

2006

Ivan Radman v. Flanders Corporation : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David M. Connors; Jennifer A. Brown; Nicole C. Squires; Chapman & Cutler; Attorneys for Appellants.

Clark Waddoups; Jonathan O. Hafen; Michael D. Black; Parr Waddoups Brown Gee & Loveless; Attorneys for Appellees.

Recommended Citation

Brief of Appellee, *Radman v. Flanders Corporation*, No. 20060479 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6547

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

IVAN RADMAN, et al., individuals,
Plaintiffs/Appellants,

vs.

FLANDERS CORPORATION, a North
Carolina corporation,

Defendant/Appellee and Cross-
Appellants.

FLANDERS CORPORATION, a North
Carolina corporation, et al.,

Counterclaim and Third-Party Plaintiffs,

vs.

IVAN RADMAN, et al., individuals,

Counterclaim Defendants.

**BRIEF OF APPELLEE AND CROSS-
APPELLANT**

Appellate Case No. 20060479-CA

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Joseph C. Fratto, District Court Judge

David M. Connors, Esq.
Jennifer A. Brown, Esq.
Nicole C. Squires, Esq.
CHAPMAN & CUTLER
201 South Main Street, Ste 2000
Salt Lake City, UT 84111
Attorneys for Appellants

Clark Waddoups (3975)
Jonathan O. Hafen (6096)
Michael D. Black (9132)
PARR WADDOUPS BROWN GEE &
LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1537
Attorneys for Appellees

FILED
UTAH APPELLATE COURTS
FEB 15 2007

IN THE UTAH COURT OF APPEALS

IVAN RADMAN, et al., individuals,
Plaintiffs/Appellants,

vs.

FLANDERS CORPORATION, a North
Carolina corporation,

Defendant/Appellee and Cross-
Appellants.

FLANDERS CORPORATION, a North
Carolina corporation, et al.,

Counterclaim and Third-Party Plaintiffs,

vs.

IVAN RADMAN, et al., individuals,

Counterclaim Defendants.

**BRIEF OF APPELLEE AND CROSS-
APPELLANT**

Appellate Case No. 20060479-CA

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Joseph C. Fratto, District Court Judge

David M. Connors, Esq.
Jennifer A. Brown, Esq.
Nicole C. Squires, Esq.
CHAPMAN & CUTLER
201 South Main Street, Ste 2000
Salt Lake City, UT 84111
Attorneys for Appellants

Clark Waddoups (3975)
Jonathan O. Hafen (6096)
Michael D. Black (9132)
PARR WADDOUPS BROWN GEE &
LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1537
Attorneys for Appellees

LIST OF PARTIES

Plaintiffs/Appellants

Ivan Radman
Janet Radman
Donna Smylie
Peter Radman
Joanne Crook
Bronte Clark
Martin Radman
Jordan Radman

Defendants/Appellees/Cross-Appellants

Flanders Corporation
Flanders Acquisitions, Inc.
PrecisionAire of Utah

TABLE OF CONTENTS

Table of Authorities	iv
Statement of Jurisdiction	1
Statement of Issues	1
Determinative Provisions.....	4
Statement of the Case	4
Statement of Facts.....	5
Summary of Argument	12
Argument	14
I. The Trial Court Properly Admitted Evidence of the Radmans’ Pre-Closing Statements.....	14
II. The Court Properly Interpreted the Warranties.	17
A. The Trial Court Properly Interpreted the Good Operating Condition Warranty.	18
B. The Trial Court Properly Interpreted the No Misrepresentations Warranty.	20
III. The Trial Court Used the Proper Standard for Damages	21
A. The Trial Court’s Factual Finding of the Value of the Electric Melters as Warranted is Correct.	23
1. The Radmans Failed to Marshal the Evidence.	24
2. No Clear Error	28
B. The Trial Court’s Finding That the Actual Value of the Electric Melters Was Zero Is Correct.	29
IV. The Court’s Ruling Denying Prejudgment Interest Is Correct.	31
A. There is no requirement that both awards must have prejudgment interest in order to offset the awards.	32
B. The Radmans are misguided in their argument that the awards must arise at the same time.	36
V. The Radmans’ “Atmosphere of Prejudice” Argument is Improper and Insufficiently Briefed.....	37
Cross-Appeal Argument	40
VI. The Trial Court Erred in Ruling that the Merger Agreement was Ambiguous.....	40
A. Flanders’s Interpretation of “Market Price” is Plausible.....	42
B. The Radmans’ Interpretation of “Market Price” is Not Plausible....	42
VII. The Trial Court Improperly Ignored the Language of the Contract in its Interpretation.	44
VIII. The Trial Court Improperly Ruled That the Radmans Were Co-Prevailing Parties	45
Conclusion	48

TABLE OF AUTHORITIES

Cases

<i>A.K. & R. Whipple Plumbing and Heating v. Guy</i> , 2004 UT 47, 94 P.3d 270	4, 46
<i>Bakowski v. Mountain States Steel, Inc.</i> , 2002 UT 62, 52 P.3d 1179	43
<i>Bartels v. Brain</i> , 13 Utah 162 (Utah 1896)	40
<i>Brown v. Richards</i> , 840 P.2d 143 (Utah App. 1992)	22, 32, 36, 37
<i>Cache County v. Beus</i> , 2005 UT App 503, 128 P.3d 63	4, 45
<i>Cal Wadsworth Constr. v. City of St. George</i> , 898 P.2d 1372 (Utah 1995)	16, 38
<i>Carlson Distrib. Co. v. Salt Lake Brewing Co., L.C.</i> , 2004 UT App 227, 95 P.3d 1171	45, 47
<i>Chang v. Soldier Summit Dev.</i> , 2003 UT App 415, 82 P.3d 203	47
<i>Chen v. Stewart</i> , 2004 UT 82, 100 P.3d 1177	20, 24, 25
<i>Christiansen v. Farmers Insurance Exchange</i> , 2005 UT 21, 116 P.3d 259	4
<i>Clark v. Ducheneau</i> , 26 Utah 97 (Utah 1903)	40
<i>Dixon v. Pro Image, Inc.</i> , 1999 UT 89, 987 P.2d 48	42
<i>Emerson-Brantingham Implement Co. v. Giles</i> , 59 Utah 54, 202 P. 543 (Utah 1921)	17
<i>Ermolieff v. R. K. O. Radio Pictures, Inc.</i> , 19 Cal. 2d 543 (Cal. 1942)	19
<i>Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.</i> , 603 P.2d 513 (Ariz. 1979)	33, 35
<i>Fleet Financial Group, Inc. v. Advanta Corp.</i> , 2003 Del. Ch. LEXIS 127	36
<i>Gemini Farms v. Smith-Kem Ellensburg, Inc.</i> , 16 P.3d 82 (Wash. App. 2001)	35
<i>Glauser Storage, L.L.C. v. Smedley</i> , 2001 UT App 141, 27 P.3d 565	17

<i>Groome v. Ogden City Corp.</i> , 10 Utah 54 (Utah 1894)	40
<i>Grynberg v. Questar Pipeline Co.</i> , 2003 UT 8, 70 P.3d 1	1
<i>Harmon Cable Comm. of Neb. Ltd. Pt. v. Scope Cable T.V., Inc.</i> , 468 N.W.2d 350 (Neb. 1991)	34, 36
<i>Hogle v. Zinetics Med., Inc.</i> , 2002 UT 121, 63 P.3d 80	2, 22
<i>Hollon v. McComb</i> , 636 P.2d 513 (Wyo. 1981)	33
<i>Kraatz v. Heritage Imports</i> , 2003 UT App. 201, 71 P.3d 188	35
<i>Lee v. Langley</i> , 2005 UT App 339, 121 P.3d 33	16, 21, 38
<i>Local Oklahoma Bank v. The United States</i> , 59 Fed. Cl. 713 (Fed. Cl. 2004)	32, 36
<i>Lysenko v. Sawaya</i> , 2000 UT 58, 7 P.3d 783	2, 3, 44
<i>MacKay v. Hardy</i> , 896 P.2d 626 (Utah 1995)	24
<i>Mahana v. Onyx Acceptance Corp.</i> , 2004 UT 59, 96 P.3d 893	2
<i>Morris v. Parkinson</i> , 2001 UT App 69	17
<i>Mountain States Broadcasting Co. v. Neale</i> , 783 P.2d 551 (Utah Ct. App. 1989)	43, 46
<i>Nielsen v. Gold's Gym</i> , 2003 UT 37, 78 P.3d 600	16
<i>Orlob v. Wasatch Med. Management</i> , 2005 UT App 430, 124 P.3d 269	32
<i>Parduhn v. Bennett</i> , 2005 UT 22, 112 P.3d 495	25, 28
<i>Peterson v. The Sunrider Corporation</i> , 2002 UT 43, 48 P.3d 918	3, 40
<i>R&R Energies v. Mother Earth Industries, Inc.</i> , 936 P.2d 1068 (Utah 1997)	43
<i>R.T. Nielson Co. v. Cook</i> , 2002 UT 11, 40 P.3d 1119	45
<i>Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc.</i> , 416 F.2d 207 (8th Cir. 1969)	33
<i>Richard Barton Enters., Inc. v. Tsern</i> , 928 P.2d 368 (Utah 1996)	32, 36

