1978

Mallory Engineering, Inc v. Ted R. Brown & Associates, Inc and Valad Electric Heating Corp : Brief of Respondent Mallory

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MALLORY ENGINEERING, INC., Plaintiff and Respondent, -vs- TED R. BROWN & ASSOCIATES, INC., Defendant, Crossclaimant, Respondent, Defendant to Valad's Counterclaim and Appellant, and VALAD ELECTRIC HEATING CORP., Defendant, Cross-Defendant) Counterclaimant and Appellant.	)	Supreme Court No. 15530

BRIEF OF RESPONDENT MALLORY

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, the Honorable G. Hal Taylor, Judge

WILLIAM J. CAYIAS and
QUENTIN L. R. ALSTON
1558 South 1100 East Street
Salt Lake City, Utah 84105
Attorneys for Respondent
Mallory Engineering, Inc.

ALLEN H. TIBBALS
220 South 200 East Street
Salt Lake City, Utah 84111
Attorney for Respondent and
Appellant Ted R. Brown &
Associates, Inc.

GODFREY P. SCHMIDT
654 Madison Avenue
New York, New York 10021
and
ROBERT B. SYKES
320 South 300 East, Suite 2
Salt Lake City, Utah 84111
Attorneys for Appellant
Valad Electric Heating Corp.

IN THE SUPREME COURT OF THE STATE OF UTAH

MALLORY ENGINEERING, INC.,)

Plaintiff and Respondent,)

-vs-)

TED R. BROWN & ASSOCIATES, INC.,)

Defendant, Crossclaimant, Respondent, Defendant to Valad's Counterclaim and Appellant,) Supreme Court No. 15530

and)

VALAD ELECTRIC HEATING CORP.,)

Defendant, Cross-Defendant) Counterclaimant and Appellant.)

BRIEF OF RESPONDENT MALLORY

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, the Honorable G. Hal Taylor, Judge

---

WILLIAM J. CAYIAS and
QUENTIN L. R. ALSTON
1558 South 1100 East Street
Salt Lake City, Utah 84105
Attorneys for Respondent
Mallory Engineering, Inc.

ALLEN H. TIBBALS
220 South 200 East Street
Salt Lake City, Utah 84111
Attorney for Respondent and
Appellant Ted R. Brown &
Associates, Inc.

GODFREY P. SCHMIDT
654 Madison Avenue
New York, New York 10021
and
ROBERT B. SYKES
320 South 300 East, Suite 2
Salt Lake City, Utah 84111
Attorneys for Appellant
Valad Electric Heating Corp.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

Cases, Statutes and Authorities Cited PAGE

CASES CITED:

STATUTES CITED:

AUTHORITIES CITED:

INTRODUCTORY COMMENTS

Because of the multiplicity of the parties and the roles they played, and in the interest of clarity and brevity, plaintiff and respondent, Mallory Engineering, Inc., will be designated hereafter simply as "Mallory"; defendant, counter-claimant, cross-claimant, respondent and appellant, Ted R. Brown & Associates, Inc., will be designated simply as "Brown"; and defendant, cross-defendant, counterclaimant and appellant, Valad Electric Heating Corporation, will be designated simply as "Valad".

Abbreviations which will be used are: Record - "R"; Transcript - "T"; line or lines - "lns"; Exhibit - "Ex." or "Exs."; Purchase Order - "P.O."; kilowatt - "KW"; and drawing - "Dwg".

STATEMENT OF THE NATURE OF THE CASE

The action involves a contract by which Brown sold Mallory some electrical heaters. The heaters were to have met specific performance criteria furnished by Mallory. Brown purchased the heaters from Valad, the manufacturer, and then resold them to Mallory. Valad, at Brown's instructions, shipped the heaters directly to Mallory. Valad also, as required, certified in writing directly to Mallory, that the heaters would in fact meet the required performance criteria. The heaters, when delivered, did not meet the required performance criteria nor were they

timely shipped. The foregoing defaults gave rise to Mallory's claims against both Brown, who sold Mallory the heaters, and against Valad, the manufacturer, who certified the heaters' performance to Mallory.

DISPOSITION IN LOWER COURT

The trial commenced January 19, 1976, and continued through January 29, 1976, for seven actual trial days. The trial was to the Court sitting without a jury. By stipulation the case was bifurcated and tried first as to the issue of liability and next as to the issue of damages.

At the conclusion of the trial the Court took the matter under advisement for the purpose of allowing all parties to submit post-trial briefs. Those briefs now are part of the record in this case.

After having considered the evidence and testimony adduced at the trial as well as the law applicable thereto, the arguments of counsel, the proposed findings, conclusions and judgments, and all objections raised thereto, the Court on July 14, 1977, awarded judgments in favor of Mallory against both Brown and Valad. The Court also awarded judgment in favor of Brown against Valad and dismissed the counterclaim and cross-complaint of Valad. The issues which were raised by the amended counterclaim which the Court, during the course of the trial, permitted Brown to assert against Mallory, were reserved for

future trial. (R. 678-9)

On July 22, 1977, the Court made and entered an order denying the motion of Brown and Valad for a new trial. (R. 680-1)

On November 16, 1977, the Court made and entered an amended judgment which basically was the same as the foregoing judgments but which specifically limited the total liability of Valad to the loss suffered by Mallory plus the loss suffered by Brown. (R. 695-6)

RELIEF SOUGHT ON APPEAL

Mallory seeks affirmance of the judgments made by the District Court in Mallory's favor against both Brown and Valad.

STATEMENT OF FACTS

While the statement of facts set forth in Valad's and Brown's briefs portray a general scenario of the situation giving rise to Mallory's claims, as was the situation in Watergate, both Brown and Valad have slanted the facts by pointing the accusing finger of blame at the other in an effort to exculpate itself from liability. This is particularly true in Brown's case wherein efforts were and are still being made to characterize Brown as a mere "conduit" or "intermediary". Mallory accordingly elects to make its own statement of facts.

Mallory is a specialty manufacturing firm which had contracted with the United States Government to build some

environmental test units. (T. 4-10 and Exs. 1, 2 and 3) The units, as part of their essential components, required special electrical heaters. Mallory had previously purchased the heaters from Chromalox Electric and Regan Engineering. (R. 14)

Prior to the fiasco involving the Valad heaters which are the subject matter of this case, Mallory had never purchased any heaters from Brown. Previously, however, Mallory had purchased several thousands of dollars of other equipment and instrumentation devices from Brown. Carl Nyman, Brown's employee, wanted the opportunity to quote prices to Mallory for the heaters Mallory needed for the environmental test units Mallory was building for the United States Government. (T. 97) In this regard Mallory was concerned about securing satisfactory heaters for the very best price obtainable. Brown, on the other hand, was interested in making a profit by selling heaters to Mallory. With reference to the heaters which are the subject matter of this lawsuit the transcript shows (T. 10):

> Q. (By Mr. Alston) Mr. Farber, I show you what, for identification purposes, has been marked Exhibit No. 4 and ask if you can tell us what that exhibit is?
>
> MR. FARBER: Exhibit No. 4 is entitled Electrical Heater Criteria. And this was criteria that I prepared and submitted to Mr. Carl Nyman of the Ted R. Brown Company for the purpose of having him understand what we needed if he was to sell us heaters on Job No. 281. . . . (Emphasis supplied)
>
> This criteria is based upon the specification requirements we had to meet in order to fulfill our contract with the Government. . . .

Thereafter, Brown furnished quotes which, among other things,

set forth prices and delivery dates for heaters of the specified criteria which Brown wanted to sell Mallory. (T. 10-11 and 220 as well as Exs. 4, 9, 12 and 14) After receiving the quotes from Brown, and under date of 12/14/1972, Mallory submitted its P.O. 4016 to Brown for some 15 KW and 21 KW heaters. (T. 18, Ex. 9) The very next day Brown, on its letterhead stationery, submitted its own P.O. 6730 to Valad. Brown's P.O. however was for only the 21 KW heater. (T. 20, Ex. 10) Subsequently Brown on 12/20/1972 sent Valad a memorandum in which reference was made to Brown's P.O. 6730.(Ex. 10) This added some 15 KW heaters to Brown's P.O. for the 21 KW heaters. (T. 22-23 and Ex. 11)

Under date of 12/26/72 Mallory submitted its P.O. 4047 to Brown for some 50 KW and 12 KW heaters. (T. 23-24, Ex. 12) As it previously did with Mallory's P.O. to Brown for the 15 KW and the 21 KW heaters, Brown, on its letterhead stationery, thereupon submitted its own P.O. 6754 to Valad for those heaters. (T. 25, Ex. 13)

As to the two 36 KW heaters which are also the subject matter of this case, Mallory on 2/8/1973 submitted Brown its P.O. 4241, designated by Lee Farber of Mallory as a "confirming purchase order". (T. 27, Ex. 14) The preceding day, 2/7/1973, Brown, as it had done before in connection with its P.O.s to Valad for the other heaters, on its letterhead stationery, submitted its own P.O. 7269 to Valad for those heaters.

