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William Anthony Kraatz v. HERITAGE IMPORTS, a Utah corporation dba HERITAGE HONDA, 0. BRYAN WILKINSON, and JEFFREY J. WILKINSON : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ, Plaintiff and Appellant, vs. HERITAGE IMPORTS, a Utah corporation dba HERITAGE HONDA, O. BRYAN WILKINSON, and JEFFREY J. WILKINSON, Defendants and Appellees.	**APPELLANT'S REPLY BRIEF** Case No. 970044-CA Priority No. 15

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT HONORABLE J. DENNIS FREDERICK

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INTRODUCTION

Tony Kraatz is a hard-working, honest man who agreed to try and rescue a failing family business. Understanding the difficulties and risks involved, the parties agreed to narrowly define Heritage's right to discharge Kraatz before the end of his contract. Notwithstanding the terms of this carefully negotiated agreement, the trial court thought it would be "inequitable in this case to interpret the agreement such that Heritage would have to continue to employ Plaintiff and stand by and watch its business decline unless Plaintiff rejected an outright request" (R.1709-10). Thus, in addition to the four enumerated grounds for discharge, the trial court, in essence, added an additional "cause" for discharge, *i.e.*, unprofitability.

In addition to rewriting the parties' contract, the trial court also fashioned findings that reflected its desire to reach a specific outcome and further justify its sense of "equity." Upon scrutiny, some of the findings are wholly unsupported by any evidence, others are irrelevant under the parties' agreement, and some are clearly induced by an erroneous view of the law.

Based upon the foregoing, Plaintiff seeks reversal and remand with instructions to the trial court to determine Kraatz's wrongful termination damages for breach of the employment agreement, as was done in *Arnold v. B.J. Titan Services Co.*, 780 P.2d 541 (Utah 1989). Remand is proper because upon application of the appropriate standards of review, crucial findings of fact and conclusions of law must be stricken or

reversed. The remaining findings show that Kraatz was discharged for reasons other than "cause" as defined by the agreement.

ARGUMENT

POINT I

KRAATZ SUBSTANTIALLY PERFORMED HIS PART OF THE AGREEMENT, THUS SHIFTING THE BURDEN TO HERITAGE TO JUSTIFY HIS DISCHARGE

Heritage argues in Point II of its Brief that because the trial court found that Kraatz failed to prove the second element of his *prima facie* case, *i.e.*, that he "performed his part of the Agreement" the trial court correctly concluded that Heritage had no burden to justify Kraatz's discharge. Heritage's Brief, p. 24. Heritage also appears to argue that all issues on appeal, including whether Kraatz substantially performed, are subject to a "clearly erroneous" standard of review. In so concluding, Heritage generalizes that the issue of "substantial performance" is in all respects a factual issue subject to deferential review.

Kraatz concedes, and has never argued otherwise, that to recover on a contract Kraatz, as part of his case in chief, must present *prima facie* evidence that he substantially performed his part of the bargain. CORBIN ON CONTRACTS, § 700-709 (1962). Whether a party "substantially performs" is a question of fact. However, ***what*** substantial performance means in the context of an employment agreement is a question of law; it depends on the contract's terms. Contract interpretation is an issue of law. This Court reviews a trial court's interpretation of an agreement for correctness and

accords the trial court's interpretation no deference. *Equitable Life & Casualty Insurance Co. v. Ross*, 849 P.2d 1187, 1192 (Utah App. 1992); *Saunders v. Sharp*, 840 P.2d 796, 803 (Utah App. 1992). Utilizing the appropriate standards of review, Kraatz responds to Heritage's arguments as follows.

A. IN EXCHANGE FOR ACCEPTING HERITAGE'S OFFER OF EMPLOYMENT KRAATZ EARNED THE RIGHT TO ENFORCE THE "FOR CAUSE" PROVISION OF THE AGREEMENT.

The Agreement Recitals state in pertinent part:

> Whereas, as an inducement to get Employee to become employed and be General Manager of Employer, Employer agrees to contract with Employee as hereinafter set forth.

Then, at Article 2.1 of the Agreement, the parties agreed that Kraatz's employment would continue for five years, and that such employment could not be terminated except for cause, defining cause as: "fraud," "dishonesty," "refusal" and physical disability.

