

2001

Walter E. Mullins v. Ralph M. Evans & Royal Industries Corporation Inc. : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

SUPREME COURT

STATE OF UTAH

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J. Reuben Clark Law School

WALTER E. MULLINS,

Plaintiff and
Respondent,

vs.

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

Defendants and
Appellants.

Case No. 14407

BRIEF OF RESPONDENT

Appeal from a jury verdict granted
in favor of plaintiff and respondent
in the Third Judicial District Court
in and for the County of Salt Lake,
State of Utah.
The Honorable Marcellus K. Snow, Judge

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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

BRIEF OF RESPONDENT

STATEMENT OF CASE

This is a civil action brought by plaintiff to enforce a contract and to collect unpaid money due as a two per cent (2%) commission on the sales price of a certain machine being sold by the defendants but in part designed and developed by the plaintiff.

DISPOSITION IN LOWER COURT

The case was tried to the court sitting with a jury, the Honorable Marcellus K. Snow, District Judge presiding. The jury found all of the issues in favor of the plaintiff and against the defendants. The court entered judgment accordingly. From said verdict and judgment, defendants appeal.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks affirmance of the judgment.

STATEMENT OF FACTS

The facts of the case were presented to the jury for its determination. The jurors answered special interrogatories requested by defendants and made findings in accordance with the evidence in favor of the plaintiff. In addition to answering the interrogatories, the jurors returned verdicts favorable to the plaintiff (R 575 to 589).

A substantial percentage of the facts, as abstracted in appellants' brief and contained within the abstract ordered by the court, does not fairly represent the evidence in a light most favorable to the jury's findings and the respondent herein or is absent from the abstract. For this reason, it will be necessary for respondent to frequently refer to the original record. It is also respectfully pointed out that none of the exhibits were abstracted by appellants.

The facts hereinafter set forth represent the evidence and all reasonable inferences that may fairly be drawn therefrom and will be viewed in a light most favorable to the jury's findings and verdict (Cottrell vs. Grand Union Tea Company, 5 Utah 2d 187, 299 P.2d 622; Weber Basin Water Conservancy District vs. Nelson, 11 Utah 2d 353, 358 P.2d 81).

Walter E. Mullins, the plaintiff and respondent herein, is an employee of Chicago Bridge & Iron Works in Salt Lake City, Utah. He has been so employed for in excess of twenty years in the maintenance department. Defendant and appellant, Ralph M. Evans, at one time was a neighbor of Mullins and had prevailed upon him to construct a boat trailer. Mullins is talented in the use of his hands in the construction of equipment and machinery and possesses an abundance of workable ideas for the improvement of machinery.

In the early part of 1966, Evans approached Mullins about constructing a new machine for laminating plastic to counter tops. Evans foresaw the need for a machine that would laminate the plastic to the wood top in one piece which would be a great improvement over other processes being then presently used. He conferred with Mullins and the two of them, after looking at various other devices, worked on ideas for the construction of the machine in question (R 488-491). Mullins was not only to build the machine but added his own ideas concerning safety doors, roller apparatus and devices which would make the machine safe and more workable (R 492-493). After considerable effort, Mullins finally manufactured the first machine at home, working nights and weekends. Evans then suggested that if Mullins would construct the machines as Evans sold them, they would both

hopefully make money. They agreed Mullins would provide the labor in making the first machines at a very nominal charge. Evans would pay for the costs of the material and the nominal labor charges going into the first machines until the business got going. Thereafter, there would be a partnership in the profits in that Mullins was to receive a percentage (R 497, 539, 566). Production commenced and Evans soon sold several machines to customers based upon the initial design and the picture of the first machine (Exhibit P-1). He would then advise Mullins of the sale and request Mullins to build and deliver as fast as possible (R 490-493, 496-497, 539-540). A larger shop was rented by Mullins and more people hired. Mullins calculated the approximate number of hours it took to make the first machine. Based upon a small labor charge for himself and the actual labor cost of those working with him on the machine, he estimated the minimum labor charge for the machine at \$300.00, so that Evans could establish a sales price.

After approximately thirty (30) machines had been sold by Evans, he discussed with Mullins the advantages of moving the manufacturing operation from Mullins' shop in Salt Lake City to Glendale, Arizona where Evans was residing. It was suggested by Evans that they could set up a plant as partners and at that time, he offered Mullins a partnership in the

business of producing and selling the machine. Mullins would have to move to Arizona and work with Evans in the business. Mullins felt that his seniority with his employer was such that he could not risk quitting his job and gamble on the success of the sales of the machines to support his family. He then discussed with Evans the possibility of Evans buying out his interest in the machine and his ideas contributing to the success of the machine for a sale price of \$10,000.00 in cash. Evans indicated he did not have sufficient capital at that time to make a lump-sum payment but suggested Mullins accept a two per cent (2%) commission on the sale price of each of the machines sold for his interest in the machine and business. Mullins agreed to this. Thereafter, Evans returned to Arizona and drew up the contract granting Mullins a 2% commission on the sale price of the machines. The unfinished machines, jigs, and other parts were moved from Salt Lake City to Arizona. Mullins' brother went along with the equipment to assist Evans in getting into production (Exhibit P-3, R 876-877, 504-505, 516).