The oral testimony and documentary evidence in the record is undisputed that the heaters were defective in several particulars. They were not timely delivered. They were deficient in capacity and exceeded the sheath temperatures expressly set forth in the specified performance criteria.

Although Valad was given every opportunity to correct the defective heaters it manufactured and shipped direct to Mallory at Brown's request, thereby minimizing the damages it had already caused and was continuing to cause Mallory, it failed and refused to do so. Other than urge Valad to do something to minimize the damages which were accruing as a direct and proximate result of the defectively manufactured heaters, Brown did nothing. Brown simply defaulted on its contract with Mallory to sell and deliver or have delivered to Mallory heaters meeting specific performance criteria.

The above are the basic facts giving rise to Mallory's claims against both Brown and Valad. Where deemed necessary, additional facts will be set forth in this brief to support the points argued by Mallory.

ARGUMENT

Point I

THE UTAH COURT DOES HAVE PERSONAL JURISDICTION OVER DEFENDANT-APPELLANT VALAD

In this case there should be no question but that Valad in fact subjected itself to the jurisdiction of the Utah Court.

In enacting the Utah long-arm statute the Legislature made the express policy determination explicitly set forth in Sec. 78-27-22 UCA 1953 that:

> ". . .the public interest demands the state provide its citizens with an effective means of redress against nonresident persons who through certain minimal contacts with this state incur obligations to citizens entitled to the state's protection. . ."

The Legislature in Sec. 78-27-24 then enumerated those acts which would subject a nonresident to the jurisdiction of the Utah Court. In part that section provides:

> "Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;
> (2) Contracting to supply services or goods in this state;
> (3) The causing of any injury within this state whether tortious or by breach of warranty; . . ."

An enlightened interpretation of the foregoing Utah long-arm statute was made by this Court in the recent case of Abbott GM Diesel, Inc. v. Piper Aircraft Corporation, 578 P2d 850. In the Abbott case, a unanimous Court speaking through Justice Wilkins said:

> "While it is true that this Court has stated that "if there is any difference between what is stated as the 'doing business' and the 'minimal contact' tests it is probably more in semantics than in substance," we now conclude that from an examination of many individual cases concerning jurisdictional matters, including the present one there can well be a significant and controlling difference in those two concepts."

In reversing the trial court's dismissal of the action in the Abbott case for lack of personal jurisdiction over the non-resident defendant, and in remanding the case to resolve the conflicts of facts set forth in the affidavits filed by the respective parties upon which affidavits the case was decided, this Court said:

> "The District Court, after remand, should as heretofore directed, conduct a hearing to resolve the conflicts of facts stated in the affidavits filed by the parties. And that hearing should be governed by inquiries into and a measurement of (a) the nature and quality of Piper's acts (b) whether Piper engaged in purposeful - rather than unintentional - acts in order to avail itself of the privileges and protections here (and the substance - not just form - of Piper's business relationship and acts should be ascertained), and (c) any other relevant matters bearing on 'notions of fair play and substantial justice'."

The facts determinative of the Utah Court's jurisdiction over Valad in this case are clear cut and undisputed. Valad did the specific acts which the Legislature said would subject a nonresident to the jurisdiction of the Utah Court. Valad contracted with Brown to supply goods (electrical heaters) which Brown sold Mallory. Valad also expressly warranted in writing by its Certificates of Certification that the heaters would meet certain performance criteria which the heaters did not. As a direct and proximate result of the failure of the heaters to meet the required performance criteria, substantial injury and damage was caused Mallory.

The selling and supplying of the heaters by Valad to Brown for resale by Brown to Mallory was a purposeful and not an

unintentional act. It was done only after many deliberate negotiations had taken place between Brown and Valad. Furthermore, the warranty Valad made by virtue of its Certificates of Certification was purposeful and not unintentional. The warranty was made by Valad so as to be in compliance with the express condition of the contract Valad had with Brown. Considering the foregoing purposeful deliberate acts on the part of Valad, "notions of fair play and substantial justice" dictate that the Utah Court does and did have jurisdiction over Valad.

An examination of the record clearly evidences that by the pleadings Valad submitted, as well as the appearances Valad made (where its entire case was thoroughly aired), Valad subjected itself to the jurisdiction of the Utah Court. So as not to belabor this point, Mallory agrees with and by reference hereby adopts the argument so ably set forth in the brief of Brown in this regard.

A not insignificant fact too is that even before Valad submitted any pleadings, Godfrey P. Schmidt, the attorney for Valad, by telegram, requested a two-week extension of time which was granted. The cross telegrams appear in the record at pages 126-7.

Considering the totality of all of the foregoing, Valad's contention that it is not subject to the jurisdiction of the Utah Court is without merit.

Point II

BROWN WAS NOT MERELY A "CONDUIT" OR "INTERMEDIARY" BUT IN FACT CONTRACTED TO SELL MALLORY HEATERS WHICH WOULD MEET SPECIFIC PERFORMANCE CRITERIA. HOWEVER, BROWN DEFAULTED ON THAT CONTRACT CAUSING MALLORY LOSS & DAMAGE

Brown endeavors to avoid any responsibility or liability by asserting that it was solely a "conduit" or "intermediary" in the entire transaction who merely transmitted Mallory's heater criteria to Valad, the manufacturer of the heaters. At page 18 of Brown's brief the statement is made that ". . .all concerned knew that, in fact, Brown was not purchasing the heaters and reselling them, but was simply serving as an intermediary. . .". This assertion is simply not true.

A careful and objective analysis of the record won't support Brown's contention in this regard. On the contrary, the record demonstrates rather conclusively that Brown was more than a mere "conduit" or "intermediary", and, in fact, that Brown was the actual seller of the heaters to Mallory.

Prior to the fiasco involving the Valad heaters, Mallory had never purchased any heaters from Brown but had purchased several thousands of dollars of other equipment and instrumentation from Brown. (T. 14 and 97) Brown no doubt made a profit on those sales and would no doubt make a profit on a sale to Mallory of the heaters which Mallory needed for the environmental units Mallory was making for the Government.

Carl Nyman, who was Brown's chief negotiator between Brown and Mallory as well as between Brown and Valad, admitted that

he never represented he was an "agent", "representative", "intermediary" or "conduit" for Mallory. On cross-examination by Valad's attorney he said (T. 351):

> Q. Did you ever represent to Valad in so many words that you were an agent or representative of Brown - of Mallory?
>
> A. I don't recall ever having used such a representation or discussion.
>
> Q. Or did you ever represent to Valad that you were an intermediary for Mallory or a conduit for Mallory?
>
> A. I don't recall having used that terminology.

Mr. Nyman wanted an opportunity to quote prices on the heaters for the environmental units Mallory had heretofore purchased from Chromalox Electric or Regan Engineering. (T. 14) With reference to the initial contact between Brown and Mallory, Lee Farber, President and General Manager, stated on cross-examination by Brown's attorney (T. 96):

> Q. Mr. Farber, who in Mallory's organization contacted Ted R. Brown with regard to the Government job that is the question here?
>
> A. Who contacted Brown?
>
> Q. Yes.
>
> A. I am not certain that Mallory did contact Brown. I think Brown contacted Mallory.

