

2001

Walter E. Mullins v. Ralph M. Evans & Royal Industries Corporation Inc. : Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Legal Brief, *Mullins v. Evans*, No. 14407.00 (Utah Supreme Court, 2001).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

WALTER E. MULLINS,

Plaintiff and
Respondent,

vs.

RALPH M. EVANS and ROYAL
INDUSTRIES CORPORATION, INC.,
a California corporation,

Defendants and
Appellants.

Case No. 14407

PETITION FOR RE-HEARING

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FILED

MAR 22 1977

Clerk, Supreme Court, Utah

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RELIEF SOUGHT ON RE-HEARING

Respondent seeks relief from the Court's opinion reversing the jury's findings and verdict of liability entered herein. It appears to the respondent that the Court has either overlooked some of the evidence adduced at the trial or has misconstrued some of the facts in the case, thereby resolving the issues of fact in favor of appellants and against respondent contrary to the jury's findings. It is respectfully submitted that the long-standing rule of law of this Court is to the effect that the prevailing party at the trial level is entitled to a construction of the facts most favorable to the jury's findings, together with all inferences flowing therefrom. Respondent respectfully

submits that the Court has failed to follow this rule in its opinion heretofore rendered in the respects as will be set forth in this Petition.

A literal reading of the Court's opinion leads one to believe that the law in this State now deprives a corporate creditor of any standing to enforce his claim against a purchaser of the debtor corporation unless he can show that the purchasing corporation knew of the outstanding obligation. On page 3 of the Court's opinion, the last paragraph thereof, this Court stated unequivocally that the plaintiff and respondent herein was in no better standing with his claim than someone with an unrecorded mortgage on a piece of machinery which had been sold for value. Respondent fails to correlate the Court's analogy of respondent's claim as it may be related to a chattel mortgage. The statutes of the State of Utah clearly provide methods by which a person may record a chattel mortgage to preserve his rights. There is no method by virtue of statute known to respondent to preserve a claim for commissions as set forth in plaintiff's complaint. There simply appears to be no recording protection available to the plaintiff herein.

The Court also states in the next to last paragraph on page 3 of its opinion that there might be or would be a contingent

liability on the part of defendant, Royal Industries' purchase of the Evans Corporation if it could be shown that

"Royal Industries knew or had any reason to know that Mr. Mullins would claim a commission on machines which it would manufacture and sell."

The testimony taken at the time of trial and which will be set forth verbatim shows that there was ample reason and opportunity for the purchasing corporation, Royal, to know or acquaint itself with the obligations of the selling corporation. If the Court, in its opinion, is saying that a purchaser of a corporation, assets and obligations, may overlook, through its own negligence or otherwise, an obligation and thereby avoid the same, it would then place the creditors of the selling corporation in an impossible situation. How simple it would be for the seller and purchaser to both state at the time of trial that neither had discussed the obligation or considered the same in the transaction, thereby avoiding responsibility and defeating a creditor's claim. It is respectfully submitted that the substance of the transaction should be considered, together with the testimony, and not merely the form of the writing. The test should be whether or not the purchasing corporation had a reasonable opportunity to acquaint itself with the obligations of the seller and whether or not, through its own inadvertence or neglect, it failed to do so. To reason otherwise would promote dishonesty between buyer and seller to the detriment of creditors. The record clearly shows by the testimony of defend-

ant, Ralph Evans, that the records of Mullins' claim were available and very possibly could have been reviewed by the purchaser's accountants and attorneys. He testified as follows:

"Q. And the fact of the matter is the minute you sent Mr. Mullins that notice that you weren't going to give him any more money and gave him a check to settle up what you thought you were going to give him any more money and gave him a check to settle up what you thought you were going to be able to terminate the agreement, he immediately wrote back with a letter within a matter of a couple of weeks, didn't he; told you he wasn't the least bit satisfied and told you he wasn't going to sit still for it?

"A. He did not say he wouldn't accept it. Accepted the check and cashed the check.

