually relate to claims for which the plaintiff may be entitled to attorney fees.*

Id. at 55-56 (citation omitted) (emphasis added). Thus, even if there is some overlap or factual relationship among causes of action, attorney fees should not be awarded where it creates an incentive for attorneys to pursue tenuous or meritless claims in order to recover larger amounts of attorney fees.

POINT III

HERITAGE DID NOT CAUSE KRAATZ TO INCUR EXCESSIVE FEES

On pages 7 and 8 of his Second Brief, Kraatz attempts to justify his enormous attorney fees by citing Heritage’s discovery failure, unmerited accusations, aggressive

defense, (arguing “refusal” is equivalent to “failure” in interpreting the contract), and unfriendly witnesses.⁹ Kraatz then proceeds on pages 9 and 10 to attempt to justify the numerous depositions taken and the thousands of documents and financial records examined. However, all of these excuses are without merit.

Kraatz’s citation to an order compelling discovery is misplaced. The motion involved Heritage’s previous counsel and no award of attorney fees was ever ordered by the trial court. (R. 224). Even if it were, Kraatz devoted 34.50 hours (\$3,253.50) to the matter. (R. 238). Hardly a justification for his enormous fees.

Kraatz’s time for his nine-page motion to compel was as large as it was, 34.5 hours, because a majority of the data Kraatz requested concerned extracontractual damages, tort claims, or claims unrelated to the breach of contract claim: Jazz tickets (R. 66), alter ego (R. 66-70), bad faith (R. 67, 69, 70), personal and corporate financial records (R. 67 & 69) for bookkeeping adjustments that were rejected by the trial court (R. 4997), and employment manual benefits that were also not included in Kraatz’s contract (R. 237). Kraatz should recover none of these fees because he failed to prevail on any of those claims.

⁹ Kraatz’s claims in his Second Brief are taken almost verbatim from paragraph 25 of counsel’s Affidavit (R. 5110), clearly demonstrating the argumentative and conclusory nature of that Affidavit. It adds nothing for Kraatz to then cite to this Affidavit as “record” authority for his claims. Similarly, paragraphs 27 and 38 of counsel’s Affidavit (R. 5111, 5115) do nothing to advance the claims on pages 9 and 10 discussed in the text above.

Further, Kraatz's counsel was billing \$85 per hour for Mr. Devashrayee's time for the motion to compel, but bumped up his hourly rate to \$90 per hour in the request on remand.¹⁰ A rate hike should not be allowed after the fact.

Heritage's "aggressiveness" simply involved defending against the unfounded and overreaching claims made against B. Wilkinson, J. Wilkinson, and Heritage. Even though Kraatz ultimately prevailed on the breach of contract action, he failed in proving breach of duty of good faith and fair dealing against Heritage, alter ego, inducement of breach and interference with prospective business relations against B. Wilkinson, and inducement of breach and interference with prospective business relations against J. Wilkinson. Heritage merely defended what began as a \$3.5 million dollar claim to what was finally determined to be worth \$124,118.56 in principal.

Heritage did take the position "refusal" was tantamount to "failure" in interpreting the contract. Out of the total of \$225,210.36 in trial fees, \$130,557.75 (58%) was exclusively devoted to "Nullification of Heritage's 'For Cause' Defenses." (Kraatz's Second Brief, p. 5). Kraatz acknowledged he made no fee reductions here. (*Id.* at p. 20). However, this Court characterized the contract as having "clear provisions." (Memorandum Decision, p. 2). If the provisions were that "clear," couldn't this issue have been handled in the trial court by motion? Clearly, it should

¹⁰ The time entry on 04/29/93 for JJD contained in the motion to compel indicates a dollar amount of \$620.50 (R. 237). However, the same entry in the fee request to the trial court has a dollar amount of \$657.00 (R. 4359).

have been handled for a fraction of \$130,557.75 in attorney fees.

No citation to the record or any example was given Kraatz in support of his claimed “unmerited accusations.” Nor was any reasoning set forth as to Kraatz’s claim of difficult witnesses resulted in extensive legal services. Accordingly, Heritage is unable to meaningfully respond to these claims.