It is undisputed that Kraatz became employed as the general manager of Heritage. One of the inducements offered to Kraatz was a severe restriction on Heritage's ability to discharge him. By appearing for work and serving as general manager, Kraatz substantially performed his part of the Agreement to the extent necessary to earn the protection of the termination only "for cause" provision in the Agreement. This is established as a matter of law by correctly applying the unambiguous terms of the Agreement to the undisputed facts.

By contrast, Heritage argued, and the trial court agreed, that substantial performance under the Agreement, at the *prima facie* stage, was to be measured by ***results***, such as profitability and employee morale, none of which results were required by the Agreement. By expanding upon the unambiguous terms of the Agreement, the trial court impermissibly rewrote the bargain between the parties.

Kraatz, of course, had many duties and privileges as general manager, some of which are expressed in the Agreement and some of which are implied by industry standards. However, the specific nature of his duties is relevant only in the context of whether Heritage met its burden to justify Kraatz's discharge for "refusing" to perform one or more of them. Such duties are not relevant for purposes of determining whether Kraatz is entitled to the protection of the "for cause" provision of the Agreement.

According to the Agreement, Kraatz promised only "input" (his best professional skill), not "output" (profits, happy employees, etc.). He did not guarantee results and nothing in the Agreement can be interpreted to constitute such a guarantee. In this regard, Heritage and the trial court again misinterpreted the Agreement. While the Agreement might be ambiguous about the scope of Kraatz's specific duties, it is unambiguous that Kraatz promised to contribute only his "best professional skill" in performing them—he did not guarantee success. The Agreement reads in relevant part: 1.2(c) "Employee shall contribute his best professional skill to perform the services at all times for the business and benefit of [the] Company."

Heritage attempts to escape its burden to justify Kraatz's discharge by raising the standard of proof on Kraatz's case in chief so high as to subsume Heritage's own burden. Heritage's arguments confuse Kraatz's promises to become employed and to contribute his best professional skill with goals and aspirations such as profits, good employee morale and competent children. However, Kraatz's termination cannot be justified by reference to poor results as a substitute for the "refusal" standard upon which Kraatz and Heritage agreed.

The parties unambiguously placed the risk of failure squarely on Heritage by agreeing that Kraatz's employment could be terminated only "for cause" restrictively defined as "fraud," "refusal," "dishonesty," or physical disability. The parties contractually defined minimum acceptable performance by Kraatz as any performance, even unsuccessful performance, so long as one of the four proscribed acts or circumstances did not arise. *Beacons Bar V Ranch v. Huth*, 664 P.2d 455, 459 (Utah 1982) (courts will not intervene to relieve one party to a contract of a bad bargain).

There is no ambiguity in the Agreement as to what performance Heritage bargained for in exchange for its promise to restrict its right to discharge Kraatz to the circumstances specified in the Agreement. This Court should find as a matter of law that Kraatz substantially performed his part of the Agreement when he became employed as General Manager and thereby shift the burden to Heritage to justify Kraatz's discharge.

B. THE TRIAL COURT DID NOT RELY ON EXTRINSIC EVIDENCE TO INTERPRET THE WORDS "REFUSAL," "HEREIN" AND "INCLUDE."

Heritage argues at page 25 of Heritage's Brief that "[t]he trial court's interpretation of 'refusal' is a question of law and fact, as the court clearly relied on extrinsic evidence in its interpretation." Heritage is incorrect. What really happened is that the trial court relied solely on the "intentions of the parties as reflected in the provisions of the Agreement" and "the plain meaning of Section 1.2 of the Agreement" for its interpretation of the word "refusal." (Conclusion B.8.6(3); R.1708-09.)

Furthermore, the trial court did not rely on any extrinsic evidence to interpret the meaning of "herein" or "include," as argued in Heritage's Brief. Rather the trial court referred to the "plain language of the Agreement," the "plain meaning of the terms," and the "plain meaning of 'include'." (Conclusion B.8., B.8.b., B.8.b.(1), R.1708).

While Kraatz's opening Brief refers to the only extrinsic evidence presented at the trial regarding the meaning of these terms, there is no finding or conclusion by the trial court, nor any admission by Kraatz, that these terms were ambiguous as used in the Agreement. Therefore, this Court should interpret the Agreement as a matter of law, without resorting to extrinsic evidence, and should accord the trial court's interpretation no deference.