"Q. Of course, because you owed him the money. He also wrote you and told you that he wasn't satisfied and that he considered it an agreement and he didn't think you were the kind that you weren't going to live up to your word, didn't he, in his letter?

"A. He wrote down that he wasn't satisfied but he accepted the check and he cashed the check and in the letter, in my letter I stated to him that this was payment in full for all his services rendered to R. M. Evans Company and Evans Manufacturing Company.

"Q. And you said it was your word that was at stake in his letter?

"A. Pardon?

"Q. He said it was your word that was at stake, that you made the agreement and it was your word that was at stake, didn't he?" (Testimony of Ralph Evans, TR 949 to 950.)

Evans further testified that when the representatives of Royal came to his company to go over their records to formulate their merger agreement, Evans made all records available for their examination. He stated:

"Q. When Evans, when the Royal people came over, was it your understanding that they knew or had access, had access to the data about Mr. Mullins and the agreement?

"A. Yes, sir, they had access to it. Yes, sir."
(R 964.) (Emphasis supplied.)

He further testified:

"Q. Where was that information and that material pertaining to Mr. Mullins; was it in your files downstairs?

"A. We had a set of files, had a file cabinet, files and they're all marked by the different companies we deal with, and everybody had total access to them, and when they made the survey and things, while the accountants were there, why they went through all the files." (R 971.) (Emphasis supplied.)

Evans admitted in his testimony that within about two weeks after he wrote his letter to Mullins, terminating, or at least attempting to terminate his agreement to pay commissions, that Mullins immediately responded within two weeks with a letter setting forth that he did not agree to the unilateral cancelation of their written agreement. The jury also so found the facts to be as claimed by Mullins, namely, that he was not accepting the check from Evans as a complete satisfaction of all obligations owed to him under the agreement. Nevertheless, the Court, in its opinion, sets forth that Evans testified to the effect that he

thought there was nothing further to be done since, in his opinion, he thought that Mullins had accepted his check and there was no further claim that would be made by Mullins. This is simply contrary to the evidence and the jury's findings. See Plaintiff's Exhibit 6, which is Mullins' letter sent to Evans within two weeks after his attempted cancelation of the agreement setting forth that he was not accepting the unilateral cancelation. How on earth the Court could feel that Evans had any justifiable reason to consider the agreement with Mullins as canceled is not justified by the evidence and the jury's findings. Evans acknowledged receiving Mullins' letter but apparently chose to ignore Mullins' claim because of his sale to Royal. In any event, the jury specifically found that Mullins did not agree to the unilateral termination of the commission agreement.

The Court's opinion apparently chose to disregard the jury findings in favor of respondent and has selected a self-serving statement of defendant, Evans, to the effect that he had decided that Mullins had no further claim. The uncontroverted evidence further shows by testimony of Evans as follows:

"Q. When you sold the corporate assets of the R. M. Evans Company to the Royal Industries, did you discuss with anybody from Royal Industries that you had written documents or letters to Mr. Mullins giving him some sort of an interest in the commissions or profits of your company?

"A. It was never specifically discussed, I don't think. They had access to all records from the time the company was formed and they had their own accountants, plus Price & Waterhouse, who reviewed all the legal documents and accounting records from inception.

"Q. Do you know whether or not Royal Industries were aware of or saw your letter to Mr. Mullins of August 23rd, 1968, wherein you indicate his share of the 52 EZY-Bond Pinch Roller Machines that were sold at \$1,211.60 and indicating that his 2% commission on the net profit of the R. M. Evans Manufacturing Company to March 31, 1967 indicated \$389.80--do you know whether or not this correspondence or copies of it were available to the Royal Industries when they purchased all of the assets of your company?

"A. It was available to them, yes." (R 761 and 762.) (Emphasis supplied.)

It should also be kept in mind that at the time of trial, Evans testified on behalf of all defendants. The record does not indicate in any respect that his testimony was to be binding only upon himself.