Kraatz argues his attorney fees were so high because he needed to sort through thousands of documents (including those regarding extracontractual claims such as warranty income, Jazz tickets, tennis lessons, Christmas bonuses) over a period of several years to defend against claims of misfeasance and establish the true value of the dealership after making adjustment for B. Wilkinson’s personal use of corporate funds. The trial court’s findings rejected bookkeeping “adjustments” urged by Kraatz. (R. 4995-97). Heritage’s bookkeeping had always been accepted by Honda, USA (*Id.*), and this standard was expressly provided for in the parties’ contract. (Ex. 38, p. 7). (R. 4996-97). Kraatz’s time and effort in “adjusting” the accounting to his benefit, cannot, therefore, support an award of fees, especially since he failed to raise this issue in his initial appeal. His claims of misfeasance must also fail for the reasons discussed concerning the alleged “aggressive” defense.

Because Heritage designated 30 potential witnesses, is it reasonable for Kraatz to have deposed 17 of them and only call 5 at trial (*see* p. 29 of Heritage’s Opening Brief) in a case where this Court, in its initial opinion, found the contract provisions

“clear”? (Memorandum Decision, p. 2). This Court in *Brown v. Richards, supra*, 1999 UT App at ¶ 30, 978 P.2d at 476, (quoting *Goos v. National Ass’n of Realtors*, 997 F.2d 1565 (D.C. Cir. 1993)) held:

We have made it clear that ‘there is a point at which thorough and diligent litigation efforts become overkill.’ At such point, ‘the district court must disallow claims for excessive, redundant, or otherwise unnecessary charges.’

Counsel for Kraatz overworked the case to pursue claims that did not apply beyond the breach of contract claim. Kraatz should not be rewarded by receiving attorney fees for excessive, unsupported and unfounded claims.

POINT IV

KRAATZ’S ATTORNEY FEES WERE EXCESSIVE AND UNREASONABLE IN LIGHT OF:

1. The Results Obtained. In response to Heritage’s argument that attorney fees should rarely exceed the principal recovered, Kraatz claims there is no supporting Utah caselaw. Numerous Utah cases hold that in awarding attorney fees, consideration should be given to the “result obtained.” See *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988), and *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1985)¹¹ (both of which were both cited to the trial court). Considering Kraatz prevailed on only one

¹¹ While *Cabrera, supra*, 694 P.2d at 625, held: “The amount of damages awarded in a case does not place a *necessary* limit on amount of attorneys fees that can be awarded,” the “results attained” is clearly a factor for consideration.

of his seven causes of action and obtained a principal judgment of \$124,118.56 after seeking \$3.5 million, Kraatz should not recover all of the fees he requested. Kraatz should recover no more than one-third of the principal recovery or \$41,372.85, since he had agreed to a one-third contingency fee. (Plaintiff's Supplemental Ex. 2, R. 4811).

Kraatz attempts to distinguish *Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14 (2nd Cir. 1992), *cert. denied*, 508 U.S. 951 (1993), claiming it is the amount in controversy that may limit recovery of attorney fees. However, Kraatz failed to recognize *Diamond D* holding that it is "the amount *reasonably* in controversy" which can serve as a ceiling to attorney fees. *Id.* at 19-20. (emphasis supplied). The amount reasonably in controversy in the case at bar was not \$3.5 million, but rather, something more like \$124,118.56 as was awarded by the trial court.

2. Multiple Attorneys. The contract called for reasonable attorney fees. Kraatz bears the burden of proof to support an award of attorney fees. *See Cottonwood Mall Co., supra*, 830 P.2d at 268. The party seeking attorney fees bears the burden "to prove and establish the reasonableness of each dollar, each hour, above zero." *Mares v. Credit Bureau*, 801 F.2d 1197, 1210 (10th Cir. 1986). "A district court should approach this reasonableness inquiry 'much as a senior partner in a private law firm would review the reports of subordinate attorneys when billing clients.'" *Robinson v.*

City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998).

Kraatz admits to using multiple attorneys throughout the case for “repetition, rethinking, brainstorming and experimentation” because of the alleged complexity of the case. (Kraatz’s Second Brief, p. 8; R. 5113). How many hourly paying clients would pay multiple attorneys for “repetition” and “experimentation”? Repetition and experimentation by definition should be disallowed as unreasonable and excessive. Further, as already noted, this Court characterized the contract at issue in this case as having “clear provisions” (Memorandum Decision, p. 2), and therefore, no repetition, rethinking, brainstorming or experimentation should have been necessary.