C. KRAATZ DID NOT FORFEIT EARNED AND VESTED BENEFITS.

At page 26 of Heritage's Brief, Heritage argues that the trial court's conclusion of law that Kraatz failed to demonstrate that he performed his part of the Agreement

(Conclusions A.2., D.1-8., E.1.-5., R.1703,1712-13), translates into a finding of fact that Kraatz was not entitled to his bargained-for unpaid health benefits and vested stock appreciation rights expressly provided for in the Agreement. To the extent Heritage is again relying on the "substantial performance" doctrine, Kraatz repeats his previous argument that by undertaking the employment he earned the right to compensation and benefits until he was discharged for cause.

The trial court made no finding that Kraatz had waived his right to unpaid health benefits as Heritage argues. Waiver was never raised as an issue in the pleadings or during trial. Heritage's assertion is not true and is not supported by any reference to the record.

The parties expressly contemplated in the Agreement that Kraatz might be discharged for cause. Nonetheless, Heritage promised Kraatz that he would receive health benefits and stock appreciation rights pursuant to a vesting schedule up to the time of his discharge—even if cause for discharge was alleged and proved. The trial court failed to award Kraatz benefits to which he was entitled under the Agreement because it failed properly to interpret the unambiguous Agreement.

Reviewing the trial court's interpretation of the Agreement for correctness, this Court should find that Kraatz is entitled to the health benefits and vested stock appreciation rights earned prior to his discharge, and then remand for a determination of the amounts to which Kraatz is entitled.

POINT II

THE EVIDENCE DEMONSTRATES THAT THE CRUCIAL FINDINGS OF FACT ARE CLEARLY ERRONEOUS

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

Heritage has assailed Kraatz's marshaling effort in six general areas. While Kraatz recognizes that it is *his* burden to marshal the evidence, Heritage has not shown any significant deficiency in Kraatz's effort. After attempting to defend a few of the trial court's findings, Heritage abandons its effort, stating "All of these facts demonstrate Kraatz did not marshal the evidence. A similar exercise as to each of the remaining ***twenty-one facts*** he challenges would likely demonstrate the same."

Heritage's Brief, p. 22 (emphasis added). Heritage's argument is merely a self-serving assumption which Heritage attempts to pass off as an adequate evidentiary foundation for erroneous findings Heritage makes no serious attempt to defend. Kraatz addresses each of Heritage's challenges to his marshaling effort in turn as follows.

A. Control. Kraatz has challenged the trial court's written Finding D.13. and Conclusion E.1. that Kraatz had control over all aspects of the dealership and ultimate control over the financing of the dealership. At page 14 of Heritage's Brief, Heritage claims that Kraatz failed to marshal evidence in support of the finding and conclusion because, among other things, Kraatz did not set forth "further facts which were readily available to him in the court's written and oral findings." However, because Kraatz's burden is to marshal ***evidence***, he was not required to marshal the trial court's oral and written findings, which are clearly ***not*** evidence.

Kraatz marshaled the evidence in support of the finding and conclusion at pages 50-51 of his opening Brief. The additional enumerated facts listed at page 14 of Heritage's Brief which Heritage claims Kraatz failed to marshal either are irrelevant to the issue of control, do not demonstrate Kraatz was allowed ***complete*** control over all aspects of the dealership, or are already included in Kraatz's marshaling effort as follows:

(1) Lack of profitability and adequate capitalization are irrelevant to the issue of who had "control over all aspects of the operation" or "ultimate control over . . . financing."

(2) Kraatz marshaled B. Wilkinson's testimony at R.1932 regarding control of advertising (Kraatz Brief, p. 52).

(3) The monthly accountability meetings at which the lack of profitability was discussed are irrelevant to the issue of control; the meetings involved both B. Wilkinson and Kraatz and none of the evidence suggests that Kraatz had complete control. (R.2028-2031.) (Heritage cites the court's oral findings at R.2469 in support of this "fact," rather than citing any supporting evidence in the record.)

(4) Kraatz marshaled Hartmann's testimony regarding control (Kraatz Brief, pp. 50-51), which testimony included Kraatz's "indication" that he had the power to fire B. Wilkinson's children. (R.2044-45, 2052-53, 2059.)

(5) Kraatz's demotion of J. Wilkinson does not demonstrate "control over all aspects" of the dealership. (Again, Heritage cites to the trial court's findings [R.2469] rather than the evidence [R.1784, 1812].)