To enable Brown to furnish quotes on heater prices, Mallory furnished specific heater performance criteria to Brown. (T. 10 and Ex. 4) The testimony of Mr. Farber in this regard is (T. 10):

> Q. (By Mr. Alston) Mr. Farber, I show you what, for identification purposes, has been marked Exhibit No. 4 and ask if you can tell us what the exhibit is?
>
> MR. FARBER: Exhibit No. 4 is entitled Electrical Heater Criteria. And this was criteria that I prepared and submitted to Mr. Carl Nyman of the Ted R. Brown Company

for the purpose of having him understand what we needed if he was to sell us heaters on Job. 281. . (Emphasis supplied)

After receiving the heater criteria Brown secured price quotes from Valad on the Valad heaters, which heaters were of an entirely different type than the heaters Mallory previously used and had purchased from Chromalox Electric or Regan Engineering. Upon receipt of the price quotes from Brown on the Valad type heater, Mallory submitted to Brown its P.O.s 4016. 4047 and 4241 for some 15 KW, 21 KW, 50 KW, 12 KW and 36 KW heaters. (Exs. 9, 12 and 14) Rather than just send copies of Mallory's P.O.s to Valad with a transmittal letter, Brown sent Valad its P.O.s on Brown's own letterhead stationery. These were Brown's P.O.s 6730 (Ex. 10), 6754 (Ex. 13), and 7269 (Ex. 15).

A comparison of the Mallory and Brown P.O.s for the very same heaters shows that the Brown P.O.s are not mere copies of the Mallory P.O.s but that there are some significant differences between them. This is evidenced by the uncontradicted testimony of Mr. Farber elicited by Brown's attorney as follows (T. 97-8):

Q. You did not, at any time, consider that Ted R. Brown & Associates were fabricating manufacturing or in any way designing those heaters?

A. Prior to seeing all of the Court documents and exhibits, it was my understanding that Mr. Nyman was not going to engineer or design anything on the heaters. But I am not so sure now after I have seen the purchase orders that he issued to Valad.

Q. The relationship that you initiated with Brown was not one based upon their performing any design service for you on those heaters? (Emphasis supplied)

A. As far as I was concerned the relationship that existed with Brown is that Brown wanted to sell us heaters and that we wanted to buy them. (Emphasis supplied)

On each of the Brown P.O.s, right after the name Valad Electric Heating Co., to whom each of the Brown P.O.s was directed, appears the following:

"PLEASE ENTER OUR ORDER FOR THE FOLLOWING" (Emphasis supplied). There is not indication of any kind whatsoever on any of Brown's P.O.s that Brown was submitting a purchase order as "agent", "Intermediary" or in any other capacity for and on behalf of what Brown now endeavors to assert was Brown's so-called "principal", namely: Mallory. The language is clear and unequivocal. The P.O.s state that they are our (Brown's) P.O.s. The instructions simply say "ship to" Mallory Engineering.

Valad's consistently repeated statements throughout the record that Brown was its customer (purchaser or vendee), which incidentally are uncontroverted, is further evidence that as between Brown and Mallory, with reference to the heaters which are the subject matter of this case, Brown was the seller or vendor and Mallory was the purchaser or vendee not of Valad but of Brown. This seller-purchaser arrangement as between Brown and Mallory is further substantiated by the plain, unambiguous language on all of Brown's P.O.s. All of them say: "Ordered by Carl Nyman", and they, in turn, are all signed by Brown's Purchasing Agent. None of Brown's P.O.s say: "Ordered for Mallory by Brown", the "agent" or "intermediary" for Mallory, the principal of Brown. Furthermore, all of Brown's P.O.s say:

"BILL TO: Ted R. Brown & Assoc., P.O. Box 1356, Salt Lake City, Utah 84110". They do not say bill our principal, Mallory, for whom Brown is acting as "agent", "representative" or "intermediary" % us, Brown.

While not binding on this Court, during the course of the trial, the District Court made several observations as to what in fact the testimony and documentary evidence indicated the relationship between Brown and Mallory was. At one point in the trial the Court said (T. 294):

> Well, I know what the relationship between the plaintiff and Brown is. That's evident from the exhibits, and that's vendor-vendee, at least in the initial stages. There was testimony that they contacted Brown - I believe Brown contacted Mallory in the initial stages and they entered into some negotiations to purchase heaters to certain criteria. (Emphasis supplied)

Furthermore, in responding to Brown's contention that Carl Nyman, for and on behalf of Brown, was acting solely as an "intermediary", the Court said:

> Well, he did something more than just forward Mallory's purchase order.

Later, the Court said (T. 644):

> Now, wait a minute. He went further than that. It wasn't a question of him (Nyman) just saying to Mallory "Look. You can get this work done at Valad Electric in New York," and walking away from it. They participated actively all the way through the negotiations.

The response which Valad's attorney made during the trial to the "conduit" or "intermediary" theory argued by Brown's attorney is enlightening as well as persuasive. It's found at page 305 of the transcript and is as follows:

MR. SCHMIDT:

I'd like to go back to their (Brown's) cross-complaint. The cross-complaint uses two words to signify the status of Brown. One is intermediary. And the other is conduit, c-o-n-d-u-i-t.

I think the word intermediary is not very illuminating because there are very many kinds of intermediary. And there is another word in the picture that has been used today. And that is - and it's been used before in this case. And that is it was for transmittal only that Brown acted. In other words it seemed to me, if I understood that argument correctly, that Brown was a kind of letter carrier for Mallory.

Well, I asked myself, can a letter carrier sue an addressee? Can an intermediary or a conduit, if that's what happened. .

Contrary to the statements and inferences in Brown's brief, there is nothing inconsistent in a vendor-vendee relationship which would preclude the vendee in that relationship from demanding a "certification" from the "manufacturer" as to the performance of the item or items being purchased. Nor is there anything in such a relationship which would preclude the vendee from making direct contact with the "manufacturer" if there was any trouble or defect with respect to any item or items. Such demands and contacts are entirely consistent and in harmony with a vendor-vendee relationship. Furthermore, the evidence in this case is uncontradicted that when trouble arose with the Valad heaters, Carl Nyman of Brown specifically requested that Lee Farber of Mallory contact Valad directly and firsthand to explain the problem. (T. 75)

There is evidence and testimony in the record about some preliminary negotiations between Valad and Brown pointing toward the possibility of Brown possibly becoming Valad's "agent" or

"sales representative" in Utah. This never materialized. More than likely the reason the "agent" or "sales representative" relationship never materialized between Valad and Brown was because of the modest 5% to 10% maximum commission Brown would have derived under such an arrangement. However, by Brown purchasing the heaters from Valad as it did, and reselling the heaters to Mallory as it did, Brown's margin of profit on the transaction ranged from 19% to 37%.

It a party does, in fact, become an "agent" or "intermediary" in a particular transaction, there is usually discussion and agreement as to what the "commission" or "consideration" is going to be. There is absolutely no testimony or evidence that there was any such discussion or agreement between Brown and Mallory. This fact is another in the totality of facts evidencing that the arrangement between Brown and Mallory in the transaction which gave rise to the lawsuit which is the subject matter of this appeal was that of seller and purchaser or vendor and vendee, and not one of "agency" or "intermediary" or some similar relationship.

The testimony and evidence adduced simply does not support Brown's contention that it served solely as an "intermediary" who merely transmitted Mallory's P.O.s to Valad.

Point III

THE HEATERS DID NOT MEET REQUIRED PERFORMANCE CRITERIA AND THEY WERE NOT TIMELY DELIVERED

There is no question but that the heaters did not meet

Mallory's required performance criteria. Lee Farber, Mallory's president and general manager, testified in this regard (T. 39-40):

> Q. Did you have any problems with the heaters at all?
>
> A. Yes. The heaters were deficient in capacity. They did not produce the capacity that we specified. And the sheath temperature exceeded the allowable temperature limits.
>
> Q. How do you know that they didn't meet the requirements, Mr. Farber?
>
> A. After we installed the heaters in the environmental chambers, we operated them. We conducted shop tests. We measured the voltage and amperage as an indication of the capacity. And we installed temperature sensors, thermal couples on the heaters, the heater sheaths, the heater fins and also in the air stream of the chamber to measure sheath temperature, fin temperature and chamber air temperature.

The test results for the 21 KW and the 15 KW heaters are set forth in Exs. 24 and 25. By comparing the test results with the heater criteria furnished, and as explained by Mr. Farber in his testimony, it is evident that the heaters were defective. Ex. 24 shows that the actual heater capacity of the 21 KW heater was only slightly more than 16 kilowatts rather than the specified 21 kilowatts. Ex. 25 shows that the actual heater capacity of the 15 KW heater was only between 9 and 10 kilowatts rather than the specified 15 kilowatts.