Other jurisdictions disallow use of multiple attorneys as excessive and unreasonable. “If the same task is performed by more than one lawyer, multiple compensation should be denied.” *Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983). Fees for more than one attorney should not be awarded unless justified to the Court. *Id.* at 554, n.4. This Court should also disallow fees incurred by multiple attorneys on Kraatz’s legal team.

3. Settlement Offers. Kraatz argues the case of *Greenwich Film Productions, S.A. v. DRG Records, Inc.*, 40 USPQ.2d 1223, 1996 WL 502336 (S.D.N.Y. 1996), cited by Heritage, is not relevant because it is not a Utah case. However, Kraatz has not cited any Utah cases that disallow consideration of settlement offers when evaluating attorney fees. Nonetheless, the reasoning supporting consideration of such

information is sound, i.e., attorneys shouldn't be rewarded for being unreasonable and trying to make a case into something it is not.

Kraatz claims at the time Heritage offered to settle for \$308,000, on July 15, 1993 (R. 4682), his claim was \$3,500,000 because he had not had the opportunity to mitigate his damages. However, Kraatz was always under the duty to mitigate damages. Any damages Kraatz would be entitled to recover under the contract must be reduced by "amounts actually earned by the employee during that period or amounts he reasonably could have earned in other available employment of a like nature." *Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1069 (Utah 1981). Immediately after being terminated, Kraatz, began receiving a salary from a new employer nearly equivalent to what he would have made at Heritage.¹² Thus, Kraatz's assertion the settlement offer was made before he had been able to mitigate his damages is flawed.

The real reason Kraatz failed to accept the initial offer to settle for \$308,000 was that he and his counsel had unreasonable expectations about this lawsuit. That behavior should not be rewarded. A litigant should not be able to assert illusory claims, as was done here, in an effort to turn a small case into a windfall for his legal team. As noted

¹² From September 1992 through December 1992, Kraatz actually earned \$35,183.86 from other sources, while he would have made only \$32,000 at Heritage during that same period. For the year 1993, Kraatz had received salary from new employment of \$87,560.44, which was \$8,439.50 less than what he would have received at Heritage. (R. 4080, 4143). Clearly this case was never worth \$3.5 million to a reasonable person.

in *Foote*, *supra*, 962 P.2d at 56:

‘When a plaintiff has a substantial claim against one defendant, he should not have a free ride to assert claims against other defendants with the expectation that the target defendant will end up paying all attorney’s fees,’ even when those claims factually relate to claims for which the plaintiff may be entitled to attorney fees.

4. Failure to Allocate Fees. Kraatz argues on page 22 of his Second Brief that Heritage raised issues for the first time on appeal, i.e., Judge Frederick’s reversal rate, travel time, and two or more attorneys on the same task. Heritage’s Memorandum in the trial court addressed Kraatz’s failure to apportion his attorney fees and refusal to withdraw his request for time spent on inappropriate tasks. (R. 4635-43). It is true Heritage only provided certain examples of Kraatz’s failure to allocate in its Memorandum. However, as noted under 2. Multiple Attorneys, *supra*, Kraatz bore the burden of proof to justify the reasonableness of each hour. Heritage expected the trial court would allocate more than a few minutes for its assessment of attorney fees, which additional time could have been used, *inter alia*, to detail Kraatz’s numerous allocation problems.

Heritage’s Appellate Brief contained more detail than the Memorandum because Heritage was obligated to marshal the evidence on appeal. Contrary to Kraatz’s assertion, Heritage cited several cases that reject attorney fees for time spent determining the reversal rate of the trial judge or appellate court (in this case 41.60 hours or \$4,596), time spent on travel, and time spent by two or more attorneys on a

task. (See Heritage's Opening Brief, pp. 49-54).

An award of attorney fees based upon a contractual right must be allocated to the underlying contractual claim. The Utah Supreme Court has declared:

a party seeking fees must allocate its fee request according to its underlying claims. Indeed, the party must categorize the time and fees expended for '(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.' *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998) (citation omitted) (quoting *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992)). In addition, '[w]hile a trial court may, in its discretion, deny fees altogether for failure to allocate, it may not award wholesale all attorney fees requested if they have not been allocated as to separate claims and/or parties.' *Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998).

Prince v. Bear River Mut. Ins. Co., 452 Utah Adv. Rep. 50, 2002 UT 68, ¶ 56.