(6) The evidence regarding return of the Handbooks consists only of Kraatz's trial testimony that he discussed the issue with B. Wilkinson and possibly Helen Green (R.1845) and that he was uncertain whether he asked Beverly Masterson to circulate a memo asking employees to return their Handbooks (R.1846-47). No inference can be drawn from this testimony that Kraatz "made and carried out the decision to turn in Employee Handbooks." Because the testimony supports neither the finding of complete control nor the conclusion regarding Kraatz's control, Kraatz was not required to marshal it.

(7) Kraatz's testimony that "the care and keeping of the dealership assets," "overseeing those people that generate the sales within the dealership," "forecasting," and helping to "make the budget" were among a general manager's responsibilities (R.1851-52), does not support a finding of ***total*** control. It is undisputed that, pursuant to the Agreement, Kraatz was promised "responsibility and authority over all aspects of the daily operations" of the dealership (Exh. 38, § 1.2[a]) and did in fact control many facets of dealership operations. The question is—was he allowed to control all of them.

While the trial court essentially found that Kraatz received all of the control he was promised, in fact, the great weight of the evidence clearly demonstrates that Kraatz did ***not*** control the following material aspects of the dealership: advertising or advertising expenses (R.1932, 1998, 2375, App. B-Exhs. 14, 18), the salaries of Helen Green and B. Wilkinson (R.1998-99), employee benefits (R.1998), legal expenses (R.1999-2000), or B. Wilkinson's use of dealership monies in the amount of several hundred thousand dollars for his personal benefit, (R.1890, 1901-03, 1933, 2165-2170, 2182, 2255-58, App. B-Exhs. 235 and 329 at tabs 2 & 3). B. Wilkinson's uncontroverted admissions show that Kraatz did not control these specific aspects of the dealership operation and that Kraatz did not have signatory authority to obtain loans for the dealership or otherwise to modify the dealership's financing arrangements. (R.1965, 2052-2053.)

By marshaling the evidence, Kraatz has demonstrated that the court's finding that Kraatz had "control over ***all*** aspects of the operation and function of the dealership" and its related legal conclusion that Kraatz had "***ultimate*** control over the ***financing*** of the dealership" are so lacking in support as to be against the clear weight of the evidence and are clearly erroneous.

B. Schedule prepared by J.J. Kraatz has challenged the trial court's oral finding that Kraatz "refused to work Saturdays and evenings when his visibility was required" (R.2469), written finding E.15., that Kraatz "refused to work the schedule B. Wilkinson had ordered J. Wilkinson to prepare" (R.1693), and written finding E.21.(d) that "B. Wilkinson testified he fired Plaintiff for . . . (d) refusal to work Saturdays when scheduled by B. Wilkinson" (R.1694).

At page 15 of Heritage's Brief, Heritage again complains that Kraatz failed to marshal the evidence in support of these findings. Heritage's argument blithely ignores Kraatz's marshaling at pages 10 and 37-44 of his Brief, referring instead only to Kraatz's introductory statement regarding the subsequent pages of marshaled testimony as Kraatz's "only attempt" to marshal. The enumerated "facts" at page 16 of Heritage's Brief which Heritage alleges were omitted by Kraatz are either already included in Kraatz's marshaling effort or are irrelevant as follows:

(1) Wilkinson's testimony regarding Saturdays and evenings is marshaled at page 41 of the Kraatz Brief.

(2) B. Wilkinson's testimony regarding his belief that the general manager needed to be visible is also marshaled at page 41.

(3) B. Wilkinson's and J. Wilkinson's testimony regarding B. Wilkinson's direction that J. Wilkinson prepare a schedule for Kraatz is marshaled at pages 39-41.

(4) The fact that Kraatz did not work the schedule prepared by J. Wilkinson is irrelevant to whether Kraatz refused to work evenings and Saturdays. Kraatz's employment was terminated on September 11, 1992 (R.1771), prior to the first Saturday on J. Wilkinson's schedule (App. B–Exh. 1). Pursuant to the schedule Kraatz prepared, Kraatz worked the evening of Monday, September 7, 1992 (App. B-Exh. 2).[1]

(5) Kraatz acknowledged at pages 3-4 of his Brief that J. Wilkinson was an officer, director and minority shareholder of Heritage and that B. Wilkinson was the majority shareholder. (There is no testimony in the record that B. Wilkinson was the "CEO.") However, this evidence cannot support the trial court's implicit legal conclusion that J. Wilkinson's status gave him authority to prepare Kraatz's work

[1] Exh. 2 is a Closing Schedule (not a day schedule) Kraatz prepared for the weeks of September 7 through October 10, 1992. Kraatz did not schedule himself to close on any Saturday for the period, but there is no testimony that he would not have worked on one or more Saturdays during that period. Kraatz referred to Exh. 2 at page 10 of the Kraatz Brief, contrary to Heritage's contention of failure to marshal.

schedule. J. Wilkinson testified that, while he had previously prepared work schedules, he had ***never*** before prepared a schedule for the general manager. (R.2364.)