At about this time, Evans also formed two corporations of which he was President. The stock in both corporations was owned by Evans with a few shares being held by his wife and children. A Mr. Alton Cherry held five shares (Exhibit D-45).

Thereafter, machines were manufactured at Glendale, Arizona under the Evans Company name and sold to the public (Exhibits P-1 and P-5). Evans then commenced paying 2% commissions to Mullins. On August 23, 1968, Evans wrote to Mullins, telling him they had had some difficulty with some of the machines having a square shaft operating the segmented roller. Because of the problems, they would have to discount his commission on 31 machines to allow for the correction and conversion from the square to a round shaft. Mullins agreed to this. Evans apparently decided thereafter to sell his lucrative business and entered into negotiations with defendant, Royal Industries Corporation, Inc., for the sale of both of the Evans corporations... one company made the machines and the other handled sales. The negotiations evidently were in progress when Evans wrote to Mullins, telling him he was not going to pay him any more commissions on the machines being built. This letter was dated August 23, 1968. It is interesting to note that in the merger agreement of the Evans Companies with Royal Industries, there appears to be a business cut-off date for the Evans Companies so that acquisition could be completed. That cut-off date is indicated in the document as August 31, 1968, a week after Evans' letter (Exhibit D-45).

It is obvious from the two documents that Evans, knowing

of his impending merger with Royal Industries, desired to sever his relationship with Mullins and reap all the profits personally.

Mullins responded by cashing Evans' check for the earnings already due and wrote him a letter, denouncing Evans' attempt to cancel his agreement and objecting to any termination of his two per cent commission (Exhibit P-6). The Evans Companies merged with Royal Industries.

During the trial of the matter, defendants continually tried to blame Mullins for designing a square shaft in the segmented roller as his idea (which it was), but which was causing some initial problems in the functioning of the machines. They claimed an off-set to Mullins' earnings (R 952). Interestingly enough, however, they, at the same time, produced documents showing that the square shaft concept in the machine had, at Evans' request, been patented by a person allegedly living in the State of Texas by the name of Floyd D. Brinkman, which patent application shows the exact design and machine built by Mr. Mullins. The patent, subsequently issued, was immediately transferred by the said Mr. Brinkman to Mr. Evans. All of this transpired without the knowledge of Mr. Mullins (Exhibits P-8, D-22, R 639-646, R 934, 962). It is also interesting to note that the patent applications were filed on March 9, 1967 and bear the

signature of one of appellants' counsel, Lynn G. Foster. He had drawings made at Mullins' shop without his knowledge and thereafter, represented to the Patent Office that the square shaft concept of the machine, as well as the safety device and other matters, were the invention of the anonymous Floyd D. Brinkman.

Shortly after Evans had attempted to cancel the commission contract, Royal Industries, through their accountants, Price Waterhouse & Co., and their counsel made a thorough study and investigation of the records and accounts of both of the Evans Companies with the idea of a corporate acquisition of the same by way of merger. A Vice President of Royal Industries and a certified public accountant, by profession, Mr. Ted Freedman, reviewed the Evans records and proposed merger with other members of the corporation, their independent accountants, and legal counsel, and approved the same. Mr. Freedman testified on cross-examination that it was thought by Royal Industries that they were obtaining not only the assets, contracts and physical plant of the Evans Companies but also their liabilities (R 909, 912, 919, 927 and 929). Mr. Freedman also testified that although he did not know of the particular contractual agreement between the Evans Companies and Mr. Mullins for the two per cent commission, his company had fairly examined the

records and thought they were assuming all of the obligations as well as purchasing all of the assets.

Mr. Evans testified concerning the merger agreement and stated that Royal Industries had all of the records at the time of the proposed sale for their consideration. He stated:

"Q. But you said here today that the contract material and data with Mr. Mullins was, I believe, you said, down in the archives.

"A. Well, what I mean in the archives, all of that stuff was in file in order that they had access to all the records and the files of the corporation, and they were all on the premises.

"Q. And I think you said in your deposition they were aware of all this, is that right?