Further, claims must also be categorized according to the various opposing parties. See *Foote*, *supra*, 962 P.2d at 55.

Thus, Kraatz's failure to categorize his claims as required by Utah law requires reversal of the fees awarded. Time spent pursuing tort causes of action and extracontractual damages such as warranty income, Jazz tickets, tennis lessons, and Christmas bonuses should all be completely disallowed. Additionally, Kraatz's fee award should be sharply reduced for failure to adequately reduce his request for time spent pursuing claims against B. Wilkinson and J. Wilkinson.

5. Blocked Time Entries. Kraatz's counsel created lumped or blocked time

entries that give a total time amount for several separate tasks. This practice makes it impossible to analyze time spent for specific tasks. Other courts have denied attorney fee requests when the billing entries do not lend themselves to review of time for individual tasks. *See Case v. Unified School Dist.*, 157 F.3d 1243, 1250 (10th Cir. 1998). (“Billing entries such as those submitted by plaintiffs, which simply refer to time spent in ‘conference’ so not meet these requirements. . . . [that] billed hours were allocated to specific tasks.”); *Webb v. James*, 967 F.Supp. 320, 324 (N.D. Ill. 1997) (disallowing time entries where “multiple tasks were described for a single block of billed time—in many of those instances, where it was impossible to estimate an appropriate sum to subtract, the Court disallowed the entire amount.”). This Court should disallow the blocked time entries submitted by Kraatz, upholding the policy of requiring complete and detailed information in order to receive attorney fee awards.

6. Kraatz’s First Appeal. Kraatz claims attorney fees solely for the first appeal of \$139,823.50. (Kraatz’s Second Brief, p. 5). This amount equals sixty-two percent (62%) of the total expended at trial by Kraatz (\$225,210.36). The amount spent on the first appeal is grossly excessive.¹³ The court in *Walton, supra*, allowed two hours of attorney time per page for appellate briefs. In this case, Kraatz’s appellate briefs, including his opening brief (64 pages), reply brief (26 pages), and brief opposing petition for certiorari (20 pages), totaled 110 pages. If Kraatz were allowed two

¹³ A small but poignant example is the 40.40 hours Kraatz spent to “Assemble Appendices to Motion.” (See Kraatz’s Second Brief, p. 11).

attorney hours for each page at an average hourly rate of \$150/hour, he would be entitled to \$33,000 in fees for the first appeal—far less than the \$139,000 Kraatz sought and was awarded.

7. Fee Reduction Based on Transcript Testimony. Kraatz minimally reduced his fee request based upon transcript pages or trial brief pages. (*See* Kraatz's Second Brief, p. 7). Such methods do not accurately correspond to time spent pursuing claims against B. Wilkinson and J. Wilkinson, individually, or other failed causes of action. Why should Kraatz be allowed attorney fees for depositions spent pursuing extracontractual damages like warranty income, Jazz tickets, tennis lessons, Christmas bonuses, and for time spent pursuing a CPI index, when the contract did not provide for those damages and the trial court refused to award them.

Kraatz's miniscule reduction method based on pages of transcripts or briefs is arbitrary, not commensurate with the time spent by Kraatz's counsel pursuing unsuccessful claims, and is unsupported by any caselaw. Kraatz only reduced his requested fees by 6.65% where he prevailed on only one of seven causes of action against one of three defendants and recovered only \$124,118.56 in principal after seeking \$3.5 million dollars.

Kraatz reduced his fees against one defendant by one-half of that defendant's trial transcript pages and based upon counsel's estimate "that 50% of J. Wilkinson's 42 pages of testimony, or 21 pages, which is 3.01% of the total of 697 pages of trial

transcript, should be excluded.” (*Id.*). The \$1,769.70 excluded (3.01 % x \$58,737.25 in trial preparation and presentation fees) does not recognize nor deduct for the time spent in discovery or phases other than trial preparation in pursuing unsuccessful claims against J. Wilkinson. As noted above, only 5 of 17 witnesses Kraatz deposed (29%) actually testified at trial. Under Kraatz’s new math, no deduction was taken for unsuccessful claims as to the 12 witnesses who did not testify. The absurdity of this argument is demonstrated by the fact that counsel for Kraatz only spent 3.22% of their time actually in trial. (112.60 hours during the week of August 27-30, 1996 (R. 4451-52) divided by 3,493.60 hours claimed). How can a transcript representing only 3.22% of counsel’s time be used as a basis for any reductions?