According to the plain language of the Agreement, Kraatz was to have had "responsibility and authority over all aspects of the daily operations" of the dealership.(App. B—Exh. 38.) It is ironic that the trial court found in one breath that Kraatz had "control over all aspects of the operation and function of the dealership" (Finding D.13., R.1690) and then, in the next breath, found that Kraatz did not have the authority to control his own work schedule. (Findings E.14, E.15, R.1694.)

The marshaled evidence demonstrates that Kraatz declined to accept a schedule prepared by his subordinate for a six-week period during September and October of 1992. However, as set forth at pages 37-44 of the Kraatz Brief, the court's findings that Kraatz refused to work Saturdays and evenings are clearly erroneous and should be stricken.

C. Training. Kraatz also challenges the trial court's finding E.21(h) that "B. Wilkinson testified he fired [Kraatz] for . . . h. refusal and failure to train J. Wilkinson and Jeff Gorringe . . ." At pages 17-18 of Heritage's Brief, Heritage attacks Kraatz's marshaling as inadequate. For the sake of brevity, Kraatz summarized B. Wilkinson's marshaled testimony at pages 44-45 of the Kraatz Brief; but since Heritage has challenged Kraatz's marshaling effort, B. Wilkinson's testimony in support of Finding E.21(h) is set forth in its entirety here.

On direct examination by Kraatz's counsel, B. Wilkinson testified as follows:

Q. Did you give him a specific example or criticism that had caused you to terminate him?

A. Yes.

Q. What was that?

A. . . . inability to teach my children what he'd agreed to . . .

* * *

Q. [Y]ou would admit, would you not, that Tony Kraatz tried to teach your children, train your children?

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

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

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

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

A. If he performed, yes.

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

A. That's correct.

(R.1877, lines 1-7; R.1877, line 14, through R.1878, line 1.)

B. Wilkinson also testified on cross-examination by his own counsel that he terminated Kraatz's employment because of "the inability to train my children to become dealers . . . ." (R.2035.) He further testified:

Q. I'm just going to ask you about two more of the areas that you listed as reasons why you let Tony go. One of them you mentioned was training kids. What was the problem or problems there?

A. Well, that was one of the most expressed concerns I had when we entered into our employment agreement, and it just did not happen.

(R.2041, lines 5-11.)

B. Wilkinson ***never*** testified that Kraatz ***refused*** to train B. Wilkinson's children. The finding that he did so testify is clearly erroneous as against the great weight of the evidence. Heritage has made no effort to defend this finding, evidently recognizing that it is wholly unsupported by the very evidence upon which it purports to rest. Heritage

complains that Kraatz spent "most of his brief arguing his version of the facts" regarding the issue of training. Heritage's Brief at 18. In fact, however, after marshaling the evidence, Kraatz pointed out that Heritage failed to adduce certain evidence at trial essential to meet ***its*** burden. For example, there was no evidence that either J. Wilkinson or Jeff Gorringe were not acceptable to American Honda in their jobs as managers of the dealership. This is essentially a legal issue.

D. Medical Reimbursement. Heritage complains at page 18 of its Brief that Kraatz "does not even attempt to marshal evidence in support of the trial court's findings that he was not entitled to reimbursable medical expenses or any damages relating to the value of the dealership." However, the trial court made no finding of fact regarding Kraatz's claims for these sums—therefore Kraatz was not required to engage in a futile marshaling exercise to support the trial court's non-ruling.

As set forth at page 61 of the Kraatz Brief and at page 6, *supra*, the trial court committed legal error by failing to award Kraatz his unreimbursed medical expenses pursuant to Schedule "A," paragraph(f), of the Agreement and 27 months of vesting of stock appreciation rights pursuant to Schedule "B," paragraph 1.(b) of the Agreement. (App. B—Exh. 38.) Such legal error flowed from the trial court's failure properly to interpret the Agreement—an issue of law, not fact.