<i>Saleh v. Farmers Ins. Exch.</i> , 2006 UT 20, 133 P.3d 428.....	2, 40
<i>Schwartz v. Gross</i> , 93 Ohio App. 445 (Ohio Ct. App. 1952)	19
<i>Shar's Cars, L.L.C. v. Elder</i> , 2004 UT App 258, 97 P.3d 724.....	17
<i>State v. Diaz</i> , 859 P.2d 19 (Utah Ct. App. 1993)	1
<i>State v. Green</i> , 2005 UT 9, 108 P.3d 710.....	29
<i>Sunbeam Corp. v. Liberty Mut. Ins. Co.</i> , 566 Pa. 494 (Pa. 2001).....	19
<i>T.H. v. R.C. (In re E.H.)</i> , 2006 UT 36, 137 P.3d 809.....	24
<i>Tuft v. Federal Leasing</i> , 657 P.2d 1300 (Utah 1982).....	24
<i>Uintah Basin Med. Ctr. v. Hardy</i> , 2005 UT App 92, 110 P.3d 168.....	16
<i>Utah State Medical Ass'n v. Utah State Employees Credit Union</i> , 655 P.2d 643 (Utah 1982).....	19
<i>Vigil v. Division of Child & Family Servs.</i> , 2005 UT App 43, 107 P.3d 716	16, 21, 38
<i>Wade v. Stangl</i> , 869 P.2d 9 (Utah Ct. App. 1994)	3, 44
<i>Wasatch Bank v. Leany</i> , 727 P.2d 633 (Utah 1986).....	2, 22
<i>WebBank v. Am. Gen. Annuity Serv. Corp.</i> , 2002 UT 88, 54 P.3d 1139.....	15, 45
<i>West Jordan City v. Goodman</i> , 2006 UT 27, 135 P.3d 874.....	15, 37
<i>West Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311 (Utah Ct. App. 1991)	3
<i>York Plumbing & Heating Co. v. Groussman Investment Co.</i> , 443 P.2d 986 (Colo. 1968).....	34, 36

Statutes

UTAH CODE ANN. §70A-2-714.....	22
--------------------------------	----

Rules

Utah Rules of Appellate Procedure 24(e).....	14, 37
Utah Rules of Civil Procedure 52(a).....	28

STATEMENT OF JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this case under Utah Code Ann. § 78-2-2(3)(j). The Supreme Court is authorized to transfer this appeal to the Court of Appeals under Utah Code Ann. § 78-2-2(4). The Court of Appeals has appellate jurisdiction over this case pursuant to Utah Code Ann. § 78-2a-3(2)(k).

STATEMENT OF ISSUES

Because Flanders is dissatisfied with the Radmans' Statement of Issues, it presents the following statement of the issues presented on appeal and on cross-appeal:

ISSUES ON APPEAL

Issue 1: Did the trial court err in admitting evidence of the Radman's prior statements and representations regarding the electric melters? The issue of "whether evidence is admissible is a question of law, which we review for correctness, incorporating a 'clearly erroneous' standard of review for subsidiary factual determinations." *State v. Diaz*, 859 P.2d 19, 23 (Utah Ct. App. 1993), *cert. denied*, 878 P.2d 1154 (1994) (citations omitted).

Issue 2: Did the trial court err in its interpretation of the Section 3(h) warranty of "good operating condition" and the Section 2(h) warranty of "no material misstatements"? A trial court's interpretation of an unambiguous contract is a question of law and the "district court's interpretation is granted no deference." *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶56, 70 P.3d 1.

Issue 3: Did the trial court err in awarding damages for breach of the good operating condition warranty based on the value of the asset that did not conform to that warranty? Whether the trial court applied the correct rule for measuring damages is a question of law that is reviewed for correctness. *See Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶25, 96 P.3d 893.

Issue 4: Did the trial court err in its finding of the value of the electric melters as warranted? The amount of damages awarded by a trial court is a factual determination that is reviewed for clear error. *See Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶25, 96 P.3d 893; *Hogle v. Zinetics Med., Inc.*, 2002 UT 121, ¶10, 63 P.3d 80; *Lysenko v. Sawaya*, 2000 UT 58, ¶15, 7 P.3d 783; *Wasatch Bank v. Leany*, 727 P.2d 633, 634 (Utah 1986).

Issue 5: Did the trial court err in its finding of the actual value of the electric melters? The amount of damages awarded by a trial court is a factual determination that is reviewed for clear error. *See Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶25, 96 P.3d 893; *Hogle v. Zinetics Med., Inc.*, 2002 UT 121, ¶10, 63 P.3d 80; *Lysenko v. Sawaya*, 2000 UT 58, ¶15, 7 P.3d 783; *Wasatch Bank v. Leany*, 727 P.2d 633, 634 (Utah 1986).

Issue 6: Did the trial court err in ruling that Flanders' award had to be offset against the Radmans' award prior to computing prejudgment interest? The trial court's decision to deny prejudgment interest is a question of law reviewed for correctness, however the trial court's subsidiary factual findings are reviewed for clear error. *See Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶28, 133 P.3d 428.

Issue 7: Did the trial court create an “atmosphere of prejudice” to the Radmans?

Flanders is not entirely sure what this issue alleges, or the correct standard of review for this amalgam of conclusory assertions regarding evidentiary and procedural error, but the underlying assertions of error are likely reviewed for abuse of discretion. *See Lee v. Langley*, 2005 UT App 339, ¶9, 121 P.3d 33.

ISSUES ON CROSS-APPEAL

Issue 8: Did the trial court err in determining that Section 9 of the Merger Agreement was ambiguous? Whether a contract is ambiguous is a question of law that is reviewed for correctness, giving no deference to the trial court. *See Peterson v. The Sunrider Corporation*, 2002 UT 43, ¶14, 48 P.3d 918. This issue was preserved by Flanders’ motion for summary judgment argued the first day of trial. [R. 4939 p. 13.]

Issue 9: Did the trial court err in interpreting Section 9 of the Merger Agreement by specifying a result rather than clarifying the actual language of the contract? A trial court’s interpretation of an ambiguous contract is reviewed under a clearly erroneous standard. *See Wade v. Stangl*, 869 P.2d 9, 12 (Utah Ct. App. 1994); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah Ct. App. 1991). However, whether a rule of uniform application was properly applied is a legal question reviewed for correctness. *See Lysenko v. Sawaya*, 2000 UT 58, ¶17, 7 P.3d 783. This issue was preserved at R. 4940 pp. 370-71 and R. 4766.

Issue 10: Did the trial court err in determining that there could be more than one prevailing party for purposes of awarding attorneys’ fees? A trial court’s determination

as to who was the prevailing party is reviewed under an abuse of discretion standard. *See Cache County v. Beus*, 2005 UT App 503, ¶7, 128 P.3d 63. However, an attorney fee decision that involves a question of law is reviewed for correctness, *see A.K. & R. Whipple Plumbing and Heating v. Guy*, 2004 UT 47, ¶6, 94 P.3d 270, and a trial court's interpretation of binding case law is a question of law that is reviewed for correctness. *See Christiansen v. Farmers Insurance Exchange*, 2005 UT 21, ¶7, 116 P.3d 259. This issue was preserved at R. 4949 pp. 29-30.

DETERMINATIVE PROVISIONS

No such provisions apply to this appeal.

STATEMENT OF THE CASE

Flanders and the Radmans entered into an Agreement and Plan of Merger (the "Merger Agreement") dated as of November 1, 1997. Pursuant to the Merger Agreement, Flanders exchanged some of its restricted capital stock for all of the stock of G.F.I., Inc. The Merger Agreement contained, among other things, a limited market protection provision and several warranties as to GFI's equipment. After the closing of the Merger Agreement, Flanders discovered that the GFI equipment did not operate as warranted, and spent considerable time and money in attempting to bring the equipment up to standard. Also after the Merger, the market value of the Flanders restricted stock dropped, and the Radmans requested that Flanders fulfill its obligations under the limited market protection provision. Flanders issued additional shares to the Radmans, which the

Radmans contended were insufficient under the Merger Agreement. The Radmans filed a Complaint [R. 1-7], and Flanders counterclaimed. [R. 13-28.]

This matter came before the trial court for a nine-day bench trial beginning on May 3-4, 2004, continuing on October 12-14, 2004, and continuing, again, to July 19-22, 2005. Thereafter, the parties submitted further briefing on certain limited issues. On October 6, 2005, the Court entered a Memorandum Decision. [R. 4287-4298.] After considering several post-trial motions, the trial court entered a second Memorandum Decision dated February 10, 2006. [R. 4673-4679.] The trial court's findings of fact and conclusions of law were entered on April 17, 2006 [R. 4857-4894], and a Final Judgment was entered on June 27, 2006. [R. 4921-4922.]

STATEMENT OF FACTS

In or about 1990, the Radmans acquired from bankruptcy the assets of a Salt Lake City fiberglass manufacturing company known as Glass Fiber Industries. [R. 4859.] The Radmans organized a new entity to hold the assets known as G.F.I., Inc., ("GFI"), owned entirely by the Radmans, and began operating GFI's fiberglass manufacturing plant. [R. 4859.] GFI manufactured Modigliani fiberglass that was used as a filter media for certain air filter products and used some of the fiberglass that it manufactured to produce its own air filters. [R. 4859.] GFI's gross yearly sales at the time of its merger with Flanders was around \$1 million. [R. 4942 p. 146.]

Sometime in 1997, GFI employee Rodney Smith approached Flanders about acquiring GFI. [R. 4861.] In late 1997, Steven Clark, on behalf of Flanders, and Ivan

Radman, on behalf of GFI, discussed the possible sale of GFI to Flanders. [R. 4861.] Mr. Radman and Mr. Clark proceeded to negotiate the terms of the transaction. [R. 4861.] Both parties were represented by counsel in documenting and finalizing the terms of the agreement and plan of merger (the “Merger Agreement”), which the Radmans and Flanders signed in or about November 1997. [R. 4862.] The transaction closed on November 26, 1997, and Flanders took over the operation, including most of the employees, on that same date. [Ex. P-1, Section 6.]

The Market Protection Clause

The price and terms of the deal changed over the course of negotiations. Flanders initially offered the Radmans \$600,000 in cash for the stock of the GFI. [R. 4940 pp. 280, 191.] The Radmans instead wanted \$1.5 million, and the parties agreed to structure the sale as an exchange of Flanders stock for GFI’s stock. [R. 4861-62, 4868.] The Radmans benefited from this structure because it provided tax advantages to them, and because it gave them the opportunity to increase what they received from the transaction if Flanders’ stock price increased. [R. 4868-69.] Eventually, Flanders agreed to exchange 187,502 shares of Flanders stock, which the Agreement expressly valued at \$8.00 per share for an aggregate market price of \$1,500,016. [Ex. P-1.]