POINT V

KRAATZ FAILED TO PRESERVE ISSUES IN HIS FIRST APPEAL

Kraatz failed to preserve in his first appeal his claims for extracontractual damages such as Jazz tickets, warranty income, and his daughter’s tennis lessons. This Court remanded “for a determination of Kraatz’s damages *under the contract*, including reasonable attorney fees.” (Memorandum Decision, p. 4) (emphasis supplied). Kraatz admits his first appeal “addressed only the issue of Heritage’s liability for breach of the express terms of the Contract.” (Kraatz’s Second Brief, p. 10). If he did not argue for extracontractual damages in his first appeal, he cannot assert a claim for attorney fees

in pursuing them now. By stating the case was remanded for “damages under the contract” this Court necessarily, albeit implicitly, rejected Kraatz’s request for damages outside the contract.¹⁴

Triton Coal Co. v. Husman, Inc., 846 P.2d 664 (Wyo. 1993) involved the same procedural scenario as the instant case. Multiple claims were brought in the trial court, which resolved all of them against the appellant (Husman). The first appeal, however, did not identify every claim as error. After an initial reversal and further proceedings in the trial court, a subsequent appeal was taken. In holding “that an appellate court’s reversal must affect only those portions of the judgment from which an appeal is actually taken,” the Wyoming Supreme Court relied upon the doctrine of law of the case. *Id.* at 669. It enunciated:

[I]t is the litigant’s failure to raise an issue on appeal which gives rise to the preclusive effect of the lower court’s ruling. . . [citation omitted]. The underlying rationale. . . is that a litigant can argue to an appellate court only those issues which he raised on appeal. *Id.* at 668.

To hold otherwise would create:

the bizarre result of placing an appellant who does *not* appeal certain issues in a superior position to one who does and forces the winning party below to cross-appeal on issues he had won just to

¹⁴ Kraatz’s citation to *Phebus v. Dunford*, 198 P.2d 973 (Utah 1948), in support of his argument for a second bite at the apple, is misplaced. The reversal in *Phebus* “was without limitation as to how much of the lower court’s decision was set aside.” *Id.* at 974. However, this Court’s reversal and remand was with limitation “for a determination of Kraatz’s damages *under the contract*, including reasonable attorney fees.” (Memorandum Decision, p. 4) (emphasis added).

ensure that those issues would not be impliedly reversed. *Id.* at 669.

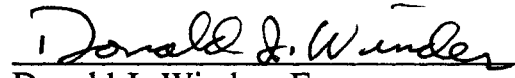
See also, Whitlock v. Klamath County School Dist., 974 P.2d 705, 711 (Or. Ct. App. 1999) (“In so remanding, we rejected, albeit implicitly, claimant’s ‘lack of training’ arguments raised in *Whitlock I* . . . Accordingly, we reject claimant’s second assignment of error.”). Kraatz should not be entitled to attorney fees for chasing extracontractual damage, tort claims, or accounting adjustments.

CONCLUSION

Kraatz’s attorney fee award should be sharply reduced because his causes of action do not overlap, his fee requests were excessive and unreasonable and because Kraatz failed to preserve many of the arguments he now makes in his second appeal. The amount awarded to Kraatz for attorney fees should be reduced to more accurately reflect the results obtained, to eliminate time spent on unsuccessful claims, as well as duplicative, unreasonable and excessive time spent by counsel and to reflect his rejection of settlement offers for more than double the principal sum recovered. Since

Kraatz's counsel agreed to a one-third contingency fee, his fees should be limited to \$41,372.85 ($\$124,118.56 \div 1/3$).

RESPECTFULLY SUBMITTED this 7th day of October, 2002.


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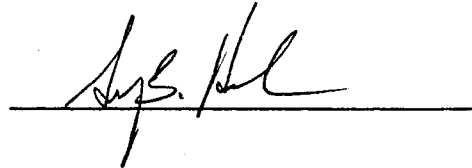
CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the Reply Brief of Appellee/Cross-Appellant to be mailed, postage prepaid, this 7th day of October, 2002, to:

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A handwritten signature in dark ink, appearing to read "K.B. Linebaugh", is written over a horizontal line.