He further testified:

"Q. What investigations to your knowledge were made by Royal Industries as to the financial condition of the two corporations?

"A. There was a couple of the top executives of Royal Industries, and examined the records.

"Q. Who would that be?

"A. Mr. Johnson and Mr. Freedman.

"Q. What is their position?

"A. Mr. Johnson is the President of Royal Industries and Mr. Freedman is Vice President in Charge of Finance.

"Q. Okay. And what occurred?

"A. And they come in and reviewed the records, the premises, the operation, and then in turn we arrived at an agreement in principle and they called in Price, Waterhouse, who is the national CPA firm which does all of the auditing for Royal Industries, and they come in and took a certified audit of the operations.

"Q. Did the Royal Industries people examine the books of the two companies?

"A. Yes, sir, they did.

"Q. Did they discuss the books and financial affairs of the two companies with the accountant for the two companies?

"A. Yes, sir, they did." (R 899 and 900.)

The record is amply clear that commissions were being paid to Mullins and that there was correspondence in the company records and files, together with obvious records indicating that Mullins was receiving a commission on all machines being sold. These records were undeniably available to be seen and examined had they been properly reviewed. Apparently, no one from Royal asked Evans for additional information concerning the Mullins agreement and evidently, from the lack of evidence in the record, no one from Royal has ever claimed that the records were concealed. The record is totally silent on any such claim. The only logical

conclusion which may be drawn from the evidence is that the records were there to be seen. In regard to the review of the records by the accountants and officers of Royal, Mr. Freedman, as Vice President of Royal Industries, testified he was a Certified Public Accountant and that he, among others, had reviewed the Evans Company records before entering into the agreement to purchase both companies. He admitted that the negotiations involved the liabilities of the Evans Companies as well as the assets and that these were considered in the purchase price. (R 909.)

Mr. Freedman testified as follows:

"Q. And you, also as far as you knew and what Mr. Evans revealed to you through these companies, you, were buying all the obligations and seeing that they were taken care of, too, whatever was disclosed?

"A. We had no reason, yes, we had no reason to believe that all of the obligations that the company had were not disclosed to us, and those were the obligations that we were assuming.

"Q. So as far as Royal was concerned you thought you were being fully informed of all assets and obligations and that you were buying all of those?

"A. That is right." (R 909.)

It is clear from the testimony of Mr. Freedman that Royal Industries intended to accept and thought they were getting all of the liabilities of the Evans Companies except those enumerated

specifically in the agreement as being reserved. He also indicated in his testimony that they thought they were getting all of the obligations as disclosed by the company records. Whether or not the accountants reviewed the records properly is not an issue in this case. The Court has clearly pointed out in its main opinion that if there was reason for Royal to have knowledge of the obligation, there might be liability. Certainly, from the records, there is reason to know of the claim of Mullins if the records had been reviewed as the parties claim they did.

Freedman clearly testified that his company, Royal Industries, thought they were getting all of the liabilities other than those set forth in Exhibit D-45, the merger agreement. In fact, he testified that certain funds were being withheld in escrow to cover a contingency that they had overlooked some of the debts or obligations of Evans Companies. In referring to the agreement between Evans Companies and Royal, Mr. Freedman was asked:

"Q. To your knowledge, Mr. Freedman, is there anything in the document that requires Mr. Evans to reimburse your company, the Royal Industries, for any undisclosed liabilities that you have to become liable for in this action?

"A. I believe that there was a period of time after the agreement was executed, a part of the consideration that we paid to him was set aside in an escrow for any, I think it was two years, if I am not mistaken, for any liabilities that we would have become responsible for that were unknown at the time the deal was made." (R 925 to 926.) (Emphasis supplied.)

This law suit in question was filed within that two-year period as is evidenced by the complaint on file her, in.

The record again clearly shows that Royal Industries intended to take all of the obligations except those enumerated in the agreement as being specifically withheld or exempt from the agreement. There were even provisions for escrow of funds to cover any obligations which might have been overlooked.