Because these shares of Flanders stock were restricted, the agreement contained a limited market protection clause. [Ex. P-1, Section 9.] Flanders counsel and counsel for the Radmans had a significant dispute over the form of the market protection clause, but Flanders’ counsel was unwilling to make the additional changes requested by counsel for

the Radmans. [R. 4862-63.] During the course of negotiations, and at Ivan Radman's request, the Radmans' counsel provided a copy of a market protection provision used by the Radmans in the prior sale of an insulation plant owned by the Radmans and sold to Owens Corning for stock valued at \$50 million at the time of the transaction. [R. 4939 p. 137.] According to Ivan Radman, that provision acted as a guarantee of the cash value of a sales price for the Owens Corning transaction, although Mr. Radman personally allowed that guarantee to lapse in hopes that Owens Corning shares would increase in value. [R. 4939 p. 115, 137.] The Radmans' counsel conceded under cross examination that the terms of the Merger Agreement did not provide the guarantee of \$1.5 million sought by the Radmans. [R. 4940 p. 239.] Section 9 of the Merger Agreement (the "Market Protection Clause") reads as follows:

Pursuant to this Agreement, the GFI Shareholders are receiving 187,502 shares of Flanders Capital Stock as set forth on Exhibit "A" attached hereto. Since the 187,502 shares of Flanders Capital Stock are restricted shares, each share has a discounted **market value of \$8.00 per share**, for an aggregate market price of \$1,500,016 (the "**Market Price**"). If at the time any of the GFI Shareholders sell any of the 187,502 shares of Flanders Capital Stock at a price below \$8.00 per share, and the average trading price for the preceding three business days of Flanders Capital Stock as listed on the NASDAQ Stock Exchange is below \$8.00 per share, Flanders shall deliver additional restricted shares of Flanders Common Stock to such GFI Shareholders in order to maintain the **Market Price** (the "Short Fall"), with such Short Fall shares valued at the **Market Price**.

[Ex. P-1, Section 9 (emphasis added).] The Merger Agreement Closed on November 26, 1997, at which time GFI, Inc. was merged into Flanders Acquisitions, Inc., a wholly owned subsidiary of Flanders Corporation. Flanders Acquisitions, Inc. was subsequently renamed PrecisionAire of Utah, Inc. [Ex. P-1; R. 4939 p. 278.] Ivan Radman and the

other Radman parties signed the Agreement as shareholders, and Ivan Radman also signed the Agreement as President of GFI. [Ex P-1; R. 4939 p. 140.]

As contemplated by paragraph 9(a) of the Agreement, Flanders issued 187,502 shares of restricted Flanders stock to the Radmans, which they divided among themselves according to their respective interest in GFI. [R. 4870; R. 4939 p. 143; Ex. P-1, Exhibit A.] By at least January 1999, the restriction on the 187,502 shares had expired, and the Radmans proceeded to sell all of their shares. [R. 4870.] Collectively, the Radmans received \$743,585 from the sale of the shares. [R. 4870.] For purposes of the calculation to be made under Paragraph 9(a) of the Agreement, the Shortfall totaled \$756,431. [R. 4870.] As permitted by the Agreement, on January 29, 1999, the Radmans requested, through written correspondence, that Flanders issue the additional shares to make up the Shortfall. [R. 4870.] On April 27, 1999, Flanders issued 94,554 additional shares of restricted Flanders stock to the Radmans. [R. 4870.] Flanders arrived at this number of shortfall shares by dividing the shortfall amount by the denominator of \$8 per share.

Warranties

The Merger Agreement also contained certain warranties. The preamble to Section 2 of the Agreement, entitled “Representations and Warranties of the G.F.I. Shareholders,” reads as follows:

To induce Flanders and Acquisitions, Inc. to enter into this Agreement, the G.F.I. Shareholders represent and warrant to Flanders and Acquisitions, Inc. that the following statements are true, correct and complete as of the date hereof, and will be true, correct and complete as of the date of Closing.

[Ex. P-1.] Section 2(h) reads as follows:

The GFI Shareholders have not made any material misstatement of fact or omitted to state any material fact necessary or desirable to make complete, accurate and not misleading every representation and warranty set forth herein.

[Ex. P-1.] The preamble to Section 3 of the Agreement, entitled “Representations and Warranties of G.F.I.,” reads as follows:

To further induce Flanders and Acquisitions, Inc. to enter into this Agreement, G.F.I. and the G.F.I. Shareholders jointly and severally represent and warrant the following statements concerning the affairs of G.F.I. are true, correct and complete as of the date hereof, and will be true, correct and complete as of the date of Closing as that term is defined in Section 6(a).

[Ex. P-1.] Section 3(h) of the Agreement, reads as follows:

Assets. Except as set forth on the Disclosure Schedule, GFI owns, possesses and controls and has good and marketable title to all of its assets, free and clear of any mortgage, lien, claim, effect, charge, encumbrance and right of third parties. **Such assets are in good operating condition and repair**, ordinary wear and tear excepted, and conform to applicable ordinances, regulations, building, zoning and other laws and directives. GFI enjoys exclusive, peaceful and undisturbed possession under all equipment and other leases to which it is a party. All such leases are identified on the Disclosure Schedules, are valid and enforceable in accordance with their terms, and no party thereto is in default thereunder.

[Ex. P-1.] (emphasis added). Section 3(d) reads as follows:

Financial Statements. The financial statements contained in the unaudited tax returns of GFI for the years ended June 30, 1994, June 30, 1995, and June 30, 1996, which are attached hereto as Schedule 3(d) to the Disclosure Schedule attached hereto as Exhibit B (the “Disclosure Schedule”), **fairly represent the financial condition of GFI as at the dates described therein.**

[Ex. P-1.] (emphasis added).

Flanders primary purpose in acquiring GFI was to acquire two pieces of fiberglass manufacturing equipment known as “electric melters.” [R. 4877.] Prior to the merger, Ivan Radman made a number of critical representations which the trial court found to be untrue. For example, Mr. Radman told Steve Clark that the electric melters were “complete and that they were operating efficiently” and GFI was profitable as a result. [R. 4877.] Prior to the merger, Ivan Radman also told Steve Clark that one person could run two electric melters, which would result in significant cost savings for Flanders. Such promised labor savings were necessary to meet the primary commercial purpose for which Flanders was acquiring GFI, which was to lower its acquisition cost of Modigliani fiberglass from approximately 4 cents per square foot to 2 to 2 ½ cents per square foot. [R. 4877-78.]

In addition, prior to the merger, Ivan Radman told Steve Clark that each electric melter was producing 20 pads per day, [R. 4878], and that the electric melters could produce fiberglass for 2 to 2 ½ cents per square foot, a figure significantly below Flanders’ cost of purchasing fiberglass, and provided Steve Clark a spreadsheet to that effect. [R. 4878-79.] Mr. Radman’s representations were false. [R. 4879.]

As of the date of the merger and the date of Closing, the electric melters did not conform to the Radmans’ representations. [R. 4880.] The electric melters were not capable of producing 20 pads each in a single day, and had never actually done so. [R. 4880.] On the date of the merger, at least two workers were required to run a single electric melter, and GFI had never had a single worker run two electric melters. [R.

4881.] As of the date of the merger and the date of Closing, the electric melters suffered from a number of problems, including fiber breakage, uneven temperature across the bushings, breakage of the bushings, bridging, transformers “blowing up,” and problems with the “weave” of the fiberglass, all of which prevented the electric melters from operating consistently and producing fiberglass of reasonable quality. [R. 4881.] The Radmans did not inform Flanders that the electric melters had the above problems prior to the effective date of the Agreement or prior to Closing. [R. 4882.] In fact, the Radmans deliberately tried to hide these problems from Flanders by, among other things, instructing their employees to have only one person manning the electric melters when Flanders personnel were in the plant. [R.4943 p. 459-60.] Despite its due diligence, Flanders did not know that the electric melters had these problems prior to the effective date of the Agreement or prior to Closing. [R. 4882.] As of the date of the merger and the date of Closing, the electric melters were not capable of running consistently for any length of time, were broken more than they were working, and in particular could not run anywhere close to 24 hours per day, 7 days per week, as is typically required of that type of industrial equipment. [R. 4883.]

Flanders spent substantial amounts of time and nearly \$1.3 million to modify and redesign the electric melters subsequent to the acquisition. [R. 4885.] In addition, Flanders’ actual production costs using the electric melters significantly exceeded the production cost promised by Ivan Radman and generally exceeded the cost at which Flanders could acquire Modigliani fiberglass from a third party. [R. 4885-86.]

Flanders' predominant purpose in acquiring GFI was to acquire the electric melters. [R. 4883.] Except for the warranties relating to the electric melters, GFI would have been of no interest to Flanders. [R. 4883.] Both parties intended that the essence of the merger transaction was for Flanders to acquire the electric melters, and Flanders took the other assets of GFI simply as part of the package to get those electric melters. [R. 4883.]

GFI was not operating at a profit, taking into account all of its actual expenses, and the Radmans were operating GFI predominantly for the purpose of developing the electric melters. [R. 4884.]

Of the purchase price, Flanders paid \$337,472 to acquire the inventory on hand and accounts receivable of GFI. [R. 4884.] With the exception of the electric melters, the remaining assets of GFI had essentially no value. [R. 4884.] The remaining \$1,162,528 of purchase price, after allocating the amounts to inventory and accounts receivable, was paid for the electric melters. [R. 4885.] Since the electric melters did not operate as warranted and did not conform to industry standards, the electric melters had no value and Flanders was damaged in the amount of \$1,162,528. [R. 4885.]

SUMMARY OF ARGUMENT

The Radmans' argument that the trial court improperly admitted "extrinsic evidence" is insufficiently briefed, since the allegedly improper evidence is never identified. Moreover, the trial court was permitted to hear any evidence that might have been "extrinsic" for the purposes of determining whether the contract was ambiguous and

to determine factually whether a breach occurred, and there is no showing that the court used any such evidence for any other purpose.

The Radmans' argument that the trial court incorrectly interpreted the warranties at issue also fails. The trial court found that those warranties were unambiguous and interpreted them according to their plain language. The Radmans have not shown how those interpretations were wrong or even advanced alternative interpretations based on the contract language.

The Radmans' argument that the trial court erred in its findings regarding the damages suffered by Flanders fails for several reasons. First, the trial court used the proper measure of damages for a breach of warranty – the difference between the value of the particular asset as warranted and its actual value. The trial court's factual findings as to those values was adequately supported by the evidence, and the Radmans' challenges to those factual findings were insufficiently marshalled and briefed.