Brown's employee, Carl Nyman, not only examined the tests conducted by Mallory but he also conducted his own tests. He thereby confirmed that the heaters were in fact deficient. He advised Peter Cecchini of Valad of this. His testimony in part is (T. 333-4):

Q. Did you advise him (Peter Cecchini) that he had failed - that Valad had failed to furnish the heaters that were required by your (Brown's) order?

A. We did. And advised him specifically that they (the heaters) were tested to produce too low a kilowatt delivery and that the sheath temperatures exceeded the specified figure.

Strabo Laboratories, Inc., an independent testing lab in Salt Lake City, at the special request of Valad and in the presence of representatives from Valad and Mallory, made other tests. (Ex. 38) The tests at the Strabo lab gave about the same performance results as the tests made by Mallory and Brown. Even though Valad, at page 26 of its brief, argues about the so-called "unrefuted and irrefutable evidence of the unreliability of Mallory's tests", Valad admits that the Strabo lab tests "exhibit results similar to the Mallory tests". The independent Strabo lab tests confirmed absolutely that the heaters were deficient in capacity.

Valad made its own tests. However, the tests Valad made apparently were only made to certify as to the accuracy of the thermostats and not to certify as to the performance of the heaters. The testimony of Geoffrey McCarron, production manager of Valad, with reference to the tests made by Valad is as follows (T. 556):

Q. O.K. Now, in response to the question that was just asked you by your counsel, you said that you did make tests on the 21 KW heater and that it was done in your presence at your plant at the Valad plant?

A. Yes, sir.

Q. What did the test consist of?

A. The same test as we made on the 1500, which was to certify as to the accuracy of the thermostats that they would maintain the 250 degree maximum sheath temperature.

Q. And that's all?

A. That is specifically why the test was made, yes.

It is very evident by the testimony from all of Valad's witnesses as well as by the arguments in Valad's brief that Valad was using limit thermostats in the heaters as the means for controlling temperatures rather than as "fail safe" devices. If the limit stats were used to control sheath temperatures, and the testimony of Valad's witnesses and the arguments of Valad's counsel evidences that this was the case, then irrefutably and by its own admissions Valad's heaters did not meet the requirements specified by Mallory.

There were no limit stats or controllers called for by any purchase orders issued by Mallory to Brown. (T. 54 and Exs. 9, 12 and 14) However, if Valad had not installed any thermostats, Mallory would have done so as "fail safe" devices only in case everything else in the heater system failed. (T. 52 and 107) Mallory's purchase orders to Brown for the 15 KW and the 21 KW heaters required that ". . .sheath temperature will not exceed +250°F when operating at continuous full voltage. . ." Very simply the requirement was that there be continuous full voltage. If the limit stats interrupted the flow of current the heaters failed the performance test (T. 186) because you could no longer get full capacity out of the heaters (T. 185).

With reference to the use of limit stats to control heater temperatures, Mr. Farber of Mallory on cross-examination by Brown's attorney, testified as follows (T. 212):

Q. And it is never intended by the manufacturer, by the user or anyone else that the limit stat that keeps the house from being burned down by some other disaster that goes wrong with the rest of the controls should be used as a control to regulate the heat of that furnace, is it?

A. I can't speak for the manufacturer, but I can speak for Mallory Engineering and say absolutely not.

Q. All right. That's my point. So that any design in these heaters which you have referred to that intended to utilize the thermostat which is shown on drawing number 119, and I show you Exhibit No. 17, and the thermostat which you referred to as being one of the typical thermostats or the limit stats I think is the word you have used?

A. Yes.

Q. That intended to use the limit stat as a means of controlling the operation of the burner so that it didn't get too - or that it produced the heat, would be incorrect in its design?

A. Absolutely.

In referring to Ex. 9 which was Mallory's P.O. to Brown for the 15 KW and the 21 KW heaters, Mr. Nyman of Brown said (T. 233):

Q. Let me direct your attention now to a portion of that exhibit which reads down here "fabricator shall submit written certification that sheath temperature will not exceed 250 degrees Farenheit when operating at continuous full voltage with a 5 FPC air velocity and a maximum air temperature of plus 260 degrees Fahrenheit." Did I correctly read that?

A. With two exceptions. It is 5 FPS. And at a maximum air temperature of 160 Fahrenheit.

Q. Can you tell us what that phrase means, at continuous full voltage, in your opinion as an electrical engineer?

A. My interpretation is that the particular heater should, when operating at its designed voltage and at its designed power production, with the air velocity moving across it as specified, should have a sheath temperature not exceeding the specified 250 degrees.

Q. Now, we have heard a lot of testimony, Mr. Nyman, about thermostats. If a thermostat were put on to interrupt the flow, would that comply with the requirements of that specification in your opinion?

A. In my opinion it would not.

The testimony of Mr. Donald C. Thomas, a completely independent professional electrical engineer with considerable experience in designing heaters, with reference to the use of thermostats to control sheath temperatures, is most revealing. Mr. Thomas first spoke about the tests which were conducted by Valad which were conducted solely for the purpose of certifying as to the accuracy of the thermostats. Mr. Thomas said (T. 598-600):

Q. Mr. Thomas, I think you heard testimony concerning certain tests conducted by Valad in New York on certain of these heaters?

A. Yes, sir.

Q. And my recollection of their testimony is the tests were made primarily to determine whether or not the thermostats worked?

A. Yes, sir.

Q. Do you recall the testimony concerning what they said the temperatures showed and what the maximum temperature showed - or let me put a question first.

Were these tests (Valad's) conducted with the - with a flow of air or with still air, according to the testimony as you remember it?

A. The testimony as I remember it was a lab test, bench test, where there was no flow of air but the atmospheric conditions in a room.

Q. Do you recall what was said concerning the amount of

temperatures that were arrived at, both as to when the thermostats went on and the maximum temperatures that were reached?

A. I think I remember that the maximum - I am not sure. They referred to a chart. Maybe if I looked at the chart.

The maximum reached was approximately 250, and cut down to 225 after. It might have been 225, 220. I'd have to see the chart.

This chart indicates apparently on the initial swing, as I would interpret it, that the temperature went above 250, swung down to 200 and after that, almost in the sine wave, went from 250 to 200 degrees.

Q. Do you recall any other testimony concerning the temperature reaching close to 500 degrees on a certain test that was conducted?

A. Yes, sir. I remember that 598 degrees, apparently was reached when this thermostat was not connected.

Q. What would that indicate to you, Mr. Thomas?

A. That 598, if I interpreted what I heard right, was the sheath temperature in which specifications say that should not exceed 250 degrees. In other words, I would assume that this thermostat is being used to control the heater down to swing between 250 and 200 degrees. (Emphasis supplied)

Q. Is this a proper use of a thermostat, Mr. Thomas?

A. It could be a proper use. In this case, with the specifications as I read them, it calls for 15 KW at continuous full voltage. (Emphasis supplied)

Q. So, when you are reading it in connection with these specifications, in this purchase order (Mallory's) which says continuous full voltage, would that be in compliance with this purchase order?

A. No sir. I would say that in that my interpretation of these specifications are that I am to have the use of the 15 KW of heaters all the time, and they will maintain a sheath temperature of 250 degrees.

I don't see here where the 15 KW should be cut off to comply with the 250 degrees.

Specifically referring to the electrical heater criteria set forth in Ex. 4 (Mallory's "electrical heater criteria") and

the requirements of Mallory's P.O. (Ex. 9) for the 15 KW and the 21 KW heaters, Mr. Thomas testified further as follows (T. 602):

> Q. Is a thermostat a proper method of controlling sheath temperature, or is that really a design function?
>
> A. According to these specifications, it must be a design function. Without any outside control, the sheath temperature should not go above 250 degrees.

Later Mr. Thomas said (T. 609):

> Q. Mr. Thomas, you have seen these heaters. You have seen the Strabo tests. You have seen the tests that were taken at the Mallory lab which were examined by Mr. Nyman, and I think Mr. Brown saw some of those tests, and the representative of Valad examined some of the tests.
>
> Did these heaters meet the requirements of the purchase orders which Mallory sent to Ted R. Brown & Company?
>
> A. No sir.

