

2001

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

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

Lynn G. Foster; Roger F. Cutler; Attorneys for Defendants and Appellants.

Wallace R. Lauchnor; Attorneys for Plaintiff and Respondent.

Recommended Citation

Legal Brief, *Mullins v. Evans*, No. 14407.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/1481

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT
OF THE STATE OF UTAH

WALTER E. MULLINS,)	
Plaintiff-Respondent,)	
-vs-)	Case No. 14407
RALPH M. EVANS, and ROYAL)	
INDUSTRIES CORPORATION, INC.,)	
a California corporation,)	
Defendants-Appellants.)	

ANSWER TO PETITION FOR RE-HEARING
BRIEF OF DEFENDANTS-APPELLANTS

- Roger F. Cutler
Lynn G. Foster
602 East Third South
Salt Lake City, Utah 84102
Attorneys for Defendants-
Appellants.

Wallace R. Lauchnor
1105 Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorney for Plaintiff-Respondent.

IN THE SUPREME COURT
OF THE STATE OF UTAH

WALTER E. MULLINS,)	
Plaintiff-Respondent,)	
-vs-)	Case No. 14407
RALPH M. EVANS, and ROYAL)	
INDUSTRIES CORPORATION, INC.,)	
a California corporation,)	
Defendants-Appellants.)	

ANSWER TO PETITION FOR RE-HEARING
BRIEF OF DEFENDANTS-APPELLANTS

Roger F. Cutler
Lynn G. Foster
602 East Third South
Salt Lake City, Utah 84102
Attorneys for Defendants-
Appellants.

Wallace R. Lauchnor
1105 Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorney for Plaintiff-Respondent.

TABLE OF CONTENTS

NATURE OF CASE	1
RELIEF SOUGHT	1
INTRODUCTION	2
ARGUMENT	2
POINT I.	2
CONTRARY TO THE ASSERTION OF RESPONDENT- MULLINS, NO THEORY OF NEGLIGENCE WAS EVER PLEAD, PROVED, OR MADE AN ISSUE IN THIS PROCEEDING, BUT IS ASSERTED FOR THE FIRST TIME IN PETITIONER'S BRIEF FOR RE-HEARING . . .	2
POINT II	5
THE BUY/SELL AGREEMENT OF ROYAL INDUSTRIES WAS NOT A "MERGER" AGREEMENT AND CONTRARY TO THE ASSERTION OF COUNSEL, BY ITS TERMS DID NOT ASSUME "ALL" OF THE LIABILITIES OF THE TWO ARIZONA CORPORATIONS.	5
POINT III	6
THE CASE AUTHORITY CITED BY RESPONDENT- MULLINS IS INAPPLICABLE TO FACTS OF THE INSTANT CASE.	6
CONCLUSION	10

AUTHORITIES CITED

<u>Knapp v. North Am. Rockwell Corp.</u> , (C.A. 3rd, 1974). 506 Fed. 2d. 361 (1974)	.6
<u>Nickle v. Guarascio</u> , 28 Ut. 2d. 425, 503 P.2d 861 (1972)	.3
<u>Simpson v. General Motors Corp.</u> , 24 Ut. 2d. 301, 470 P.2d 399, 401 (1970)	.3
<u>Smith v. Deniro</u> , 28 Ut. 2d. 259, 501 P.2d 265 (1972).	.3
<u>Wagner v. Olsen</u> , 25 Ut. 2d. 366, 482 P.2d 7023

IN THE SUPREME COURT
OF THE STATE OF UTAH

WALTER E. MULLINS,)	
Plaintiff-Respondent,)	
-vs-)	Case No. 14407
RALPH M. EVANS, and ROYAL)	
INDUSTRIES CORPORATION, INC.,)	
a California corporation,)	
Defendants-Appellants.)	

BRIEF IN ANSWER TO PLAINTIFF-RESPONDENT'S
PETITION FOR RE-HEARING

NATURE OF THE CASE

This Court, in a unanimous opinion written by Justice A.H. Ellett, reversed a judgment entered in the Third District Court by Judge, Marcellus K. Snow. The plaintiff-respondent, Walter E. Mullins, has petitioned the Court for a re-hearing pursuant to the provisions of Rule 76(e) of the Utah Rules of Civil Procedure.

RELIEF SOUGHT

The defendants-appellants seek this Court to deny Mr. Mullins' petition for re-hearing. The decision of this Court filed February 15, 1977 should stand as issued and the case remanded to the Lower Court.

I.

INTRODUCTION

The appellant-respondent will not make a long reply to Mr. Mullins' petition for re-hearing. There has already been filed and considered by the Court almost one hundred pages of briefing, excluding the additional 25 pages in Mr. Mullins' latest petition for re-hearing.

However, this response is thought required to note certain inconsistencies and erroneous citations of the record and case law submitted by Mr. Mullins.

II.

ARGUMENT

POINT I.