The trial court properly ruled that Flanders' award had to be offset against the Radmans' award prior to computing prejudgment interest. This is simply the correct legal method, since the two awards arose out of the same contract. Moreover, Flanders' award actually arose first, meaning that the Radmans were never deprived of the use of their money.

Finally, the Radmans' "atmosphere of prejudice" argument is unsupported by any law. In addition, it is based upon only vague allegations of evidentiary and procedural

error. The Radmans were obligated to properly brief and argue those underlying assignments of error, which they failed to do.

Regarding the Cross-Appeal, the trial court erred in finding that the market protection clause of the Merger Agreement was ambiguous, since there is really only one interpretation of the language of the agreement that is plausible.

The trial court also erred in its interpretation of the market protection clause, as it added terms and computations and essentially rewrote the contract provision rather than restricting itself to interpreting the actual language used.

Finally, the trial court erred in finding that the Radmans were co-prevailing parties in this lawsuit, as guidance from this Court states that there can only be one prevailing party, and Flanders was that party.

ARGUMENT

I. The Trial Court Properly Admitted Evidence of the Radmans' Pre-Closing Statements.

The Radmans claim that the trial court improperly admitted “evidence regarding the parties’ pre-merger negotiations related to performance standards.” [See Appellant Brief, pp. 2 and 16.] Flanders notes that the Radmans do not specifically identify this allegedly improper evidence, do not provide citations to the record to identify where this allegedly improper evidence was presented, objected to and received (as required by *Utah Rules of Appellate Procedure* 24(e)), and do not demonstrate that this allegedly improper evidence was indeed improper. This argument is insufficiently briefed and

should be dismissed, since this Court “is not ‘a depository in which the appealing party may dump the burden of argument and research.’” *West Jordan City v. Goodman*, 2006 UT 27, ¶29, 135 P.3d 874.

Although Flanders is not sure exactly what evidence is being questioned, it does not matter, since the trial court’s ruling regarding the warranty of “good operating condition” is clearly based only on the contract language. The entirety of the trial court’s conclusions of law on this issue are as follows:

10. In deciding Flanders’ claim for breach of the Section 3(h) warranty, the Court must interpret the phrase “good operating condition, ordinary wear and tear excepted.”

11. Based on the evidence that has been presented, the Court finds that the arguments and the evidence that have been presented from both parties demonstrate that the phrase “good operating condition, ordinary wear and tear excepted” is only capable of one reasonable interpretation and that the phrase is therefore not ambiguous. *WebBank v. American General Annuity Service Corp.*, 2002 UT 88, ¶20.

12. Therefore, based on the evidence presented at trial, the Court interprets the phrase “good operating condition, ordinary wear and tear excepted” to mean that the equipment performs the function expected of a similar piece of equipment in the industry to the standards of the industry, modified to take into account the effects of the equipment’s age and prior wear.

13. The industry standard for a melter is consistent operation 24 hours a day, seven days a week at least 90% of the time.

14. At the time of the merger and the Closing, the electric melters did not conform to this standard, as they would break often and for various reasons.

15. Accordingly, the Radmans breached their warranty that the assets of GFI would be in “good operating condition, ordinary wear and tear excepted” as of the date of the merger and the date of Closing.

None of these findings mention any pre-merger statements or other parol evidence, nor have the Radmans' shown how these findings were in some way influenced by such evidence. Therefore, even if the trial court committed error, which it did not, any such error was harmless and does not warrant reversal. *See Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995) ("An erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful.")

However, no error occurred, because the trial court was fully entitled to hear evidence of the course of negotiations and events prior to the merger (which appears to be the general universe of evidence the Radmans are objecting to) for at least two reasons: (1) to determine whether the warranties were in fact ambiguous, and (2) to determine whether the Radmans' breached the "no material misstatements" warranty. All of the evidence admitted at trial was properly admissible for these purposes. "Trial courts are afforded broad discretion in determining the admissibility of evidence; thus we will not disturb a trial court's ruling whether to admit or exclude evidence absent an abuse of discretion." *Lee v. Langley*, 2005 UT App 339, ¶9, 121 P.3d 33 (quoting *Vigil v. Division of Child & Family Servs.*, 2005 UT App 43, ¶8, 107 P.3d 716).

It is incontrovertible that the trial court was entitled to review "extrinsic evidence" to determine whether the warranties were in fact ambiguous. *See Nielsen v. Gold's Gym*, 2003 UT 37, ¶7, 78 P.3d 600; *Uintah Basin Med. Ctr. v. Hardy*, 2005 UT App 92, ¶13, 110 P.3d 168 (internal citations omitted). It is also clear that the trial court was entitled

to hear any and all facts offered for the purpose of proving that a breach occurred. *See Glauser Storage, L.L.C. v. Smedley*, 2001 UT App 141, ¶21, 27 P.3d 565 (parol evidence is evidence “offered for the purpose of varying or adding to the terms of an integrated contract.” (emphasis added)). “Whether there was a breach of warranty is a question of fact” and the trial court, as the finder of fact in this bench trial, was entitled to hear all evidence relevant to whether a breach occurred. *Morris v. Parkinson*, 2001 UT App 69 (not for official publication) (quoting *Emerson-Brantingham Implement Co. v. Giles*, 59 Utah 54, 202 P. 543, 544 (Utah 1921)); *Shar's Cars, L.L.C. v. Elder*, 2004 UT App 258, ¶30, 97 P.3d 724. The trial court found that numerous Radman pre-merger statements constituted breaches of warranty, and the Radmans have not properly challenged those factual findings nor marshalled the evidence against those findings. [R. 4888-89.]

The category of evidence that the Radmans appear to object to was therefore properly admitted for the purposes for which it was used and the trial court’s evidentiary rulings should be affirmed.

II. The Court Properly Interpreted the Warranties.

Although not properly identified as an issue in the Radmans’ brief, the Radmans’ appear to argue that the trial court’s interpretations of two of the warranties at issue in this case were erroneous. The first relevant warranty is found in section 3(h) of the Merger Agreement (the “Good Operating Condition Warranty”), which states:

(h) Assets. Except as set forth on the Disclosure Schedule, GFI owns, possesses and controls and has good and marketable title to all of its assets, free and clear of any mortgage, lien, claim, effect, charge, encumbrance and right of third parties. **Such assets are in good operating condition and**

repair, ordinary wear and tear excepted, and conform to applicable ordinances, regulations, building, zoning and other laws and directives. GFI enjoys exclusive, peaceful and undisturbed possession under all equipment and other leases to which it is a party. All such leases are identified on the Disclosure Schedules, are valid and enforceable in accordance with their terms, and no party thereto is in default thereunder.

[Ex. P-1, Section 3(h), (emphasis added).] The second relevant warranty is the warranty found in Section 2(h) of the Merger Agreement (the “No Misrepresentations Warranty”), which states:

The GFI Shareholders [Radmans] have not made any material misstatement of fact or omitted to state any material fact necessary or desirable to make complete, accurate and not misleading every representation and warranty set forth herein.

[Ex. P-1, Section 2(h).] The trial court found that both of these warranties were unambiguous and proceeded to interpret them according to the language of the Merger Agreement. [R. 4887-4889.] The trial court’s interpretations are consistent with the Merger Agreement and prior case law, and are unremarkable. Although the Radmans’ brief contains much rhetoric about the trial court having gone beyond the language of the Merger Agreement, in the end the Radmans fail to show how the trial court did so.

A. The Trial Court Properly Interpreted the Good Operating Condition Warranty.

The trial court interpreted the language “‘good operating condition, ordinary wear and tear excepted’ to mean that the equipment performs the function expected of a similar piece of equipment in the industry to the standards of the industry, modified to take into account the effects of the equipment’s age and prior wear.” [R. 4889, ¶12.] This is a perfectly reasonable interpretation of the language used and is entirely consistent with the

Utah Supreme Court’s interpretation of “good condition and repair” as meaning “that the condition of the article is reasonably good, ‘comparing favorably with other articles of like kind, in view of the average quality of such articles.’” *Utah State Medical Ass’n v. Utah State Employees Credit Union*, 655 P.2d 643, 645 (Utah 1982). The case cited by the Utah Supreme Court in *Utah State Medical Ass’n* held that “when the word ‘good’ is used to describe the ‘quality’ or ‘condition’ of a chattel, it may be found to be an affirmation of fact that the chattel is sound, reliable and right, as opposed to the characterization ‘poor condition.’” *Schwartz v. Gross*, 93 Ohio App. 445, 451 (Ohio Ct. App. 1952).

In this case, the words “good operating condition” and the context of the Merger Agreement justified the trial court in determining that the condition of each piece of equipment should be compared to similar equipment “operating” in the industry. In any event, the trial court was entitled to hear evidence regarding any industry-specific meaning of the term “good operating condition”, as when “particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage.” *Ermolieff v. R. K. O. Radio Pictures, Inc.*, 19 Cal. 2d 543, 550 (Cal. 1942); *see also Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 501 (Pa. 2001) (“custom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts”). This does not violate the parol evidence rule because “the usage evidence does not alter the contract of the parties, but

on the contrary gives the effect to the words there used as intended by the parties.” *Ermolieff*, 19 Cal. 2d at 550. The Radmans have failed to identify an alternate interpretation that comports with the contractual language or show that the trial court’s interpretation was erroneous. Accordingly, the trial court’s interpretation should be affirmed.

To be sure, the Good Operating Condition Warranty does require some factual findings. The warranty is broadly worded and applies to each separate piece of equipment owned by GFI. The trial court was required to determine factually what would be a similar piece of equipment, how it should perform, and whether the equipment at issue met that standard, and it did so with respect to the electric melters. [R. 4889.] These, however, are factual findings, and the Radmans have neither briefed this issue nor have they marshaled the evidence with respect to those factual findings. It is now too late for them to do so. Accordingly, the trial court’s findings related to this warranty must be assumed to be correct, and the trial court affirmed. *See Chen v. Stewart*, 2004 UT 82, ¶¶19 and 80, 100 P.3d 1177.