The Valad heaters simply did not meet Mallory's required performance criteria. That is no doubt why Brown says in its brief at page 16:

> ". . .Brown does not dispute the contention of Mallory that the heaters supplied by Valad were defective and were not manufactured in accordance with the mandate of the purchase order of Mallory. . ."

Not only were the heaters defective, they were not timely delivered, and, time was of the essence. After Carl Nyman of Brown secured heater criteria from Mallory, he then on behalf of Brown gave Mallory some price quotes and delivery dates for the 15 and the 21 KW heaters Brown wanted to sell Mallory. The quoted delivery dates submitted by Brown to Mallory in writing were 8 to 10 weeks. (Ex. 4, T. 10 and 193) Mallory,

however, couldn't live with the quoted delivery dates. As testified to by Mr. Farber of Mallory (T. 685, lines 13-30 and T. 686, lines 1-6):

> A. . . .I personally discussed with Mr. Nyman that I could not give Ted R. Brown a purchase order for the heaters based upon an eight to ten week delivery schedule, and that one of the purchases - conditions of the purchase order would be six weeks.
>
> Q. Was that put in the purchase order?
>
> A. That was put in the purchase order.
>
> Q. That's the purchase order 4016 that's one of the exhibits in this record at this trial?
>
> A. Yes, sir. That was not only put in the purchase order as a promised date, that was put in the purchase order as a guaranteed date, because the significance of that is that these pieces of equipment were very large that we were working with. They occupied most of our shop space. And for us to effectively schedule our work, we had to bring this work along in the shop so that our part of the job would be completed, ready to receive the heaters, when they were installed.
>
> In addition to the delivery date of the heaters, it was also specified that within two weeks, we would have shop drawings, because Mallory could only fabricate the chamber up to what we call a head wall. And then we could not fabricate the heat wall until we knew the structural configuration of the heaters so that we could make our heater arrangement in the head wall.

Accordingly, when Mallory did submit its P.O. to Brown for the heaters, Mallory expressly set forth therein that (Ex. 9):

> ". . .Shop drawings required within 2 weeks. . ."
>
> ". . .Delivery guaranteed within 6 weeks. . ."

The heaters were in fact delivered late. In this connection, Mr. Farber, during the course of his cross-examination by Brown's attorney responded (T. 72-73):

> ". . .The first problem was on Job 281 where the heaters were late, in the first place, and when they were finally

delivered, in our opinion, the heaters, didn't perform in accordance with specification requirements.

The other two problems were on Job No. 277 and Job No. 285 where orders were accepted by Brown with the condition that time was of the essence and this was verbally communicated to Borwn, that they had to be delivered on time.

And in some purchase orders the time was guaranteed and we did not get even delivery of the heaters, and at one point in time there was around $400,000 worth of work, of Mallory work being held up that we couldn't complete.

That, at our normal yearly volume of doing business, represented about ninety percent of our work in process at this particular time. So it was an urgent critical thing with Mallory Engineering to get our heater problems solved. . ."

Even before any heaters were delivered Mr. Farber was gravely concerned because the shop drawings were not furnished Mallory within the required two weeks. On cross-examination by Brown's attorney, Mr. Farber not only expressed his deep concern about this but he also said what he did about it as follows (T. 117):

Q. . . .Now, when did you first become concerned with regard to whether or not the manufactured product prepared by Valad was going to meet your requirements?

A. I first became concerned with the overall project when Mallory Engineering did not receive the shop drawings within two weeks, within the guaranteed time.

Q. And did you ask for an explanation of this?

A. Not only did I ask for an explanation, I constantly hounded Carl Nyman to produce those documents so we could make the elevation - or so we could determine how we were going to mount these heaters in our equipment that was currently being fabricated.

There is no testimony or evidence in the record which challenges the fact that as between Mallory and Brown, time was of the essence. The testimony of Brown's employee, Carl Nyman, dramatically and affirmatively demonstrates this.

Brown was buying heaters from Valad to re-sell to Mallory, and, in order to meet its contract commitment to Mallory, Brown had to see that Valad shipped the heaters timely. Valad did not ship the heaters timely and so, of course, Brown was concerned. The testimony of Brown's employee, Carl Nyman, demonstrating his concern about the heaters being delivered late is (T. 343-5):

Q. (By Mr. Tibbals) A great deal of discussion has been had, Mr. Nyman, during the course of this trial, as to deficiencies on the delivery schedule of Valad. Did you have any understanding at any time, verbally or in writing, with Valad as to when these machines or these heaters were to be delivered?

A. Yes, we did.

Q. How was that manifested? Was it a verbal conversation or was it in writing?

A. It was initially a verbal conversation. I would have to examine the exhibits to see if it appears on the written quotations, but I believe it does.

Q. I now hand you exhibit first, No. 46, and ask you to examine that and be sure that that relates to the heaters that we are discussing in this case?

A. Yes, it does.

Q. Does it contain any information with regard to delivery schedule?

A. The delivery schedule quoted was between six and eight weeks.

Q. And what was the date of that instrument?

A. This particular quotation is dated December 6 of 1972.

Q. Now, what does that mean in the industry, six or eight weeks from what?

A. From the time of receipt of an order until the time shipment or delivery is made.

Q. So that since that document that you have in your hand relates to the 15 kilowatt heaters, it would appear that the time should then be computed from the date of receipt of Exhibit 10 and 11?

A. Yes. That is correct. Uh-huh.

Q. So that since those instruments are dated December 15 and December 20 respectively, 10, 15 and 11, the 20th, the six to eight weeks should start from the receipt of this order by Valad; isn't that true?

A. This is correct.

Q. Were they shipped within that time?

A. They were not.

Q. Was this deficiency called to the attention of Valad?

A. It was, in several communications. Telephone communications were conducted with Valad to try to expedite the shipment and to obtain the heaters when they were required.

Q. Did Valad ever communicate directly, to your knowledge, with Mallory concerning the delay in shipment?

A. Yes, he did. On a particular instance he provided them with a letter of explanation of the delays.

Valad simply cannot claim now that time was not of the essence. Valad promised delivery of the 15 KW and the 21 KW heaters within 6 to 8 weeks. Peter Cecchini of Valad admits this. In testifying as to the promised delivery of the 15 KW heater he refers to a telephone conversation he had with Mr. Nyman of Brown on 12-5-72 and says (T. 373 line 9):

". . .I gave him delivery of six to eight weeks. . ."

As to the promised delivery of the 21 KW heater Mr. Cecchini told Mr. Nyman (T. 374 line 22):

". . .And I gave delivery of six to eight weeks. . ."

The testimony of Valad's employee, Peter Cecchini, and the notes he made of a telephone conversation he had on 3-26-73 with Carl Nyman of Brown show that the 36 KW and the 50 KW heaters were to be shipped April 5th. (T. 475 lines 13-23) Mr. Cecchini admitted Valad had approved shop drawings for the 12 KW, the 15

KW and the 36 KW heaters. (T. 476, lines 14-17) He admitted further that even though Valad didn't have approved shop drawings for the 50 KW heater, he nevertheless, represented to Mr. Nyman of Brown that the 50 KW heater would be shipped April 5th. Mr. Cecchini also admitted that after Mallory got into the act because of the defective heaters which were delivered, Mr. Farber of Mallory inquired many times as to when the heaters would be delivered.

Those heaters which were delivered were delivered late. This is not disputed by anyone. The 36 KW and the 50 KW heaters were never delivered. There is no question but that time was of the essence. Valad's apparent assertion now that time was not of the essence simply does not square with the undisputed facts and is without merit.