If a generous approach to the facts is taken and it is merely alleged that the parties to the agreement, namely, the defendants herein, had overlooked the Mullins obligation, it would still have been an obligation of the Royal Industries as contemplated by its purchase agreement with the Evans Companies.

It is respectfully submitted that the evidence simply does not support the Court's findings that there was no proof that Royal Industries

"knew or had any reason to know"

that Mullins would claim a commission on his machines. Mullins' immediate reply to Evans denouncing his attempt to cancel the agreement, as is evidenced by his letter heretofore designated as Exhibit P-6, which clearly shows the same. The jury also made such a finding of fact. A review of the records and any reasonable inquiry which might have been made by Royal, had it contacted Mr. Mullins, would have obviously revealed his claim. Since no one claims that the information concerning the contract with

Mullins was withheld from Royal, it can only logically be inferred that they saw the agreement and failed to heed its meaning or through their own inadvertence, overlooked the same. In either instance, they should not be relieved of responsibility. It is clear that their own agreement intended to make provision for any eventuality, such as an overlooked debt which might arise. In any event, Royal's failure to make provisions for the Mullins claim was brought about by their fault, not Mullins.

This Court's opinion, on page 3, paragraph 4 thereof, further states as follows:

"As a part of the sale, the purchaser agreed to assume all debts and liabilities of the selling corporation."

The fact that Mr. Freedman of Royal disclaimed any personal knowledge of the obligation certainly does not negate the evidence that the information was there to be seen. It also does not nullify the terms of the agreement wherein special escrow provisions were made to cover such eventualities as an overlooked obligation. The records were certainly there to be seen as is shown by the uncontradicted evidence.

This Court then states in its opinion at the conclusion of the same as follows:

"If anybody owed any obligation to Mr. Mullins, it was the R. M. Evans Company, Inc. but that company was not made a party to this action."

It is respectfully pointed out that at the time of the bringing of this suit, there was no company in existence named R. M. Evans Company, Inc. who could respond in damages in any event. The facts and evidence clearly show that the only thing remaining of the Evans Corporations at the conclusion of their agreement with Royal were the corporate books. All of the corporate stock of the Royal Corporation given to the Evans Companies as payment for the purchase of the company was required to be immediately disbursed to the stockholders and a liquidation of the companies had to be brought about as soon as possible.

This Court also said in its opinion that in any event if the R. M. Evans Company did not make any further machines, the agreement with Evans would have been in essence worthless because he would have no commissions coming. In one breath, the opinion says we should have sued the Evans Company after the sale to Royal for commissions but then states that if Evans Company did not make any further machines, we have nothing coming. It would seem that what the Court's opinion is saying, in substance, is that either way Mr. Mullins was to turn, he is left without a remedy. In other words, the person or corporation having contracted to pay the obligation could assign it to someone else and thereby both parties avoid any responsibility under the agreement. This seems totally unsupported by logic or law.

As is indicated by the Court's own opinion, a law suit against Evans Companies after the acquisition of the companies by Royal would have produced, at best, a judgment with about as much value as a "Gerald Ford Button."

The law should be and respondent believes still is to the effect that acquisition agreements as evidenced by the testimony in this case and Exhibit D-45 should be reviewed as to their substance, not just merely as to form. In reference to said Exhibit, it is captioned at the top of the first page

"Closing Documents Royal Industries, Inc.
Acquisition of R. M. Evans & Company, Inc.
and Ralph Evans Manufacturing Company, Inc."

The plan of reorganization as the agreement is referred to on page 1 of the Exhibit clearly sets forth that the intent is to acquire all, or at least substantially all of the assets of the Evans Companies. The agreement states on page 1 thereof

"...and the assumption by Royal of substantially all of the corporations' liabilities."