B. The Trial Court Properly Interpreted the No Misrepresentations Warranty.

The trial court’s interpretation of the No Misrepresentations Warranty is equally correct. The trial court interpreted the plain language of the provision as a warranty “that any statements of fact made by them [the Radmans] prior to November 26, 1997, were true and that the Radmans did not omit to tell Flanders any fact that would be ‘necessary or desirable to make complete, accurate and not misleading’ all of the other

representations and warranties in the Agreement, including the Section 3(d) and 3(h) warranties.” [R. 4887, ¶5.] This interpretation is also entirely consistent with the plain language of the provision, and the Radmans have not identified an alternate interpretation nor have they shown how this interpretation is erroneous.

Rather, the Radmans appear to object to the trial court’s factual findings that certain statements the Radmans made were “necessary or desirable” to inform Flanders as to the other warranties in the Merger Agreement. However, “trial courts are afforded broad discretion in determining the admissibility of evidence” and those determinations will only be disturbed if there is “an abuse of discretion.” *Lee v. Langley*, 2005 UT App 339, P9 (Utah Ct. App. 2005) (quoting *Vigil v. Division of Child & Family Servs.*, 2005 UT App 43, P8, 107 P.3d 716). Whether a particular piece of evidence is relevant or helpful to a determination of whether a breach of a warranty has occurred is a factual determination, and again the Radmans failed to brief this issue or marshal the evidence with respect to these factual findings. Accordingly, the trial court’s interpretation of this warranty and factual determination that the Radmans breached this warranty by making numerous false representations regarding the electric melters [R. 4878-79] should be affirmed.

III. The Trial Court Used the Proper Standard for Damages

After finding that the electric melters did not meet the Good Operating Condition Warranty and that the Radmans breached the No Misstatements Warranty, the trial court was required to determine the damages suffered by Flanders. The measure of damages

for breach of a warranty, as correctly noted by the trial court [R. 4890 ¶16], is the excess of the value the asset would have had if it had been as warranted over the actual value of the asset. *See Brown v. Richards*, 840 P.2d 143, 150 (Utah App. 1992); UTAH CODE ANN. §70A-2-714.¹ In this case, the breach of the Good Operating Condition Warranty related to the condition of the electric melters. [R. 4889-90.] No warranty as to the condition or value of the GFI stock was at issue, and the cases cited by the Radmans related to the valuation of stock in dissenters rights cases are completely irrelevant.²

Therefore, the trial court was obligated to find the value of the electric melters as warranted and their actual value, the difference being one part of Flanders' damages. Of course, finding the value of an asset is not a matter of contract interpretation, but is an issue of fact. *See Hogle v. Zinetics Med., Inc.*, 2002 UT 121, ¶10, 63 P.3d 80; *Wasatch Bank v. Leany*, 727 P.2d 633, 634 (Utah 1986). The trial court correctly concluded, after hearing all of the evidence, that the value in this transaction was in the assets of GFI (and not its goodwill, trade name, client list, or other intangibles), and therefore, for purposes

¹ Although Flanders recognizes that the warranties at issue are not governed by the Utah Uniform Commercial Code, UTAH CODE ANN. §70A-2-101 et seq. ("UCC"), the result under the UCC is helpful to a resolution of this issue.

² In fact, it makes no sense to talk about the "operating condition" of stock. Notably, the trial court also found that the Radmans breached the warranty regarding the financial condition of the company as the warranted tax returns omitted material expenses that should have appeared in them. [R. 4887.] This warranty arguably relates to the value of the stock, however the trial court found that Flanders had not met its burden of establishing its damages from the breach of this warranty, demonstrating the trial court's understanding of the difference between a warranty dealing with equipment and a warranty dealing with the company as an entity.

of finding the value of the assets as warranted, the transaction could be analogized to an asset purchase. [R. 4884 ¶36.] Far from an “interpretation” of the contract, this was simply a factual finding regarding where the value in the transaction lay.

The trial court then made the factual determination that, aside from the liquid assets (accounts receivable, inventory) and the electric melters, the rest of the GFI assets were essentially worthless. This finding is supported by extensive evidence from Mr. Mercer, whom the Court recognized as an expert in the industry, as to the condition and value of the GFI equipment, including the electric melters. [R. 4944 pp. 610-16 and 703-18.] The trial court then made factual findings as to the value of the accounts receivable and inventory, leaving a simple arithmetic equation to determine the value of the melters as warranted. [R. 4884-85.]

The Radmans’ persistence in referring to the trial court’s value findings as an “interpretation” of the contract is puzzling. Fully half of their briefing on this issue relates to purported “subjective intent” evidence, alleged “extrinsic evidence”, and the trial court’s alleged “interpretation” of the contract as an asset purchase. These concepts are entirely irrelevant to the trial court’s consideration of evidence and factual determination as to the value of an asset.

A. The Trial Court’s Factual Finding of the Value of the Electric Melters as Warranted is Correct.

Aside from their perplexing contract-based arguments, the Radmans assert that the trial court’s factual finding that the value of the electric melters as warranted was \$1,162,528 was clearly erroneous. This argument fails on both procedural and

substantive grounds. First, the Radmans failed to properly marshal the evidence in their challenge to this factual finding. Second, the trial court's finding was correct on the merits. The trial court looked to the substance of the transaction rather than its form, *see MacKay v. Hardy*, 896 P.2d 626, 629 (Utah 1995); *Tuft v. Federal Leasing*, 657 P.2d 1300, 1303 (Utah 1982), and applied the commonsense approach that the best evidence of the value of the electric melters was the value placed on them by the parties themselves. Here there was no other practical way to determine the value of these novel pieces of equipment, and the trial court's findings should be affirmed.

1. The Radmans Failed to Marshal the Evidence.

The Radmans' effort to marshal the evidence related to the trial court's finding of the value of the electric melters as warranted is a hopelessly short list of eleven "facts" that they allege are the only facts relevant to this determination in this entire 9-day trial, with no explanation of even those bare facts or how they support the trial court's conclusions. To successfully challenge the trial court's findings, the Radmans "must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Chen v. Stewart*, 2004 UT 82, ¶76, 100 P.3d 1177 (internal quotations omitted). The Radmans are not allowed to just marshal some of the evidence, but are required to "present 'every scrap of competent evidence introduced at trial which supports the very findings the appellant resists' and then 'ferret out a fatal flaw in the evidence.'" *T.H. v. R.C. (In re E.H.)*, 2006 UT 36, ¶64, 137 P.3d 809. The Radmans are

then required to describe how the evidence presented related to and supported the trial court's conclusion:

To appropriately marshal evidence, parties must 'provide a precisely focused summary of all the evidence supporting the findings they challenge. This summary must correlate all particular items of evidence with the challenged findings and then convince us that the trial court erred in the assessment of that evidence to its findings.' Indeed, parties challenging factual findings must 'fully embrace the adversary's position' and play 'devil's advocate.'

Parduhn v. Bennett, 2005 UT 22, ¶30, 112 P.3d 495. The Radmans may not simply "re-argue the factual case presented in the trial court" and also cannot merely present carefully selected facts and excerpts from the record in support of their position. *Chen* 2004 UT 82 at ¶78. If the evidence is inadequately marshaled, the court assumes that all findings are adequately supported by the evidence. *See id.* at ¶19 and ¶80.

The Radmans have failed to meet this burden. First, their paltry list of eleven "facts" omits an enormous amount of relevant and persuasive evidence. For example, the Radmans failed to marshal the following relevant evidence supporting the trial court's finding of the value of the electric melter as warranted:

1. Ivan Radman testified that all of the GFI equipment other than the electric melters was purchased at a bankruptcy auction in approximately 1990. [R. 4942 p. 45.] Ivan Radman testified that at the time the Radmans purchased those assets out of bankruptcy, the assets were already 25 years old. [R. 4942 p. 46.] These two facts support a conclusion that the assets of GFI other than the electric melters were old, in relatively poor condition, and had very little value as operating assets.

2. A major focus of the Radmans' discussions with Steve Clark was the electric melters and their potential benefit to Flanders. [R. 4942 pp. 53 and 61-72; R.4946 pp. 275-78.] This supports the trial court's finding that both parties viewed the purchase of the electric melters as the primary purpose of this transaction.

3. Ivan Radman considered the existing GFI melters to be "filthy, dirty, they were hard to work with" and the Radmans' primary purpose in running GFI was to build the electric melters. [R. 4942 pp. 48-49.] In addition, the Radmans specifically told their employees to make the electric melters look artificially efficient when Flanders viewed the plant prior to the merger. [R.4942 p. 460.]

4. Ivan Radman represented that the electric melters were complete and fully operational at a very high level of efficiency. [R. 4942 pp. 53 and 152.] Ivan Radman told Steve Clark that the electric melters produced more than twice as much fiberglass than the gas melters (which were the other GFI assets) using half the labor of the gas melters, and were producing fiberglass at 2 to 2 ½ cents per square foot. [R. 4942 pp. 151-61.] Moreover, Ivan Radman asked Rodney Smith to prepare spreadsheets showing the cost per square foot of fiberglass produced on the electric melters. [R. 4943 pp. 504-09.] These facts support the trial court's conclusion that the value of this transaction lay in the electric melters, since this evidence shows that the Radmans' were particularly focused on selling Flanders on the benefits of the electric melters, and not the other assets of GFI.

5. Ivan Radman testified that the Radmans had tried unsuccessfully to sell GFI to other companies prior to the transaction with Flanders. Ivan Radman “would have sold Fiber – GFI the week I bought it, because I don’t like that kind of system...” [R. 4942 pp. 54-55.] In fact, the evidence suggests that Ivan Radman told his employees that he was going to shut down GFI. [R. 4942 pp. 55-56 and 452-54.] This evidence further highlights the poor condition and worthlessness of the GFI assets as an operation.

6. Darrell Cossey, GFI’s maintenance manager, testified that other than the electric melters, the GFI equipment had been unchanged since 1978, and had been operating for years prior to 1978. [R. 4943 pp. 410-12.] James Mercer, recognized by the trial court as one of the few experts in this field [R. 4881-82 ¶26 and 4883 ¶31] testified that, other than the electric melters, the GFI equipment was old and the vast majority of it was in poor condition. [R. 4944 pp. 610-16.] This further emphasizes the worthlessness of the GFI assets other than the electric melters.