E. Profitability. Kraatz challenges the trial court's oral finding that the dealership's net worth declined to approximately one-half from June 1 of '90 to August of '92 (R.2470) and written Finding E.1. that the dealership was not profitable during the 27

months Kraatz was the general manager. Kraatz's challenge is that the findings are both temporally irrelevant because the dates referred to incorporate significant periods of time both before and after Kraatz's employment, and legally irrelevant under the Agreement's definition of "cause." In response, Heritage attacks Kraatz's marshaling of the evidence at page 19 of Heritage's Brief, erroneously claiming that other unmarshaled evidence supports the trial court's findings.

Kraatz marshaled the evidence in support of these findings at pages 57-59 of his Brief. The additional evidence enumerated by Heritage once again is either irrelevant to the issue of profitability or is already included in Kraatz's marshaling. For example, whether Schmitz considered the dealership to be a "license to steal" is wholly irrelevant to whether the value of the dealership declined by one half or whether the dealership was in fact unprofitable. Since such "evidence" has nothing to do with, let alone support, the trial court's findings, Kraatz was not required to marshal it.

Even if this Court were to sustain the finding that the Dealership was unprofitable, it is incumbent on this Court to review the trial court's conclusions of law and its application of the law to the facts as found. *See Saunders v. Sharp*, 806 P.2d 198, 199-200 (Utah 1991). Since the interpretation of the Agreement is a matter of law, this Court must determine whether the trial court correctly concluded as a matter of law that failure to make a profit is cause for termination under the Agreement, *i.e.*, whether failure to make a profit was a "refusal" by Kraatz to perform his duties.

Given B. Wilkinson's testimony that Kraatz "tried to operate the store in a profitable fashion" (R.2001); that profitability was important to Kraatz during his employment (R.2029); and that B. Wilkinson himself was responsible for some of the losses in 1990 and 1992 (R.2031, 2000), the trial court's legal conclusion that lack of profitability was a justifiable cause for termination cannot be upheld, even if the finding is otherwise sustainable.

F. Other Examples.

Customer Complaints. Heritage contends at page 21 of its Brief that Kraatz "failed to marshall [sic] any evidence supporting the trial court's finding regarding customer complaints." Since Finding E.21.(k) refers specifically to B. Wilkinson's testimony, Kraatz marshaled B. Wilkinson's testimony that he fired Kraatz because of "claims from some customers that they couldn't get customer satisfaction through customer relations or that the General Manager wouldn't talk to them." (R.2034.) This is the extent of B. Wilkinson's testimony on the subject of customer complaints. There is no other evidence to be marshaled. There is no testimony regarding the identity of the complaining customers, when they complained, what their complaints were, that Kraatz knew of a complaint and knowingly refused to address it, that B. Wilkinson made any attempt to investigate the customer's allegations as they pertained to Kraatz or that a customer did not receive satisfaction from ***either*** customer relations or Kraatz.

There was no attempt by Heritage to show that this alleged breach of Kraatz Agreement was "willful" or "substantial." This presents a legal question as to the

sufficiency of the evidence to meet Heritage's burden of proof. The foundationless testimony of B. Wilkinson is insufficient to support a legal conclusion that such complaints were cause for termination under the Agreement. *Sharp v. Williamson*, 915 P.2d 495, 499 (Utah 1996) (evidence so slight and unconvincing as to make verdict plainly unreasonable and unjust).

Employee Morale. At page 21 of Heritage's Brief, Heritage argues that evidence which Kraatz allegedly failed to marshal supports the trial court's oral finding and written findings E.17. and E.21(c) to the effect that there were morale problems at the dealership. Kraatz marshaled all of the evidence in support of these findings at page 56 of his Brief. Heritage misunderstands Kraatz's challenge to the court's findings regarding morale. Kraatz's challenge is not to the accuracy of the factual findings, but to the ***legal effect*** of such findings.

In all of the record, there is no evidence that the decline in morale was due to any "refusal" by Kraatz to perform his obligations under the Agreement. In the absence of such evidence, the trial court's findings regarding Kraatz's discharge based upon declining morale are insufficient to support a legal conclusion that Kraatz was discharged for proper cause.

Balance Sheets. Kraatz challenges the trial court's oral finding that "[Kraatz] manipulated and/or modified the balance sheet by *disguising the age of inventory units* which should have been returned and/or sold but were not." (R.2469, emphasis added.)