Point IV

THE DAMAGES THE COURT AWARDED MALLORY MERELY COMPENSATED MALLORY FOR ONLY THOSE DAMAGES MALLORY ACTUALLY SUSTAINED AND THOSE WHICH WERE WITHIN THE REASONABLE CONTEMPLATION OF THE PARTIES

The general rule applicable to recoverable damages is set forth in 22 Am Jur 2d - Damages - Sec. 12, page 28 as follows:

> "Compensation is the stated goal of Courts in awarding damages for tortious injury or for breach of a contractual promise. . .With contracts, compensation is most often stated in terms of placing the Plaintiff in the same financial position in which he would have been had the promise not been broken." (Emphasis supplied)

The same general rule is expressed just a little differently in 25 CJS - Damages - Sec. 71, page 836, providing in part:

> ". . .the measure of damages is such sum as will compensate

the person injured for the loss sustained, with the least hardship to the wrongdoer consistent with the idea of fair compensation, and with the duty of the person injured to exercise reasonable care to mitigate the injury, according to the opportunities which may fairly be or appear to be within his reach; and the same rule obtains whether the loss is claimed for injury to property, personal injury, or breach of contract." (Emphasis supplied)

While both Brown and Valad in their respective briefs cite the Utah Uniform Commercial Code as precluding at least some of the damages which the Court awarded, neither of them cited all of the pertinent provisions of that Code which specifically allow and justify all the damages which the Court awarded Mallory. The provisions of the Utah Uniform Commercial Code which are applicable are Secs. 70A-2-711, 712, 713, 714 and 715, UCA 1953 as amended.

70A-2-711 provides in part:

"(1)Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved. . . the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a)"cover" and have damages. . .
(b)recover damages for nondelivery. . .(Emphasis supplied)

70A-2-712 provides in part:

"(1)After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined. . .(Emphasis supplied)

70A-1-713 provides in part:

"(1)Subject to the provisions of this chapter. . .the measure of damages for nondelivery or repudiation by the

seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages. . .(Emphasis supplied)

70A-2-714 provides in part:

"(1)Where the buyer has accepted goods and given notification . . .he may recover damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." (Emphasis supplied)

(2) The measure of damages for breach of warrant is the difference at the time and place of acceptance between the value of the good accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (Emphasis supplied)

(3) In a proper case any incidental and consequential damages under the next section may also be recovered. (Emphasis supplied)"

70A-2-715 provides in part:

"(1)Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach. (Emphasis supplied)

(2) Consequential damages resulting from the seller's breach include

(a)any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. . .(Emphasis supplied)

There is no question but that Mallory sustained substantial damages, and, that it did everything reasonably possible to mitigate its damages by expeditiously securing heaters from another source which met the required performance criteria to replace the defective heaters which were fabricated by Valad and sold to

Mallory by Brown. In this connection Brown states in its brief at page 29:

> "It was conceded at the trial that the cost of securing replacement heaters and the incidental costs to reconstruct the test chambers to fit the new heaters, the cost of removal of the defective heaters and the installation of the new heaters were direct costs and under the Utah Uniform Commercial Code were allowable items of damage to be awarded to Mallory against Valad and if the Court refused to accept Brown's theory of the case, against Brown. . ."

Not only were the "direct costs" allowable items of damage but so were the "indirect costs". They were not speculative or conjectural. They comprised only a fair and just pro-rata allocation of the overhead expenses to the very Jobs affected by the defective heaters on a "completed-contract method" of accounting basis. Mallory's accounting was not done by Mallory's employees but by Elwood and Barnes, a Certified Public Accounting Firm in Salt Lake City, Utah. The "completed-contract method" of accounting for income and expenses was the method used by Mallory from its inception and is authorized and approved by the Internal Revenue Service. See Sec. 451 of the 1954 Internal Revenue Code and the Regulations promulgated thereunder, Sec. 1.451-3 (2).

A fair and reasonable allocation of "overhead expenses" is a proper element of recoverable damages. In an annotation in 3 ALR 3rd dealing with the subject of DAMAGES - OVERHEAD EXPENSES, it is stated in the Summary and comment in Sec. 2 at page 692 that:

> "If the defendant has been responsible for the plaintiff's incurring or wasting reasonably forseeable overhead expenses, it is generally agreed that the plaintiff is entitled to recover damages as reimbursement for his outlay of such

> overhead expenses. (See Secs. 7-10, infra.) If, however, the plaintiff's claim for damages is based on the theory that the defendant has prevented the plaintiff from carrying out certain transactions and has thereby been responsible for causing theplaintiff a loss of profits, there can be a divergence of opinion as to whether or not the plaintiff must deduct the overhead expenses allocable to the unperformed transactions in computing the amount of lost profits recoverable from the defendant; and to the extent that the plaintiff is not required to deduct such overhead expenses in computing the amount of his damages recoverable for lost profits, these overhead expenses are of necessity, included as an element of damages. (See Secs. 3-6, infra.)

Mallory did not and does not seek lost profits as part of its damages but only those damages actually sustained which normally and particularly in this case include a portion of Mallory's overhead expenses.

The same annotation on damages and overhead expenses in 3 ALR 3rd states at page 695:

> "If the plaintiff has wasted or otherwise incurred overhead expenses as a result of the defendant's wrongful conduct (such as a tort or breach of contract), and the plaintiff is seeking to obtain reimbursement for such outlay, it is generally agreed that the overhead expenses, to the extent reasonably forseeable and properly allocated, are recoverable as damages. . ." (Emphasis supplied)
>
> * * *
>
> ". . .it would appear that the defendant often knows or has reason to know that overhead expenses will be allocable to transactions which he wrongfully prevents or delays the plaintiff from carrying out, and this principle has received recognition both in modern decisions and in modern statutes."

The above annotation cites numerous cases where overhead expenses were allowable by the Courts as an element of recoverable damages.

This Court in the case of Even Odds, Inc. v. Nielson, 22 Utah 2d 49, 448 P2d 709, said:

"Speaking generally about damages, the desired objective is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed."

In the case of Pacific Coast Title Insurance Company vs. Hartford Accident & Indemnity Company, 7 Utah 2d 377, 325 P2d 906, the District Court had included attorneys fees in its award of damages in an action on a construction contractor's performance bond. The award of attorney's fees was challenged because such fees were not provided for by statute or by the express provisions of the bond. Nevertheless, this Court said at page 907:

"The rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable forseeability that loss of such general character would result from the breach. Therefore, to be compensable, the loss must result from the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of the parties had averted to breach when the contract was made, loss of such character would have been within their contemplation.

Applying the above rule to this case: it could reasonably be foreseen that the natural and usual consequence of Cassady's failure to pay the laborers and materialmen would bring about the series of events which occurred: that liens would be filed and legal proceedings instituted to enforce them; that plaintiff Title Company, having the duty to keep the titles clear, would interpose defenses and attend to some disposition of the claims, which would require the services of attorneys and court costs incidental thereto. That is the type of loss for which Hartford's bond was given to guard against."

The specific details of all the damages which follow in fact need not necessarily be within the contemplation of the parties at the time of the contract to be recoverable. As pointed out in 22 Am Jur 2d - Damages - Sec. 58:

> "The principle that damages, to be recoverable, must have been in the contemplation of the parties at the time the contract was entered into, does not require the defaulting party to know the specific details of the injury or of the damages which followed in fact. For example, it is sufficient if the defaulting party could, at the time the contract was entered into, foresee that failure to make delivery would cause the nondefaulting party's factory to shut down. . ."

See also Kelley, M. & Co. v. La Crosse Carriage Co., 120 Wis. 84, 97 NW 674.

In a rather detailed discussion and analysis of the various remedies of the buyer under the Uniform Commercial Code set forth in 67 Am Jur 2d - Sales - Secs. 664-667, Sec. 667 at page 864 provides in part:

> ". . .The term 'consequential damages' is not itself precisely defined in the Uniform Commercial Code, but it would seem to cover damages other than those standarized in various provisions of the Uniform Commercial Code which might flow proximately from the breach by the seller, and might be equivalent to what are sometimes called 'special damages'."

The attention of this Court is respectfully invited to the annotation in 3 ALR 3rd which in Sec. 10 at pages 710-711 reviews several cases holding that overhead expenses are recoverable as an element of damages. Also, several additional cases to the same effect are cited in the supplement to that annotation.

Carl Nyman, Brown's employee, was well aware of the fact that Mallory was building environmental units for the government. He had previously been instrumental on behalf of Brown in selling Mallory many thousands of dollars of equipment and instrumentation devices. He obviously wanted to sell more items to Mallory. The electrical heaters which Mallory required for the environmental units fell naturally within his sales line because he himself was an electrical engineer and he knew Mallory's needs.