In paragraph 2 of page 13 of Exhibit D-45, it again clearly indicates that it was contemplated that the stock being given to Evans Companies by virtue of the acquisition was to be immediately distributed to the stockholders and a liquidation was to take place of the companies. What difference in substance is there to such an agreement as compared to some of the

more formal requirements in mergers that the stocks be given directly to stockholders? A provision that the stock go to the corporation with a mandatory requirement of immediate distribution to stockholders accompanied by a liquidation of the corporation appears to accomplish exactly the same result. The only distinguishing feature might be the tax consequences to the parties involved. This should not have a bearing on claims made by creditors.

On page 29 of the Merger Agreement, Article IX, it is captioned as follows:

"Liquidation of Corporation 9.1. The Corporation further agrees that promptly after the closing date, the Corporation shall file all necessary documents for the Secretary of State of the State of Arizona to liquidate the Corporation, and to distribute to its shareholders all shares of the common stock of Royal received by Corporation and then available for distribution on a pro rata basis. The Corporation shall be obligated immediately to change the name of the Corporation to a name agreed to by Royal."

In the Merger Agreement, the Evans Companies were referred to as "Corporation." It is clear from the agreement that it was never intended that the stock traded by Royal for the assets of the Evans Companies would be held for the purposes of payment to creditors or for a further sale or investment by the Evans Companies to perpetuate those companies. The agreement clearly shows that the contrary was required. The stock was to be

immediately given to the stockholders and the companies liquidated. Under such a state of facts, it is difficult to understand how such an arrangement can be anything but a merger agreement. Certainly, in substance, that is exactly what was brought about by the agreement.

In 19 AmJur 2d, page 923 (Corporations), Section 1546, it is stated:

"There are certain instances, however, in which the purchaser or transferee may become liable for the obligations of the transferor corporation. The transferee may be held liable for the debts of the transferor corporation: (1) where there is an express or implied assumption of liability;" (Emphasis supplied.)

Surely, the Agreement of Acquisition contemplates both an express and an implied assumption of all obligations other than those specifically excluded by the agreement. Provisions were made in the Agreement to accommodate claims that may have been overlooked as apparently was the Mullins claim.

Mr. Evans testified at the time of trial that his companies were, after the merger agreement, virtually non-existent companies. (R 964.) He also testified that he was not allowed to use the corporate names in the future and that by virtue of the agreement with Royal, there was nothing left of his companies by a shell. (R 966.) He was asked:

"Q. Was there anything withheld by the R. M. Evans Corporation other than the corporate name when it sold to Royal Industries?

"A. No." (R 711.)

The merger agreement further contemplated an immediate dissolution of the Evans Companies as is evidenced by Article X on page 29 of Exhibit D-45, wherein it states:

"All covenants, agreements, representations and warranties made hereunder and in any certificate delivered at closing pursuant hereto shall be deemed to have been relied upon by Royal and by Corporation (Evans Companies) and shall survive the execution of this agreement, the closing, the liquidation or dissolution of Corporation, and any investigation that either party or any of its agents or employees may have made prior to the closing." (Emphasis supplied.)

The liquidation of a corporation is generally deemed in law to be the winding up of its affairs. See 19 AmJur 2d, Corporations, Page 953, Section 1586.

It appears obvious from Exhibit D-45 that all parties to the acquisition considered that the Evans Companies were to be immediately liquidated or dissolved. A case in point, which demonstrates the futility of reviewing the evidence as to form rather than substance, is Stanley Knapp, Jr. vs. North American Rockwell Corporation, CCA 3rd (1974), 506 Fed. 2d 361. In the Knapp case, the facts of acquisition of the corporation by defendant, North American Rockwell, were very similar to those in the instant case. The agreement in many ways was almost

identical in terminology. It was claimed by defendant, Rockwell, that because it was a purchase of certain liabilities as well as assets that any tort obligations not known at the time could not be imposed upon the successor corporation. The Third Circuit Court of Appeals stated as follows:

"Denying Knapp the right to sue Rockwell because of the barren continuation of TMW after the exchange with Rockwell would allow a formality to defeat Knapp's recovery. Although TMW technically existed as an independent corporation, it had no substance. The parties clearly contemplated that TMW would terminate its existence as a part of the transaction. TMW had, in exchange for Rockwell stock, disposed of all of the assets it originally held, exclusive of the cash necessary to consummate the transaction. It could not undertake any active operations. Nor was TMW permitted under the agreement to divest itself of the Rockwell stock, so that it might become an effective investment vehicle for its shelters. Most significantly, TMW was required by the contract with Rockwell to dissolve 'as soon as practicable.'