CONTRARY TO THE ASSERTION OF RESPONDENT-MULLINS, NO THEORY OF NEGLIGENCE WAS EVER PLEAD, PROVED, OR MADE AN ISSUE IN THIS PROCEEDING, BUT IS ASSERTED FOR THE FIRST TIME IN PETITIONER'S BRIEF FOR RE-HEARING.

There exists no pleading and no facts to support the respondent-Mullins' new theory announced for the first time in its petition for re-hearing. On page 3 of his latest brief, respondent-Mullins asserts that Royal Industries should be held liable for "negligence" in failing to "...acquaint itself with the obligations of the selling corporation (the non-party Arizona corporation)." Petition for Re-Hearing, p.3. (Emphasis added).

This Court has clearly and consistently held that

matters not plead and properly presented to the lower court cannot be considered for the first time on appeal.

It has said:

"Orderly procedure, whose principal purpose is the final settlement of controversies, requires that a party must present its entire case and his theory or theories of recovery to the trial court; and having done so, he cannot change to some different theory and thus attempt to keep in motion a merry-go-round of litigation." Simpson v. General Motors Corp., 24 Ut.2d. 301, 470 P.2d. 399, 401 (1970); See also, Wagner v. Olsen, 25 Ut. 2d. 366, 482 P. 2d. 702; Smith v. Deniro, 28 Ut. 2d. 259, 501 P.2d. 265 (1972); Nickle v. Guarascio, 28 Ut. 2d. 425, 503 P.2d. 861 (1972).

Certainly, such a meritorious rule is even more applicable when a litigant attempts such an allegation for the first time in a petition for re-hearing.

However, even accepting arguendo that such a position can or should now be considered by the Court, the testimony was clear and un rebutted that Royal Industries did not have actual knowledge of these transactions between Mr. Mullins and the two non-party Arizona corporations. Rather, this particular matter was in the Arizona corporations' archives and they were not in fact inspected. (R-2; R-916, R-910-911, 918; A-278, 274-275, 280). Further, there was no evidence to suggest a sinister motive on the part of Royal Industries or anyone else as nakedly intimated by the petitioner. These were merely dead file records to which Royal, of course, had access, but which no one reasonably would examine. The only evidence on this point was by

Mr. Freedman who testified that Royal Industries retained an independent accounting firm to audit these Arizona companies and that in his expert C.P.A. opinion, all the examination was done in accordance with good business and accounting principles. (A-

It is also to be noted that this Court correctly stated in its decision that, by Mr. Mullins' own admission, the agreement for a commission did not run into perpetuity. Rather, Mr. Mullins was to receive a commission only so long as the Arizona corporation manufactured the machines. He stated:

"The agreement was that he would pay me two percent of the selling price of the machine, as long as he manufactured them."
(Testimony of Walter Mullins, R-597; A-104-105; see also discussion thereof at page 49 and 50 of defendants-appellants original brief).

The Court was absolutely correct in its observation on page 3 of its decision that:

"The right of Mr. Mullins to a commission was limited to machines made by the R. M. Evans Company, Inc. If the company made and sold no machines, then no commissions would be due Mr. Mullins, and he would have no basis for an action on his contracts against the R. M. Evans Company."

Respondent-Mullins has filed in his petition for re-hearing as well as in his brief in the principal case, to address this underlying term of the agreement on which he based his claim.

It is and was uncontested that the two Arizona corporations survived the sale of assets and assumption of certain liabilities by Royal Industries. Thus, the

opinion of the Court was absolutely correct in ruling as a matter of law that there was no obligation which could be and need be assumed by Royal Industries, Inc.

POINT II

THE BUY/SELL AGREEMENT OF ROYAL INDUSTRIES WAS NOT A "MERGER" AGREEMENT AND CONTRARY TO THE ASSERTION OF COUNSEL, BY ITS TERMS DID NOT ASSUME "ALL" OF THE LIABILITIES OF THE TWO ARIZONA CORPORATIONS.

The touchstone of respondent-Mullins' petition for re-hearing is his desperate attempt to merge the two Arizona corporations, which are non-parties to this action, and Royal Industries. He does that by repeatedly calling the buy/sell agreement a "merger" agreement and substantially stretching the record; as a result, Mr. Mullins' own petition is internally inconsistent. The Court's attention is drawn to page 9 of the Petition for Re-hearing, where Mr. Mullins states:

"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 (two Arizona corporations) except those enumerated specifically in the agreement as being reserved." (See page 9 and 10 of Mullins' Petition for Re-hearing).

Compare this unsupported statement with the actual language of the contract quoted on page 14 of the Petition for Re-hearing. Here the actual language of the contract is quoted states that Royal was going to assume "... substantially all of the corporations' (two Arizona corporations) liabilities."

A further examination of that contract demonstrates that those assumed liabilities were enumerated in detail and were included as a part of the purchase price. Likewise, the assets which were being acquired were enumerated with specificity. In fact, the agreement on numerous occasions explicitly stated in various ways the following:

"Notwithstanding any other statement herein to the contrary, the assumption by Royal of the debts, liabilities and obligations of the corporation (two non-party Arizona corporations) shall expressly exclude ... (5) any liabilities or obligations of the corporation of any nature, whether absolute, accrued, contingent or otherwise, ... not reflected or reserved against on the balance sheet of the corporation as of August 31, 1968 ..."
(See Exhibit 45 at pages 20 and 21) (Emphasis added).