The environmental units Mallory was manufacturing for the government were very large and occupied most of Mallory's shop space. (T. 685 lines 25-6) At one point in time, approximately $400,000.00 worth of work or about 90% of Mallory's work was being held up (T. 73 lines 3 to 6) because of the heaters Brown had contracted to sell Mallory and have delivered to Mallory within definite time schedules. Brown knew absolutely that time was of the essence. Brown has never denied this and has admitted that the heaters were not timely delivered. Because of the defective heaters Mallory could do nothing more with the bulk of the work in its shop and Mallory's overhead expenses were going on every day. (T.80) Mallory did the only reasonable thing it could do to mitigage and minimize its damages by securing heaters meeting required performance criteria from another source. Mallory did this however only after both Valad and Brown refused and failed to do anything about the defective heaters.

Brown, under all of the foregoing circumstances, either knew or reasonably should have known that the natural, reasonable and readily forseeable consequences of Brown's failure to deliver Mallory heaters meeting required performance criteria as Brown had contracted to do, would be the very damages which Mallory actually sustained. In this connection it is undisputed that Brown also tried to prevail upon Valad to do something about the situation so as to mitigate the damages which Brown knew and recognized were accruing.

Point V

BROWN'S CLAIM TO BEING MERELY AN "INTERMEDIARY" IS UNFOUNDED, AND, THE CASES BROWN CITES TO CAST ALL BLAME ON VALAD AND EXONERATE BROWN FROM LIABILITY DO NOT SUPPORT BROWN IN THIS REGARD BUT ESTABLISH THAT MALLORY CAN RECOVER AGAINST BROWN AND VALAD

Brown, in endeavoring to exonerate itself from liability, states in Point III of its brief at page 26 that ". . .Brown should not be involved in the controversy which basically involves only Mallory and Valad. . ." purportedly because, as Brown states further, ". . .the parties throughout have treated Brown as a mediator or intermediary. . ." These statements are simply not true.

Brown was not Mallory's agent or intermediary. Mallory contracted to purchase heaters from Brown and Brown contracted to sell heaters to Mallory. Brown defaulted on that contract.

During the course of the proceedings the unchallenged and unchallengeable statement made by Mr. Schmidt, Valad's attorney was (T. 615 lines 23-28):

> ". . .there is nothing in the record to dispute the fact that the only relationship between Mallory and Brown was that of purchaser and seller. And there is nothing in the record to dispute the fact that as between Brown and Valad the relationship was purely one of purchaser and seller."

Brown's own employee, Carl Nyman, admitted that he never represented to Valad that he was an "agent" or "representative" of Mallory or that he was an "intermediary" or "conduit" for Mallory. (T. 351 lines 15-21) There were discussions which did take place between Brown and Valad about Brown becoming a representative of Valad but these never materialized. (T. 327-8)

On being questioned by Brown's attorney as to why Valad sent certain shop drawings to Mallory, Mr. Cecchini of Valad replied (T. 442 lines 9-13):

A. . . .The order is with T. R. Brown & Associates. And I was told by T. R. Brown & Associates, who is my customer, to send it to Mallory Engineering.

Q. So you did what you were told?

A. That is correct.

In further discussing the relationship between Brown and Valad, Mr. Cecchini of Valad said (T. 482 lines 7 through 17):

Q. Who was your customer?

A. T. R. Brown.

Q. Your customer was never Mallory, was it?

A. No.

Q. But the order was that you send the heater to Mallory. That was really the only relationship?

A. That was who it was shipped to.

Q. And to whom were you to bill?

A. T. R. Brown.

Q. Because they were your customer?

A. That is correct.

That Brown was not a mere "intermediary" but the actual seller and that Mallory was the buyer of the heaters was recognized and acknowledged by the Trial Court which was in the advantaged position of seeing and hearing the witnesses, observing their demeanor, judging their biases and prejudices, and personally examining the exhibits adduced at the trial. In this connection the Trial Court remarked (T. 294 lines 24-27):

"THE COURT: Well, I know what the relationship between the plaintiff (Mallory) and Brown is. That's evident from the exhibits, and that's vendor-vendee, at least in the initial stages. . ."(Emphasis supplied)

In striving to exonerate itself from liability and cast all responsibility on Valad, Brown cites two Washington cases. One case is that of Freeman v. Navarre, 47 Wash. 2d 153, 289 P2d 1015. Brown acknowledges that the factual situation in the Freeman v. Navarre case is different from the case here on appeal. Nevertheless, Brown states in its brief at page 28 that the Freeman v. Navarre case supports Brown's theory of non-liability as far as Brown is concerned because it ". . .recognized that one serving as a conduit is not liable for the mal-performance or non-performance of a third party contractor." The actual holding of the case is only that even without "privity of contract" an ultimate user of a product may sue the manufacturer.

In the first place, in this case on appeal, Brown was not a mere "conduit" or "intermediary". Brown was the seller and Mallory was the buyer of the heaters manufactured by Valad. The Freeman v. Navarre case concerned itself primarily with the legal concept of "privity of contract". It had to decide the issue as to whether the user of an article with no privity of contract with the manufacturer could sue and recover from the manufacturer because of a defect in the manufactured article. The exact language of the Court during the course of its decision in part was"

> ". . .It follows that the only question presented here is whether appellant, the ultimate user can recover from respondent, the manufacturer."

The court held the user could recover from the manufacturer. The case does not support Brown's theory that the seller (Brown in

this case) is relieved of responsibility. On the contrary, it supports Mallory's claim that Mallory (the buyer of the heaters from Brown) cannot only recover from the defaulting seller (Brown) but also from the manufacturer (Valad) even though there may not have been any privity of contract between Mallory and Valad.

The other Washington case Brown cites in its attempt to relieve Brown of any liability and place the entire blame on Valad is the case of Kadiak Fisheries Co. v. Murphy Diesel Co., Inc., 422 P2d 496. Brown even states in its brief at page 27 that the Washington Court in the Kadiak case ". . .was confronted with an almost factually parallel situation. . ." as the case here on appeal. The Kadiak case is factually distinguishable and legally non-supportive of Brown's attempt to relieve Brown of responsibility and liability.

In the interest of clarity and brevity, the parties in the Kadiak v. Murphy case hereafter will simply be referred to as follows: The plaintiff, Kadiak Fisheries Co., the owner of a fishing vessel which needed a new motor, will be referred to as Kadiak. One of the defendants in that case, Alaska Pacific Supply Company, the actual "Sales Agent" for the motor manufacturer Murphy Diesel Co., will be referred to as Alaska Pacific. And, the motor manufacturer and other defendant, Murphy Diesel Co., will be referred to as Murphy.

The Kadiak V. Murphy case was an action by Kadiak, the vessel owner, against the motor manufacturer's "Sales Agent",

Alaska Pacific, and the motor manufacturer, Murphy, based on negligence and breach of implied warranties of fitness and merchantability. In the case on appeal here, Mallory did not and does not base its case on the theory of negligence. Mallory's case was and is a "breach of contract" action against Brown for Brown having furnished Mallory defective heaters which Brown sold Mallory, and for Brown not furnishing Mallory other heaters which Brown sold Mallory, as well as an action by Mallory against Valad on a "third-party beneficiary" theory and because the heaters Valad manufactured did not meet the written certifications Valad furnished Mallory.

It is of particular significance to note that in the Kadiak v. Murphy case, Alaska Pacific was actually the "Sales Agent" of Murphy, the motor manufacturer, while in this case, Brown was not the "Sales Agent" of Valad nor an agent for Mallory. In fact, in this case, no "Sales Agent" was involved because Brown was the seller and Mallory was the buyer of the heaters as between Brown and Mallory, and as between Valad and Brown, Valad was the seller and Brown was the buyer.

In the Kadiak v. Murphy case, both the manufacturer, Murphy, and the "Sales Agent", Alaska Pacific, denied negligence and any breach of implied warranty. No writing was involved in that case such as is involved in this case by virtue of the written certifications from the heater manufacturer, Valad, to Mallory, the ultimate consumer. In the Kadiak v. Murphy case, the

manufacturer, Murphy, alleged lack of privity of contract between it and the vessel owner, Kadiak. Also, the "Sales Agent", Alaska Pacific, (which "Sales Agent" is lacking in this case), asserted a cross-claim against the motor manufacturer, Murphy, its principal.