7. The Merger Agreement values the transaction at \$1,500,016. [Ex. P-1.] The value given to the transaction by the parties supports the trial court’s finding of the amount of value to allocate to the assets transferred in the transaction.

8. The Radmans warranted that the tax returns accurately represented the financial condition of GFI, which includes the value of its assets. [Ex. P-1.] Those tax returns state the value of the inventory as \$88,353, the value of accounts receivable as \$249,119, and the value of all of the rest of the assets as \$5,749. [Ex. P-1, Schedule 3(d).] This warranted information supports both the trial court’s finding that the assets

other than the electric melters were worthless, and the trial court's computation of the value of the electric melters as warranted by taking the value of the transaction and subtracting the value of the inventory and accounts receivable.

The above facts, in addition to those "marshaled" by the Radmans, provide a more than adequate basis for the trial court's finding that the GFI assets other than the electric melters were valueless and that the Radmans and Flanders both viewed the electric melters as comprising the value in this transaction.

Second, the Radmans failed to adequately perform their marshalling obligation even with respect to the few facts they did identify. Marshalling requires the party to show the appellate court how the facts identified could have convinced the trial court to make its factual finding. *See Parduhn*, 2005 UT 22, ¶30. The Radmans, however, simply listed a few facts, failed to describe their significance, and moved right along to re-arguing the position they took at trial. Since the Radmans have failed to marshal the evidence regarding this factual finding, the finding is presumed correct and the trial court ruling should be affirmed.

2. No Clear Error

If this Court were to review the trial court's findings of fact, those findings entered by the trial court are reviewed by an appellate court under the "clearly erroneous" standard. *See Utah R. Civ. P. 52(a)*. "For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by

the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination.” *State v. Green*, 2005 UT 9, ¶25, 108 P.3d 710.

Even had the Radmans properly fulfilled their duty to marshal the evidence, which they did not, they simply cannot show that the trial court’s factual determination did not have adequate support. The evidence described above show that the assets, other than the electric melters, were old and in poor condition, that both Flanders and the Radmans viewed the electric melters as the primary assets of GFI and the purpose for the merger, and that the inventory and accounts receivable had a value of \$88,353 and \$249,119, respectively. Since the trial court’s factual findings are supported by adequate evidence they should be affirmed.

B. The Trial Court’s Finding That the Actual Value of the Electric Melters Was Zero Is Correct.

The Radmans begin their argument regarding this finding of fact by “marshalling the evidence” with the following *ipse dixit*: “the list of evidence marshalled above is also the evidence upon which the trial court might have based its calculation of this value.”

[Appellant Brief p. 39.] This is a very odd statement, in which the Radmans are alleging that the trial court relied on eleven facts, and only those eleven, for both the finding that the electric melters should have had a value of over one million dollars and the finding that the electric melters actually had a value of zero. This rather incongruous statement then spawns a tangential argument based entirely upon the Radmans’ interpretation of a Confidentiality and Nondisclosure Agreement (which the trial court never interpreted) dated two and a half years after the merger.

With respect to their challenge to this factual finding, the Radmans have utterly failed to marshal any evidence (aside from their entirely inconsistent statement) and have in no way shown how the trial court might have arrived at its factual conclusion. In fact, there is plenty of evidence not marshalled by the Radmans to support the finding that the electric melters had no value:

1. Ivan Radman testified that the electric melters might still be experimental. [R. 4942 p. 96.] When juxtaposed with Ivan Radman's representation that the electric melters were complete and fully operational at a very high level of efficiency, [R. 4942 pp. 53 and 152], this evidence supports the trial court's finding that the electric melters in fact did not have operational value as was warranted.

2. Fiberglass manufacturing is a very small margin business that relies upon high volume continuous manufacturing to make a profit. [R. 4942 pp. 197-98.]

3. Production of fiberglass on the electric melters was sporadic and low-volume, and Flanders could have purchased fiberglass cheaper than they manufactured it on the electric melters. [R. 4942 pp. 199 and 258.]

4. In fact, the electric melters were inoperable at least as often as they were operable. [R. 4943 p. 419.]

5. Darrell Cossey, Rodney Smith, and James Mercer described a host of operating problems with the electric melters that would cause the machines to be shut down for extended periods of time. [R. 4943 pp. 420-446 and 512-16; R. 4944 pp. 703-18.]

6. Flanders spent at least \$1,377,304.19 in projects designed to repair the electric melters. [R. 4945 p. 60.]

7. Flanders completely wrote-off the GFI assets for accounting purposes. [R. 4942 pp. 252-554.]

This list comprises only part of the evidence that should have been marshalled by the Radmans and was not. Since the Radmans have failed to satisfy their burden to marshal the evidence, the trial court's rulings are assumed to be correct.

Moreover, one tangential fact (the Confidentiality Agreement) that might arguably conflict with the trial court's ruling is hardly a sufficient basis for a conclusion that the finding was "clearly erroneous." Accordingly, the trial court's determination should be affirmed.

IV. The Court's Ruling Denying Prejudgment Interest Is Correct.

The Radmans argue that the trial court erred in denying them an award of prejudgment interest before Flanders' offset is applied because: (1) Flanders is not entitled to prejudgment interest, (2), and the awards arise on different dates. The Radmans base these arguments on misguided interpretations of the case law, which do not comport with the purpose or logic behind offsets and prejudgment interest. As explained below, the Radmans' arguments in favor of preserving their prejudgment interest award fail based on well-established legal principles.

A. There is no requirement that both awards must have prejudgment interest in order to offset the awards.

The Radmans misinterpret and misapply *Brown v. Richards*, 840 P.2d 143, 152 (Utah App. 1992), when they claim that because Flanders has not been awarded prejudgment interest, the parties' awards cannot offset each other until after the Radmans' prejudgment interest is calculated. Contrary to the Radmans' stated position, Utah law does not require that "both awards are entitled to prejudgment interest." Flanders is not aware of any such requirement in, or out, of Utah. The mere fact that *Brown* dealt with a situation where both parties were entitled to an award of prejudgment interest does not mean that an offset should not be deducted if one party is not entitled to an award of prejudgment interest.

Although Utah courts have not specifically addressed the issue of whether an unliquidated counterclaim should be offset before prejudgment interest is awarded on a liquidated claim, Utah law appears consistent with the rules articulated by other courts facing this precise issue. See *Orlob v. Wasatch Med. Management*, 2005 UT App 430 ¶37, 124 P.3d 269 ("All that is required is that the offsets be deducted before the interest is calculated."). See also *Richard Barton Enters., Inc. v. Tsern*, 928 P.2d 368, 381 (Utah 1996); *Brown v. Richards*, 840 P.2d 143, 152 (Utah App. 1992). Other courts facing this issue have applied several different rules, depending on the factual situation, to determine how prejudgment interest should be addressed in light of competing claims. See, e.g., *Local Oklahoma Bank v. The United States*, 59 Fed. Cl. 713, 722-23 (Fed. Cl. 2004)

(explaining four possible rules: interest on the balance, interest on the entire claim, conversion of the liquidated claim, and counterclaim as a discount).

When “one party has a liquidated claim subject to prejudgment interest and the other party has an unliquidated set-off, not subject to prejudgment interest, the rule on calculating depends on whether the claims are related.” *Id.* at 722. When “both claims arise out of related transactions, courts employ the ‘interest on the balance’ rule.” *Id.* Applying the “interest on the balance” rule, prejudgment interest is available only on the net difference between the two claims, and the amount of the counterclaim is offset against the liquidated claim. *Id.* (citing *Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc.*, 416 F.2d 207, 212 (8th Cir. 1969)). Interest is then calculated on the balance due after deducting the offset. *Id.* The objective of the rule is to compensate for lost use of money only to the extent of the difference between the two claims. *Id.* The interest on the balance rule has been applied in numerous situations similar to the present case, as demonstrated below, and should be applied here.

As a matter of first impression in Wyoming, the Wyoming Supreme Court addressed whether prejudgment interest should be awarded when one party has a liquidated claim and the other party seeks to offset its unliquidated claim. *Hollon v. McComb*, 636 P.2d 513, 517 (Wyo. 1981). The court looked to the Supreme Courts of Colorado and Arizona for guidance. *Id.* (quoting *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 603 P.2d 513 (Ariz. 1979) (stating “if the unliquidated counterclaim offsets are attributable to the same contracts which are the basis of the

primary liquidated claims, those claims and the unliquidated counterclaims are offset and prejudgment interest is allowed only on the net difference”); *York Plumbing & Heating Co. v. Groussman Investment Co.*, 443 P.2d 986 (Colo. 1968) (holding that an unliquidated claim should be offset against a liquidated claim prior to the computation of interest at least in those cases where the claims arise out of the same general transaction”)). Following their reasoning, the Wyoming Supreme Court ruled:

A contractor should not be allowed to perform his obligations poorly, and thus force a purchaser to make expenditures correcting the shoddy work, and still collect interest on all the monies owed to him under the contract. Since the contractor should have expended the money the purchaser paid to repair the purchase, the contractor should not be entitled to prejudgment interest on that amount. The money the purchaser properly used to correct the defects in the contractor’s work should be viewed as having been paid to the contractor, thus canceling any debt up to that amount.

Id. at 518. Thus, the Wyoming court concluded that “[i]t simply would not make good sense to charge appellees interest on money they do not owe.” *Id.*

Other courts have also held that prejudgment interest cannot be added to a liquidated claim until after the court offsets the amount of a related, unliquidated counterclaim. *See, e.g., Harmon Cable Comm. of Neb. Ltd. Pt. v. Scope Cable T.V., Inc.*, 468 N.W.2d 350, 371 (Neb. 1991). This rule is generally applicable where the liquidated claim and the offsetting unliquidated claim arise from the same transaction or contract. *See, e.g., York Plumbing & Heating Co. v. Groussman Inv. Co.*, 443 P.2d 986, 988 (Colo. 1968). Of particular significance to this appeal, the rule always applies where the unliquidated counterclaim is for defective goods or performance and the liquidated claim is for failure to pay for those goods or performance. *See, e.g., Gemini Farms v.*

Smith-Kem Ellensburg, Inc., 16 P.3d 82, 84 (Wash. App. 2001); *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 603 P.2d 513, 537-38 (Ariz. 1979).