In support of the finding, Kraatz marshaled the following evidence at pages 32-33 of the Kraatz Brief:

1. B. Wilkinson's nebulous and conclusory testimony that (a) Kraatz had not been "exactly honest . . . about the status of used car overaged inventory . . . (R.2034-35); and that (b) B. Wilkinson fired Kraatz for "not always leveling with me on . . . overaged used cars and such" (R.1877); and

2. The financial statement for 1992. (Exh. 297.)

There is no evidence anywhere in the record that Kraatz manipulated and/or modified the balance sheet to disguise the age of inventory units. Neither B. Wilkinson nor anyone else ever accused Kraatz of such manipulation. Without even an allegation, let alone supporting testimony, the balance sheets standing alone cannot possibly support an inference that they were modified in a dishonest way by Kraatz. (Exhs. 295, 296 and 297.)

In footnote 12 on page 22 Heritage attempts to deny that at trial B. Wilkinson vouched for Kraatz's integrity and quotes only part of B. Wilkinson's testimony. That crucial part omitted by Heritage reads as follows:

Q. And he didn't deceive you; he didn't intentionally deceive you?
A. Well, I haven't read this, you know, as you've referred here, but I don't think he would try to do that . . . . (R.1977.)

In footnotes 11 and 12, Heritage implies that although there is no evidence to support the trial court's finding that "[Kraatz] manipulated and/or modified the balance sheet by *disguising the age of inventory units* which should have been returned and/or

sold but were not" (R.2469), other types of manipulation occurred for which this Court might find Kraatz responsible and thereby justify his discharge; even though the trial court did not do so.

There were no underlying facts found by the trial court to support a conclusory finding that Kraatz dishonestly manipulated the corporate books in different additional ways than that erroneously found by the trial court. As this Court has noted, a conclusory finding of dishonesty would require sufficiently detailed supporting findings to make possible a challenge by Kraatz of the conclusory finding by marshaling the evidence. *Woodward v. Fazzio*, 823 P.2d 474 (Utah App. 1991). If Heritage's tactic were accepted by this Court it would render any challenge of a trial court's findings impossibly unwieldy because it would require an appellant not only to challenge the findings actually made by the trial court, but to also marshal the evidence and argue against any other theory of the appellee's case which the trial court did not accept but might have accepted.

In this case, at trial Heritage expressly disclaimed any attempt to justify Kraatz's discharge on the grounds that he had dishonestly manipulated the corporate balance sheet by improperly deferring expenses through the pre-paid account. (R.2435.) There was no argument by Heritage at the close of the evidence that Kraatz's discharge should be upheld for any such reason. (R.2453-63.) No such reason was even suggested in Heritage's proposed Findings of Fact, which the Court adopted (R.1681-1717).

The trial court did not find Kraatz responsible for other manipulations of the balance sheet because Kraatz showed that the specific type of balance sheet manipulation suggested by Heritage in footnotes 11 and 12 was a routine practice at Heritage long before he arrived (R.1989-90, 2436), continued after he left (*id.*), and that the practice was specifically approved of by B. Wilkinson (R.1993-94). Kraatz did not marshal such evidence in his opening Brief because it was not an issue in this appeal. As a matter of basic fairness and of appellate procedure it should not be a basis for this Court to conclude that Heritage has met its burden of proving Kraatz was terminated for cause.

After marshaling all the evidence which supports the trial court's crucial findings of fact, Kraatz has demonstrated that the challenged findings are clearly erroneous because they are either without adequate evidentiary foundation, are induced by an erroneous view of the law, or are wholly unsupported by any evidence in the record.

POINT III

THE TRIAL COURT PROPERLY DENIED HERITAGE'S MOTION TO AMEND THE PLEADINGS TO ALLEGE A COUNTERCLAIM

"The granting or denying of leave to amend a pleading is within the broad discretion of the trial court," and this Court "will not disturb such a ruling absent a showing of an abuse of that discretion." *Mountain America Credit Union v. McClellan*, 854 P.2d 590, 592 (Utah App. 1993). Under that standard, this Court "will not reverse

unless the decision exceeds the limits of reasonability." *Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994).