At the conclusion of Kadiak's evidence, Alaska Pacific was allowed to amend, over Kadiak's objections, to assert the defense of estoppel against Kadiak. At the end of all the evidence, Kadiak's claims of breach of warranty against Alaska Pacific, and Alaska Pacific's defense of estoppel against Kadiak and its cross-claim against Murphy were withdrawn from the jury. The issues of negligence, breach of implied warranties, privity of contract, contributory negligence and damages remained and were submitted to the jury. The jury returned a verdict against Murphy and exonerated Alaska Pacific. Murphy appealed. After the appeal, Kadiak, Murphy and Alaska Pacific stipulated that Alaska Pacific, the "Sales Agent", was not a party respondent so that the appeal was limited to the controversy between the vessel owner, Kadiak, and the motor manufacturer, Murphy, and that in the event of a new trial, the "Sales Agent", Alaska Pacific, would not be a party defendant. Accordingly, the parties stipulated that the jury verdict and judgment of dismissal as to the "Sales Agent", Alaska Pacific, was final. In the course of its decision the Supreme Court of Washington among other things, said:

> ". . .under the issues as ultimately framed and submitted to the jury, the theories of responsibility

> and liability as between Murphy Diesel, the manufacturer, and Alaska Pacific, the sales conduit (THE MANUFACTURER'S "SALES AGENT"), were not equal - Murphy Diesel could be found liable upon either one of two theories (breach of warranty or negligence), whereas Alaska Pacific's (THE MANUFACTURER'S "SALES AGENT'S") liability was restricted to the theory of negligence in connection with the sale and installation of the motor." (Emphasis and designations of "Sales Agent" supplied.)

Thus, the Kadiak v. Murphy case and this case are readily distinguishable. In the Kadiak v. Murphy case, negligence was the only possible theory of liability against the acknowledged manufacturer's "Sales Agent". In this case no "Sales Agent" was involved and at least insofar as Mallory's claims against either Brown or Valad are involved, the theory of negligence is not applicable. The theory of liability against Brown is breach of contract which Brown in fact breached by delivering or causing to be delivered defective heaters to Mallory and by failing to deliver to Mallory other heaters which Brown contracted to deliver.

The Washington Court's reasoning in the Kadiak v. Murphy case as to the motor manufacturer's liability (Murphy) in that case, and the heater manufacturer's liability(Valad) in this case, is perfectly sound and justifies this Court in affirming the judgments awarded Mallory against both Brown and Valad. While in this case Mallory did not ask for and was not awarded "loss of profits" but only "actual damages", the Washington Court did, in fact, award damages for "lost profits" as a result of the lost time the fishing vessel encountered because

of the defective motor. During the course of its decision the Court said in 422 P2d at page 505:

> "In the instant case there can be little doubt under the evidence that Murphy Diesel was aware of the fishing function and purpose of the Jaguar in Kadiak's fleet. It was advised that the vessel was being repowered to continue its operations. There could, therefore, be virtually no question as to the fact that loss of fishing time due to motor difficulties would result in a diminution of profits. Likewise, the evidence leaves little room for argument that the Jaguar did lose time as a result of motor troubles. The only element remaining, then, for dispute is the certainty of the amount of the lost profits occasioned by the Jaguar's incapacitation due to engine repairs. On this factor, however, Kadiak produced uncontradicted evidence revealing the average daily crab deliveries of other comparable vessels fishing in the same area in which the Jaguar was fishing on the occasions immediately prior to engine breakdowns. It also produced undisputed evidence bearing upon the average prices paid for the pertinent catches and the usual cost of operation. Under these circumstances, the jury was not required to speculate. It had only to weigh the credibility of the witnesses, for it was presented with a reasonable basis upon which to determine the amount of the loss. . ." (Emphasis supplied)

Neither the undisputed facts nor the cited case law support Brown's theory that it was a mere "intermediary" and, therefore, absolved from all liability.

Point VI

THE JUDGMENTS AGAINST BROWN AND VALAD ARE SUBSTANTIATED BY SUBSTANTIAL COMPETENT AND ADMISSIBLE EVIDENCE AND SHOULD BE AFFIRMED

Brown contracted to sell Mallory heaters which would meet specified performance criteria. The heaters were to be delivered timely because time was of the essence which fact Brown knew and admits. However, none of the heaters were timely delivered. Furthermore, every heater which was delivered, including the 12 KW heaters, were defective. Not one heater met the required

performance criteria although the 12 KW heaters were subsequently replaced with good heaters. Brown conceded that all heaters delivered were defective. Some of the heaters which Brown contracted to sell Mallory were never delivered and Brown never offered to do anything to replace the defective heaters nor to supply the heaters which were not delivered. Brown knew that the heaters it contracted to sell Mallory were for the environmental units Mallory was building for the government. Those environmental units were very large and in fact occupied most of Mallory's shop space and at one point in time constituted approximately 90% of Mallory's work in process.

Valad, on the other hand, partly performed the contract it had with Brown by manufacturing some of the heaters which Valad shipped directly to Mallory pursuant to Brown's instructions. And, Valad billed Brown, not Mallory, for those heaters. As indicated above, all of the heaters Valad manufactured and shipped Mallory were defective. Valad did, however, replace the defective 12 KW heaters with good heaters. Although Valad never shipped some of the heaters, Valad expressly represented to both Brown and Mallory that the balance of the heaters would be shipped, and Valad also expressly represented to both Brown and Mallory the exact delivery dates for those heaters. Furthermore, Valad certified in writing to Mallory that the 15 KW heaters and the 21 KW heaters Valad manufactured and shipped Mallory would, in fact, meet the required performance criteria.

However, the undisputed and undisputable evidence is that they did not.

There is no question but that Mallory sustained substantial damages because of the defective heaters and that those damages were only the natural forseeable consequences of the heaters contracted for not being timely delivered as they should have been. The damages which Mallory sustained and for which judgments were awarded Mallory by the Court are substantiated by substantial competent and admissible evidence and the judgments should accordingly be affirmed.

This Court has expressed itself many times on the standard rule of review in cases similar to the case presently being reviewed here by this Court. In the case of Fillmore City v. Reeve, 571 P2d 1316, Justice Crockett speaking for a unanimous Court said:

> ". . .we follow the standard rule of review, that where the evidence is in conflict, we assume that the trial court believed those aspects of the evidence that support his findings. . ."

Justice Hall, speaking for a unanimous Court in the case of Fisher v. Taylor, 572 P2d 393, said:

> "This Court has consistently followed the well-recognized standard of appellate review which precludes the substitution of our judgment for that of the trial court on issues of fact, and where its findings and judgments are based on substantial, competent, admissible evidence we will not disturb them."

In the case of Wash-a-Matic, Inc. v. Rupp, 532 P2d 632, Justice Ellett had this to say:

> "The evidence was sufficient to sustain the judgment made, and we should sustain the trial court even if we might have come to a different decision had we been trying the matter. . ."

Finally, in the case of Dalton v. Dalton, 6 Utah 2d 132, 307 P2d 894, Justice Henriod said:

> ". . .on review of a case of this kind we must view the facts in a light most favorable to defendants and we cannot disturb the conclusions of the trial court if, viewing the facts in such fashion, there is substantial competent evidence supporting the trial court's pronouncement."

See also Charlton v. Hackett, 11 Utah 2d 389, 360 P2d 176, and Salt Lake County v. Ramoselli, 567 P2d 182.

The judgments awarded Mallory are supported by substantial competent admissible evidence and should be affirmed.

CONCLUSION

The Judgments awarded Mallory against Brown and Valad are supported by substantial, competent, admissible evidence and in accordance with the law applicable in such cases. Those Judgments should accordingly be affirmed.

RESPECTFULLY SUBMITTED,

WILLIAM J. CAYIAS
and
QUENTIN L. R. ALSTON
Attorneys for Mallory Engineering, Inc
1558 South 1100 East Street
Salt Lake City, Utah 84105
467-5100 or 467-5109

CERTIFICATE OF MAILING

Two copies of the brief of Respondent Mallory Engineering, Inc. were deposited in separate sealed envelopes in the United States Mail with postage prepaid thereon addressed to each appellant's respective attorney of record as follows:

ALLEN H. TIBBALS
220 South 200 East Street
Salt Lake City, Utah 84111

GODFREY P. SCHMIDT
654 Madison Avenue
New York, New York 10021

ROBERT B. SYKES
320 South 300 East, Suite 2
Salt Lake City, Utah 84111

all on this 9th day of November, 1978.

Quinton L. R. Clinton