Thus, it is respectfully submitted: (1) Even if a negligence theory were supported by case law, petitioner cannot now raise it for the first time in this petition for re-hearing; (2) The Mullins commission agreement, by its own terms, expired before the sale of assets to Royal Industries; and (3) The Buy/Sell agreement of Royal Industries and the Arizona corporations expressly did not include the assertion by Royal of any claims, other than those enumerated and listed therein. The decision of this Court should not be disturbed.

POINT III.

THE CASE AUTHORITY CITED BY RESPONDENT-MULLINS IS INAPPLICABLE TO FACTS OF THE INSTANT CASE.

The respondent-Mullins has cited, at substantial length, an opinion from the Third Circuit called Knapp v. North Am. Rockwell Corp., (C.A. 3rd, 1974) 506 Fed.2d.361 (1974). However, that case did not involve a contract

assumption, much less a negligent assumption, issue; further, it did not involve any liability accruing by virtue of a commission agreement or any contract principles whatsoever. Rather, that case concerned the tort liability of one corporation which acquired the assets of another corporation, for injuries caused by defective products manufactured by the other corporation before the date of acquisition. This point was succinctly summarized by Circuit Judge Rosenn as follows:

"The majority holds that, under certain circumstances, a corporation which acquires substantially all of the assets of another corporation may be held liable for injuries caused by defective products manufactured by the other corporation before the date of acquisition. In the instant case, they conclude that, even though the transaction was structured as a sale of assets, it should be 'treated as a 'merger' for the purpose of imposing tort liability.'" Id at p. 370 (Emphasis added).

Significantly, the rationale behind the decision was based upon the Federal Court Judgment as to what would be the applicable state law under the circumstances. In doing so, the Court was substantially influenced by what it construed to be Pennsylvania public policy for imposing tort liability upon those individuals most able to spread the loss. In doing so, it reasoned from a Pennsylvania decision holding a governmental immunity statute invalid because such a ruling would spread personal injury loss to those most able to bear it. See Court discussion and rationale id at p. 369.

In making its decision, the Court candidly admitted

it was basing its decision on this philosophical
extention of Pennsylvania case law. It stated:

"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 an analysis of public policy considerations rather than by a mere procrustean application of formalities, we must consider whether the TMW-Rockwell exchange was a merger, evaluate the public policy implication of that determination." Id at p. 369.

The Court then noted:

"As between these two parties, however, Rockwell is better able to spread the burden of the loss."

Thereafter the Court observed that Rockwell could have protected itself by obtaining insurance and stated:

"Rockwell could have protected itself from sustaining the brunt of the loss by securing from TMW an assignment of TMW's insurance. There is no indication in the record that such an assignment would have placed the burden on either Rockwell or TMW since TMW had already purchased the insurance protection, ..." Id at p. 370.

The Court, therefore, held:

"In the absence of contrary controlling decisions by the Pennsylvania Courts, we conclude that the State Judiciary would have adopted the rule of law that appears to better reason and more consistent with social policies set forth in recent Pennsylvania cases." Id at p. 370 (Emphasis added).

It is, therefore, clear that the decision was underpinned on the principle that when a corporation acquires the assets of another, tort liability should be assumed by the acquiring corporation because:

- (1) The acquiring corporation is better able to spread the loss of that injury, and

acquiring the insurance maintained by the
previous manufacturing organization.

Those policy considerations are totally inapplicable to the instant case, which involves a commission contract for the payment of commissions for a limited time period.

This Court in its decision correctly noted that the commission agreement by respondent-Mullins' own testimony was limited in time and duration. It was only to continue so long as the Arizona corporation made the machines. See discussion supra at p.4. As opposed to the case before the bar, there was no tort injury, no insurance to be assigned, and no public policy considerations of the nature enunciated in the Knapp decision.

Thus, it is respectfully submitted that the authority cited is totally inapplicable to the facts of the case now before the bar. The question of merger was fully discussed and argued in the previous brief submitted to the Court. (See appellant's original brief at pp 15-22, 33-35; cf. appellant-Royal Industries, Inc. brief at pp 28-34). There are presented in this petition for re-hearing no new relevant authority or facts from those previously considered by the Court. Not only do the facts not justify the merger theory, but more importantly, such a theory is irrelevant to a contract which by its own terms was terminated and fulfilled.

CONCLUSION

This Court properly disposed of the issues and rendered a correct decision. It is respectfully submitted that the matters now urged upon the Court by Petitioner are either irrelevant or issues already fully briefed, argued and correctly decided by the Court against the Petitioner. The previous decision of this Court should not be reconsidered.

Respectfully submitted,

Lynn G. Foster

Roger F. Cutler,
Attorneys for defendants-
appellants.