Here, Flanders' counterclaim arose from the same contract as the Radmans' claim for failure to pay. Moreover, the Court awarded Flanders over \$1 million because it found that GFI's primary asset—the electric melters—were so flawed as to be valueless and that the Radmans had failed to perform under the contract by breaching a number of warranties. [R. 4887-90.] Thus, under well-established legal precedent, the Radmans are not entitled to prejudgment interest on their liquidated claim until the offset of the amount awarded to Flanders. Because the trial court awarded Flanders more than twice what it awarded the Radmans, there can be no prejudgment interest awarded to the Radmans following application of the offset. [R. 4893.]

Moreover, it would be inconsistent with the purpose for awarding prejudgment interest not to require the offset. This Court has stated that prejudgment interest is allowed “to compensate for the full loss suffered by the plaintiff in losing the use of the money over time.” *Kraatz v. Heritage Imports*, 2003 UT App. 201 ¶75, 71 P.3d 188. In this case, the trial court found that the damage to Flanders arose prior to the damage to the Radmans, and that the Radmans were never denied the use of any money. [R.4893] Accordingly, the Radmans were entitled to no further payment of the purchase price until Flanders' damages were offset.

B. The Radmans are misguided in their argument that the awards must arise at the same time.

The Radmans argue that the awards at issue arose at different times and, thus, prejudgment interest should be calculated prior to the offset. The Radmans appear to base their argument on a literal interpretation of the statement in *Richard Barton Enterprises* that “offsets should be deducted before interest is calculated when an interest bearing award arises at the same time as the offsets.” *Richard Barton Enters. , Inc. v. Tsern*, 928 P.2d 368, 381 (Utah 1996) (citing *Brown v. Richards*, 840 P.2d 143, 152 (Utah App. 1992)). Such a literal interpretation is too narrow and misplaced. While the Utah courts have not squarely addressed the issue presently before this Court, the statement from *Richard Barton Enterprises* is actually consistent with the authority cited herein. Indeed, the language “same time,” as used in *Richard Barton Enterprises*, should be equated with the language used by other courts, such as “same general transaction,” *York Plumbing & Heating Co. v. Groussman Inv. Co.*, 443 P.2d 986, 988 (Colo. 1968), “same transaction,” *Harmon Cable Comm. of Neb. Ltd. Pt. v. Scope Cable T.V., Inc.*, 468 N.W.2d 350, 371 (Neb. 1991), “related transactions,” *Local Oklahoma Bank v. The United States*, 59 Fed. Cl. 713, 722 (Fed. Cl. 2004), and “directly related” or “related to the one transaction.” *Fleet Financial Group, Inc. v. Advanta Corp.*, 2003 Del. Ch. LEXIS 127, *12, 15. Here, both the damages awarded to Flanders and to the Radmans arose under the Merger Agreement and out of the same facts and the same transaction. The damages relate directly to the same mutual duties and obligations owed by the parties to each other. More importantly, the Radmans breached the warranties effective on the

date of Closing. Thus, if the damage to Flanders had been applied as of that date, the Radmans would have been entitled to no payment at all. The value of additional shortfall shares at issue was more than offset by the damage to Flanders.

Therefore, the trial court's ruling offsetting the awards prior to awarding any prejudgment interest was correct and should be affirmed.

V. **The Radmans' "Atmosphere of Prejudice" Argument is Improper and Insufficiently Briefed.**

The Radmans assert that the trial court made "numerous erroneous rulings that resulted in a cumulative effect of prejudice" to the Radmans. [Appellant Brief p. 44.] It is incumbent upon a party challenging a trial court's evidentiary rulings to specifically identify the objectionable evidence, and identify where in the record the evidence was offered and received or rejected. *See* UTAH R. APP. P. 24(e). The appealing party must also present a coherent legal argument as to why the evidentiary ruling was in error, identifying the rule of law and the standards that were allegedly breached by the trial court. Finally, it is up to the appealing party to show how the errors prejudiced the outcome of the case, as the Radmans' own citation reveals. *See Brown v. Richards*, 840 P.2d 143, 149 (Utah App. 1992). Instead of satisfying these obligations, the Radmans' brief on this argument contains a series of conclusory assertions of systemic error that come perilously close to impugning the motives of the trial court. This argument is insufficiently briefed and should be dismissed, since this Court "is not 'a depository in which the appealing party may dump the burden of argument and research.'" *West Jordan City v. Goodman*, 2006 UT 27, ¶29, 135 P.3d 874.

Oddly, the Radmans appear to admit that none of the allegedly improper rulings were harmful. [Appellant Brief p. 44.] Therefore, even if the trial court committed error, any such error was harmless and does not warrant reversal. *See Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995). The Radmans' only assertion of "harm" is that their attorneys had to do more work and were allegedly distracted from their trial preparations.³ Even assuming this to be true, the Radmans have not shown how the trial court's ultimate ruling in the case was affected by this "atmosphere of prejudice." This, of course, is what is meant by "harm."

Finally, with respect to these alleged errors, Flanders notes that "trial courts are afforded broad discretion in determining the admissibility of evidence" and those rulings will not be reversed "absent an abuse of discretion." *Lee v. Langley*, 2005 UT App 339, ¶9, 121 P.3d 33 (quoting *Vigil v. Division of Child & Family Servs.*, 2005 UT App 43, P8, 107 P.3d 716). With this standard in mind, Flanders briefly visits each of the asserted errors.

With respect to Radmans' claim of late produced documents, the identity of the documents and where they were offered and received into evidence is not disclosed. Rather, the Radmans point to their pre-trial motion in limine, which was equally vague.

With respect to the Radmans' claim of improperly admitted summaries, the trial court's rulings incorporate many subsidiary fact findings, which are not properly briefed,

³ This argument actually appears more akin to an "ineffective assistance of counsel" argument, which of course is a criminal law concept and not civil.

challenged, or marshaled by the Radmans. [R. 4942 pp. 202-212; R. 4942 pp. 218-228.]

Moreover, the trial court heard extensive argument on this point and gave it all due consideration, and clearly did not abuse its discretion.

With respect to the Radmans' claims of late designation of experts, they only cite to the record where Steven Clark testifies as to damages. They also fail to support their assertions that the deadlines were passed, fail to address the trial court's actual ruling and the reasons given, and fail to identify a legal basis for claiming that the trial court erred.

With respect to the Radmans' claim of improper substitution of a party, the Radmans' present no legal argument supporting their claim, nor do they specifically address the content of the trial court's ruling.

With respect to the Radmans' claim of improper settlement discussion testimony, they have failed to identify the testimony or where in the record it occurred. Nor do they present any legal argument or address the trial court's specific ruling.

In short, this argument is insufficiently briefed and should not be considered by the Court. It should be observed that the trial of this matter was extended over almost a year, with significant time between the dates on which evidence was heard. Given these facts, any prejudice the Radmans complain about because of inadequate time to prepare was rejected by the trial court, due to the several opportunities the Radmans had to review evidence produced after the start of trial.

CROSS-APPEAL ARGUMENT

VI. The Trial Court Erred in Ruling that the Merger Agreement was Ambiguous.

The basis of the Radmans' claim against Flanders is Section 9 of the Merger Agreement. In awarding judgment for the Radmans on this claim, the trial court found that this provision was ambiguous, and in fact, the trial court was even more specific, finding that it was the last phrase of that section – “with such Short Fall shares valued at the Market Price” – that was ambiguous. [R.4865 ¶37.]⁴ Only after resolving this alleged ambiguity in the Radmans' favor was the trial court able to award judgment in the Radmans' favor. This ruling was in error, and is reviewed *de novo* by this Court. See *Peterson v. The Sunrider Corporation*, 2002 UT 43, ¶14, 48 P.3d 918.

A contract is only ambiguous if “it is unclear, it omits terms, or ‘the terms used to express the intention of the parties may be understood to have two or more plausible meanings.’” *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶15. A proffered alternate interpretation “must be plausible and reasonable in light of the language used,” and “to merit consideration as an interpretation that creates an ambiguity, the alternative rendition

⁴ It bears noting that the parties stipulated, and the trial court found, that the Merger Agreement “speaks for itself as to its terms and conditions.” [R. 4862 ¶23.] This, of course, is a finding that the contract is not ambiguous. See *Clark v. Ducheneau*, 26 Utah 97, 104 (Utah 1903); *Bartels v. Brain*, 13 Utah 162, 168 (Utah 1896); *Groome v. Ogden City Corp.*, 10 Utah 54, 58 (Utah 1894). Despite this finding, the trial court proceeded to make the inconsistent finding that Section 9(a) of the Merger Agreement was ambiguous. [R.4865 ¶37.]

‘must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction.’” Id. at ¶17 (emphasis added).

The contract provision at issue (the “Market Protection Clause”) reads as follows:

Pursuant to this Agreement, the GFI Shareholders are receiving 187,502 shares of Flanders Capital Stock as set forth on Exhibit "A" attached hereto. Since the 187,502 shares of Flanders Capital Stock are restricted shares, each share has a discounted market value of \$8.00 per share, for an aggregate market price of \$1,500,016 (the "Market Price"). If at the time any of the GFI Shareholders sell any of the 187,502 shares of Flanders Capital Stock at a price below \$8.00 per share, and the average trading price for the preceding three business days of Flanders Capital Stock as listed on the NASDAQ Stock Exchange is below \$8.00 per share, Flanders shall deliver additional restricted shares of Flanders Common Stock to such GFI Shareholders in order to maintain the Market Price (the "Short Fall"), with such Short Fall shares valued at the Market Price.

The Market Protection Clause is relatively short and has no facial deficiencies.

Therefore, for the trial court to have properly held that the Market Protection Clause was ambiguous, it would have to have found that there were two or more plausible interpretations. Although one may wish that the parties had used language that more clearly expressed their intent, the language itself only allows one, not two, plausible meanings. Because of this fact, the trial court erred.