"On the other hand, Rockwell acquired all the assets of TMW, exclusive of certain real estate that Rockwell did not want, and assumed practically all of TMW's liabilities. Further, Rockwell required that TMW use its 'best efforts,' prior to the consummation of the transaction, to preserve TMW's business organization intact for Rockwell, to make available to Rockwell TMW's existing officers and employees, and to maintain TMW's relationship with its customers and suppliers. After the exchange, Rockwell continued TMW's former business operations.

"If we are to follow the philosophy of the Pennsylvania courts that questions of an injured party's right to seek recovery are to be resolved by the analysis of public policy considerations rather than by a

mere procrustean application of formalities, we must, in considering whether the TMW-Rockwell exchange was a merger, evaluate the public policy implications of that determination."

The main opinion of the Circuit Court then went on to hold that the substance of the agreement was in effect a merger and therefore, the plaintiff did have a standing in court to sue. The concurring opinion filed by one of the judges of the Circuit Court further sets forth the conclusions to be drawn from such facts as we have in our instant case as follows:

"I believe that, where a corporation purchases substantially all of the assets of a second corporation, the legislature intended to impose the second corporation's tort liabilities on the acquiring corporation at least if the following attributes of merger are present: (1) an ongoing business, including its name and good will, is transferred to the acquiring corporation; and (2) the corporation whose assets are acquired is dissolved after distribution to its shareholders of the consideration received from the acquiring corporation.

"In the present case, TMW transferred to Rockwell almost all of its assets, retaining only its corporate records and a limited amount of cash, to effectuate the transaction.

"The agreement and plan of reorganization specifically provided for the transfer of TMW's business 'as a going concern,' including good will, exclusive right to use the name 'textile machine works' and the 'permits or licenses to conduct business as now carried on.' TMW also agreed to change its name and dissolve. In this regard, the agreement and plan of reorganization provided that 'on the closing date, TMW shall take all action required

to change its name to TW Company as soon as practical after the last liquidating distributions to its shareholders of Rockwell stock, TMW shall wind up its affairs and dissolve..." (Emphasis supplied.)

The Court further went on to state in the concurring opinion:

"In addition, this transaction has another characteristic of a statutory merger. The consideration given for TMW's assets was Rockwell stock which in turn was to be distributed to TMW shareholders on TMW's liquidation and dissolution. Thus, TMW shareholders became shareholders 'in Rockwell just as if they had exchanged their shares directly with Rockwell under the statutory merger procedure.'

"On the basis of the foregoing, I am persuaded that the Pennsylvania courts would consider this transaction a merger within the intentment of section 803. This I believe they would do even though the transaction was structured as a sale and even though TMW had not fully wound up its affairs and dissolved until eighteen months after the culmination. TMW actually had ceased to function as a going concern when the sale was consummated. Only a corporate shell remained, engaged solely in the process of winding up and dissolution.

"While I recognize the rightful prerogative of a corporation to rearrange its business or go out of business entirely, there is also a practical and reasonable basis for construing this transaction as a merger..."

The judge then concluded:

"I realize that the acquiring corporation was not a party to any tortious act and had no connection with the acquiring corporation at the time the alleged defective product was manufactured."

The concurring opinion then agreed that the judgment in favor of

the defendant should be reversed. The fact that Mullins claim herein is based upon a contract right as opposed to a tort obligation would appear to have no basis for distinction.