Three factors are relevant to this Court's review of the trial court's ruling on a motion to amend: (1) the timeliness of the motion; (2) the moving party's reason for the delay; and (3) the resulting prejudice to the responding party. *Mountain America*, 854 P.2d at 592. This Court will uphold a trial court's denial of a motion to amend "where the amendment is sought late in the course of the litigation, where there is no adequate explanation for the delay, and where the movant was aware of the facts underlying the proposed amendment long before its filing." *Regional Sales Agency, Inc. v. Reichert*, 784 P.2d 1210, 1216 (Utah App. 1989).

In this matter, Heritage's motion to amend its answer to include its omitted counterclaim was filed more than *three years* after its original Answer to the Complaint. Heritage offered no explanation to the trial court for its delay and offers none on appeal. Heritage was clearly aware of the factual basis for its proposed amendment well in advance of its motion. By the time the trial court was able to rule on the motion, the trial was scheduled to begin in less than 30 days. (R.922.) The trial court specifically held that allowing an amendment at such a "late date would work prejudice on the Plaintiff." (R.922, 1170.)

The trial court also found that additional discovery would be necessary if the proposed amendment were allowed. (R.922, 1169.) The trial court's finding was based in large part upon Heritage's acknowledgment that additional discovery would be

required and its offer to cooperate with Kraatz in conducting such additional discovery (R.955, 2387). The trial court reasonably relied on Heritage's representation, as well as Kraatz's objection to the motion, as evidence that additional discovery would be necessary if the motion were granted, resulting in prejudice to Kraatz.

Reviewing Heritage's motion to amend in light of the factors articulated by this Court, the trial court correctly denied the motion as untimely and prejudicial.[2] Heritage has failed to demonstrate on appeal that the trial court's decision "exceeds the limits of reasonability" and thus has failed to demonstrate that the trial court abused its discretion. This Court should therefore sustain the trial court's denial of the motion to amend.

CONCLUSION

The trial court's judgment of no cause of action must be reversed and the case remanded with instructions to enter judgment for Kraatz and determine damages. Otherwise, unambiguous employment contracts will be shown to be of little value. The trial court did not have the right to rewrite the Agreement in the name of "equity."

Because the trial court's legal analysis of the parties' respective burdens of proof and the meaning of the Agreement was flawed, the trial court's analysis of the evidence was also flawed. Kraatz has exposed the trial court's crucial findings and conclusions as

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[2] Heritage fails to cite any evidence in the record to support its claim that the amendment should be allowed to conform with the evidence adduced at trial. (Heritage Brief, p. 40.)

clearly erroneous. While the trial court's oral findings are replete with unflattering gratuitous findings, most are irrelevant to the issue of termination for "cause" as defined by the Agreement. There was no legal basis argued or shown to justify rewriting the Agreement to Heritage's advantage. The trial court had no right to relieve Heritage of the burden to justify Kraatz's discharge by proof of a ***willful*** and ***substantial*** breach of the Agreement evidencing a ***positive and unequivocal intent not to render his promised performance***. This burden cannot be satisfied by foundationless, vague and conclusory allegations in oral testimony of wrongdoing or evidence that the dealership was experiencing difficult economic times.

After the erroneous findings regarding "cause" are stricken, for legal or factual reasons under the appropriate standards of review, the remaining findings show Kraatz is entitled to damages beyond his health benefits and vested stock appreciation rights. He is entitled to those vested rights even if a finding of "cause" for his discharge is somehow affirmed.

DATED this 18th day of May, 1998.

JARDINE LINEBAUGH & DUNN
A Professional Corporation

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Attorneys for William Anthony Kraatz

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 1998, I served the foregoing **REPLY BRIEF** by causing a true and correct copy thereof to be mailed, via United States Mail, postage prepaid, addressed to the following parties:

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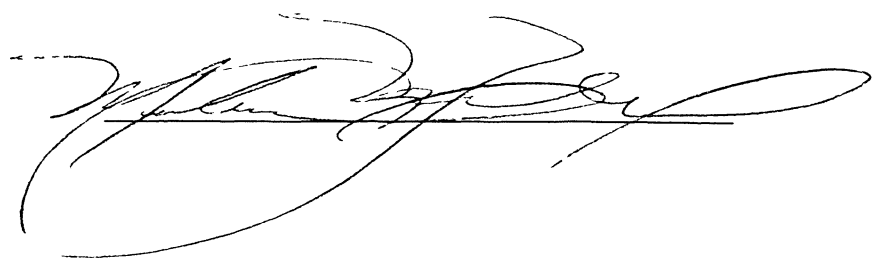

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