Although the trial court held that the phrase “with such Short Fall shares valued at the Market Price” was ambiguous [R.4865 ¶37], that is clearly inaccurate. That phrase is quite clear that the additional shares issued will be valued at an amount represented by the defined term “Market Price.” It is the definition of that term that the Radmans claim is ambiguous. [R. 4865; R. 4939 pp. 27-28.] However, that term is defined earlier in the provision with the phrase “each share has a discounted market value of \$8.00 per share,

for an aggregate market price of \$1,500,016 (the ‘Market Price’).” Therefore, only two definitions for the term “Market Price” are even possible -- \$8 or \$1,500,016.

A. Flanders’s Interpretation of “Market Price” is Plausible.

Flanders’ interpretation of the term “Market Price” as meaning \$8 is the only interpretation that makes sense in the context of the Merger Agreement as a whole. Under Flanders’ interpretation, each share sold by the Radmans could be treated separately, and if that share were sold for less than \$8, that Radman would be entitled to an additional fraction of a share (up to a maximum of one additional share) equal to the shortfall on the sale of that share divided by the “Market Price” of \$8. This interpretation is the only reasonable interpretation allowed by the actual words, and causes the provision to function even if only some shares were sold, as the provision contemplated. *See Dixon v. Pro Image, Inc*, 1999 UT 89, ¶14, 987 P.2d 48 (“a court must attempt to construe the contract so as to ‘harmonize and give effect to all of [its] provisions.’”)

B. The Radmans’ Interpretation of “Market Price” is Not Plausible.

The Radmans’ interpretation, on the other hand, is that “Market Price” means \$1,500,016, which renders the last phrase nonsensical and provides no guidance on how many shares are to be issued. Therefore, the Radmans argue, the provision is ambiguous, and should be interpreted as an absolute guarantee of receiving \$1.5 million and that Flanders was obligated to issue an amount of additional shares equal to the shortfall amount divided by the trading price of Flanders stock on the date the shortfall shares were issued.

Defining “Market Price” as \$1,500,016 leads to absurd results. Giving meaning to all of the words in the provision, as the Court must, the Radmans’ interpretation would produce the following result: if a Radman sold one share at \$4, Flanders would issue an amount of shares equal to the \$4 shortfall divided by the “Market Price” of \$1,500,016 – or .0000027 shares. In fact, under this interpretation, if all of the shares were entirely worthless, the Radmans would get one additional share to split between them (1,500,016 shortfall divided by 1,500,016 market price). This interpretation is not “plausible and reasonable in light of the language used,” and if fact only serves to create an ambiguity. As a matter of contract interpretation, courts rightly refuse to interpret ambiguity into a contract such that they would be “required to divine a formula on our own and . . . thereby add a term to the parties agreement that they did not include themselves.” *R&R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1079 (Utah 1997).

Lacking any plausible contrary interpretation of the Merger Agreement, there can be no ambiguity in the Merger Agreement, but only a generalized dissatisfaction on the part of the Radmans. However, dissatisfaction with an agreed-upon deal is not grounds for breach of contract, as Utah courts “will not make a better contract for the parties than they have made for themselves.” *Bakowski v. Mountain States Steel, Inc.*, 2002 UT 62, ¶19, 52 P.3d 1179. Since the Market Protection Clause has only one plausible interpretation, the trial court erred in holding that it was ambiguous and its decision in favor of the Radmans on their claim for breach of contract should be reversed.

VII. The Trial Court Improperly Ignored the Language of the Contract in its Interpretation.

Even if the Market Protection Clause were ambiguous, the trial court erred in the way it interpreted the provision. Although a trial court's interpretation of an ambiguous contract is reviewed under a "clearly erroneous" standard, the question of whether a court properly applied a rule of uniform application, such as a rule of contract interpretation, is a legal question reviewed for correctness. *See Wade v. Stangl*, 869 P.2d 9, 12 (Utah Ct. App. 1994); *Lysenko v. Sawaya*, 2000 UT 58, ¶17, 7 P.3d 783. The trial court held that the term "Market Price" in the provision meant \$1,500,016, that this meant "that the short fall shares would be valued based on the Market Price of \$1.5 million", and that the computation of how many shares would be issued would "be accomplished by dividing the Short Fall amount by the trading price of Flanders shares on the date the Short Fall shares were issued." [R. 4867-68.] This interpretation completely rewrites the language of the provision, adding terms and computations that cannot be found in the contract, such as the trading price on the date of issuance of shares.⁵ Moreover, if the parties had intended "Market Price" to mean the "trading price" the clearly could have said so, as is evident from the fact that they used that term in the very provision at issue. By giving the provision a meaning that cannot be harmonized with the words themselves, the trial court

⁵ In fact, this interpretation leaves open further ambiguities. Does trading price mean average trading price for the day, opening price, closing price, the daily high price, the daily low? More importantly, any additional shortfall shares would also be restricted, meaning that their value could also change dramatically before the Radmans would ever have been able to sell them, rendering this computation largely pointless.

overstepped its role. *See WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶25, 54 P.3d 1139 (“It is the general rule that if an agreement is ambiguous because of a lack of clarity in the meaning of particular terms, it is subject to parol evidence as to what the parties intended with respect to those terms.” (emphasis added)). Instead, the trial court interpreted the allegedly ambiguous term “Market Price” and then proceeded to rewrite the Market Protection Clause. This was improper, and the trial court’s interpretation should be reversed.

VIII. The Trial Court Improperly Ruled That the Radmans Were Co-Prevailing Parties

In post-trial briefing regarding the award of attorney fees, Flanders suggested to the trial court that it could find that both parties prevailed based on language from *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶25, 40 P.3d 1119, and *Carlson Distrib. Co. v. Salt Lake Brewing Co., L.C.*, 2004 UT App 227, ¶37, 95 P.3d 1171.

Prior to the trial court’s decision on this matter, this court issued an opinion clearly stating that “[t]here can be only one prevailing party in any litigation.” *Cache County v. Beus*, 2005 UT App 503, ¶14, 128 P.3d 63. Although Flanders’ counsel brought this authority to the trial court’s attention prior to and at the hearing on this matter, the trial court nevertheless held that both parties prevailed. [R. 4949 pp. 29-30; R. 4891-92.] Based on this Court’s holding in *Cache County*, that ruling was in error.

Instead, the trial court should have ruled that Flanders was the prevailing party and awarded Flanders its attorney fees. The Merger Agreement in this case awards attorneys’ fees to the prevailing party in any litigation, stating that “[i]n the event of any action at

law or suit in equity in relation to this Agreement, the prevailing party shall be paid by the other party a reasonable sum for the attorneys' fees and expenses incurred by such prevailing party." [Ex. P-1, Section 12(m).] This provision allows Flanders to recover its reasonable attorneys' fees and expenses incurred in successfully pursuing the breach of warranty claims.

The Utah Supreme Court has adopted and approved the "flexible and reasoned" approach first used by the Utah Court of Appeals in *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 557 (Utah Ct. App. 1989). See *A.K.&R. Whipple Plumbing & Heating v. Guy*, 2004 UT 47, ¶26, 94 P.3d 270. This approach begins (and possibly ends) with the "net judgment rule," pursuant to which the party awarded the most damages is the prevailing party. See *Mountain States*, 783 P.2d at 557. If the "net judgment rule" provides a sensible result, the Court need not look any further. However, if the Court is uncertain of the "net judgment rule" result, it can consider other "common sense perspectives" that the Court finds applicable to the case at issue. See *Whipple*, 2004 UT 47 at ¶26. Different courts have proposed different tests to apply in determining who is the prevailing party. The Utah Court of Appeals has compiled the following non-exclusive list of considerations for the trial court in making that determination:

(1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims.

Carlson, 2004 UT App 227 at ¶37. This list can be summarized by asking which party prevailed on the predominating claim.

Application of the “flexible and reasoned” approach in this case results in Flanders being the prevailing party. The “net judgment rule,” the starting point in this approach, shows that Flanders received an award of \$1.162 million compared to the Radmans’ award of \$547,904.50, and thus Flanders is the prevailing party. [R. 4893.]

If the Court does elect to go farther in its analysis, the most appropriate alternative perspective to apply in this case is which party prevailed on the predominant claim. *See Chang v. Soldier Summit Dev.*, 2003 UT App 415, ¶21, 82 P.3d 203 (holding that “although each party prevailed on some claims, the Defendants prevailed on the ‘major issues and most expensive aspects’ of this case”). Here, while the Radmans were awarded some additional compensation under the Merger Agreement, Flanders was given its entire purchase price back on the defective equipment, amounting to nearly the entire contract price of the acquisition. [R. 4893.] Moreover, while Flanders had already complied in large part with its contractual obligations, the Radmans completely breached the Merger Agreement from the very first day it was signed, frustrating all of Flanders’ contractual expectations. Additionally, the breach of warranty claim was the most complex factually and legally, and absorbed the vast majority of the time spent by the lawyers, the parties, and this Court. The trial time devoted to the breach of warranty claims was nearly 80% of the total trial time, and discovery in this case focused largely on Flanders’ breach of warranty claims. [R. 4355-58.] Clearly the breach of warranty

claims predominated in this litigation, and Flanders was the prevailing party with respect to those claims.

The “net judgment rule” leads to the appropriate result that Flanders is the prevailing party. Even under an alternative approach analyzing which party prevailed on the predominant claim, Flanders is also the prevailing party. If there can only be one prevailing party, it must be Flanders. Accordingly, the trial court’s decision that the Radmans were also a prevailing party should be reversed.

CONCLUSION

Because none of the arguments advanced by the Radmans are sufficient to show that any error even occurred, much less an error than in any way affected the outcome of the case, the trial court should be affirmed with respect to the judgment rendered in favor of Flanders. However, because the trial court erred in critical ways in its interpretation of the Market Protection Clause, the judgment rendered in favor of the Radmans on their claims should be reversed, and the trial court’s determination that the Radmans were co-prevailing parties should be reversed.

DATED this 15th day of February, 2007.

PARR WADDOUPS BROWN GEE & LOVELESS


By: 

Clark Waddoups
Jonathan O. Hafen
Michael D. Black
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2007 a true and correct copy of
the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT**
was served via first class U.S. mail, postage prepaid, upon:

David M. Connors, Esq.
Jennifer A. Brown, Esq.
Nicole C. Squires, Esq.
CHAPMAN & CUTLER
201 South Main Street, Ste 2000
Salt Lake City, UT 84111
Attorneys for Appellants



Michael D. Black