CONCLUSION

This Court's opinion in the instant case effectively points out by its reasoning the impossibility of enforcing the Mullins agreement under any circumstances. The Court first says that any claim, if there be one against anyone, should have been against the Evans Companies but in the next breath, it says that if the Evans Companies do not make any additional machines, there is no claim. This would make a suit against the Evans Companies worthless since they apparently made no more machines but sold all of the rights to Royal. The Court then states that unless there is some sort of recording so that Royal would be aware of the Mullins' interest in the machines, it would not be bound and he would be in the position of an unsecured creditor holding an unrecorded chattel mortgage. In the instant case, there is no way known to the undersigned by which Mullins could have recorded anything to protect his rights. He must rely upon the law and the facts to protect him. If the Court is going to allow the defendants, by their evidence, to conclude that Mullins really was not serious in making a claim and therefore, deprive Mullins of his claim unilaterally, it then appears that the only possibility that Mullins had to protect his

right would have been to give actual notice to Royal. The difficulty with this position is obvious, however. Mullins had no knowledge of the corporate acquisition taking place until long after it had been concluded. At this point in time, if the Court's logic is followed, the door was closed on Mullins because an innocent purchaser for value could not be held liable.

One might then ask, could not Mullins have pursued the assets by way of Royal's stock which was given for the merger directly to the stockholders for his relief. The difficulty with that argument would also be that as the Court pointed out in its opinion, since Evans Companies made no more machines, there would be nothing by way of damage and again Mullins' suit would have been to no avail.

If the Court's opinion is taken literally, namely, that Mullins could only claim the fruits of his contract as against machines made by the Evans Companies, then it appears obvious that the agreement could easily be circumvented by a transfer to a third party. Such a conclusion would be tantamount to a breach of agreement without a remedy. It would permit anyone to relieve himself of a contractual obligation merely by conveying the subject of the contract to third parties. Admittedly, however, if third parties were willing to concede they knew and had actual knowledge of such a transfer, they may be held liable, but who would be willing to admit such a fact if not forced to

do so. Proof of actual knowledge in many instances would be virtually impossible. In spite of this, however, there still remains one other problem. There are no recording acts of any nature known to the undersigned whereby Mullins could have preserved any rights by giving constructive notice by recording. In other words, by virtue of the Court's opinion, he is left without a remedy under any view of the facts.

With all due respect to the Court's opinion and this Honorable Court, it appears to the undersigned that a gross injustice is being perpetrated upon the respondent herein. The opinion allows the Evans Companies to unilaterally claim they thought the agreement had been terminated by mutual consent when, in fact, the jury found to the contrary. The problem is further compounded by stating that although Royal received all of the benefits of the machine and Mullins' efforts, it could still avoid any consequences of the agreement by merely stating it had no knowledge of the same, even though its own merger agreement, which it prepared, provides for compensation for claims which might have been overlooked. Whether or not Royal had actual knowledge of the agreement between Evans and Mullins is not really material. The Court concedes that reason to know of this agreement was sufficient to impose liability. It is respectfully submitted that the records of the Evans Companies which were reviewed from the inception of the Companies to the date of the merger agreement, were clearly available for inspection and

should have imparted knowledge to anyone checking the records. It seems totally inequitable to allow Royal to escape responsibility by having Evans testify that he personally thought the agreement had been terminated because of his own unilateral contract, and contrary to the jury's findings. The unilateral decision by Evans to breach his companies' agreement with Mullins should not be permitted as a basis for the Court's decision. No substantive distinction can be drawn between agreement of acquisition as evidenced by Exhibit D-45 and a clear-cut statutory merger other than the tax results. Clearly, the form of the agreement between the parties herein amounted to a merger, at least a de facto merger. As was pointed out in Knapp, supra, where the ongoing business, including its name and good will, is transferred to the acquiring corporation; and to the corporation whose assets are acquired is dissolved after distribution to its shareholders of the consideration received from the acquiring corporation, this does in fact constitute a merger. The Court's decision should be reconsidered and reversed, and the judgment and verdict of the trial court reinstated.

Respectfully Submitted,

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