"A. They were aware." (R 962-963)

At the time of testifying, Mr. Evans was the President of the Evans Division of Royal Industries. Royal Industries has twenty-one divisions, each having a president of its respective division (R 841). In late December of 1968, the two Evans-owned companies were finally merged into Royal Industries (Exhibit D-45). Royal Industries purchased all of the assets, contracts, accounts receivable, agreements, leases, and all other obligations with the exception of those enumerated in the agreement. The agreement does not exclude the contract with Mr. Mullins (Exhibit D-45, P. 18). The

merger agreement clearly reflects that it was to encompass all of the assets of the two Evans Companies, whether or not reflected in the balance sheet, and showed a balance sheet furnished by the Evans Companies as of August 31, 1968, showing Gross Sales of \$926,124.00, with Gross Profits of \$463,289.00 to said date. The balance sheet also shows an Evans operating profit for the year ending August 31, 1968 of \$217,771.00.

The agreement further indicates in its body that there was a general assignment by the Evans Companies to Royal Industries of "all of its rights, title and interest to its agreement, contracts, ... with other parties, including but not limited to the exhibits and schedules thereto excepted ..."

Thereafter, the document also listed a bill of sale and agreement whereby Royal Industries acquired all contracts to which the Evans Companies were a party (Exhibit D-45).

Evans then took over as President of the Evans Division of Royal Industries and continued to manufacture the pinch-roller machine designed by Mr. Mullins. Production continued at the same address in Arizona with photographs and brochures of the same machine, the only change being the ownership shown as the Evans Division of Royal Industries (Exhibits P-5 and P-7). After repeated demands by Mullins for payment of his

two per cent commission, suit was brought for enforcement thereof.

At the time the initial machine was made for sale, Evans represented that it was being sold for the sum of \$1,165.00. Evans testified that in 1972, the machines were selling for approximately \$2,000.00 (R 955-956). Defendants' answers to interrogatories show 385 machines sold to April 1972 (R 91).

Appellants' brief complains about the court's instructions; however, all 46 interrogatories requested by them were given by the court without change (R 303). They now complain that there appears to be some ambiguity. It should also be pointed out that appellants' counsel cite numerous statements of fact concerning matters contained wholly within affidavits or counsel's argument to the court and not part of the record. They cite the same as authority for appellants' position, none of said arguments being evidence (A 318, R 1044, A 322, R 436, 452, A 402, 360, 357). At the conclusion of the trial and upon receipt of the jury's verdict, the court promptly, at the request of appellants, polled the jurors. The verdict was unanimous (R 1023-1025).

After appeal had been taken, affidavits were filed by appellants, one of which is signed by a junior attorney in the office of appellants' counsel. He alleges that a juror told

him certain information about the conduct of the jurors and thereafter, he attaches an unsigned affidavit, stating the juror would not sign the same (R 399 or 438). Such inadmissible self-serving hearsay is not worthy of further comment (Glazier vs. Cramm, 71 Utah 465, 267 P. 188).

Counsel further recite in the factual statement the allegation of continued delays in the trial but without any reference to the record. The record will reflect there were no delays whatsoever. The trial commenced on a Monday morning and ran continuously through Thursday afternoon. It was some time after five o'clock p.m. when all of the evidence was in and both sides rested their case. The record clearly reflects no unusual breaks, disturbances or anything of this nature. Counsel then indicate that because of the illness of the judge and his apparent inability to properly conclude the case, they had been deprived of a fair trial. Such is a "cheap shot" at the trial judge and without merit. The record does not reflect any objections or motions for mistrial or any other complaints by counsel prior to the matter going to the jury. None in fact were made.

The trial judge indicated that his father-in-law had passed away and he would need perhaps two days to make funeral

arrangements and to attend the funeral before concluding the case. The case was recessed Thursday evening at the conclusion of all evidence and both sides having rested. It reconvened the following Tuesday morning. In the meantime, an infection in the judge's leg required that he be hospitalized for antibiotic treatment and rest. The judge made it clear he was under no sedatives or medication of any kind other than antibiotics although counsel attempt to so infer and did so state in their Motion for a New Trial (R 1042-1043). The trial judge prepared all of the jury instructions he intended to give to the jury and after signing them, delivered them to Judge Bryant H. Croft, the presiding Judge, for presentation to the jury. Counsel were fully informed of the fact that Judge Snow would not be instructing the jury but again, it is pointed out, no objection was raised to another judge instructing the jury nor were any motions made or objections taken. After counsel had reviewed the instructions, there were certain questions which came to mind and objections to be raised thereto. Judge Croft then contacted Judge Snow by telephone and counsel were invited to go to the hospital and confer with Judge Snow on those objectionable instructions. Counsel did so. After approximately two hours of consultation, a reconsideration of some of the instructions was had and some were

deleted from the judge's proposed instructions at defendants' request. Thereafter, the instructions were again signed by Judge Snow with certain corrections and delivered to Judge Croft for reading to the jury (R 321). Judge Croft then contacted Judge Snow by telephone to verify the fact that the instructions had been corrected and were ready to be given. He thereafter read the instructions to the jury. The only objections taken to the instructions by appellants were those normal and usual exceptions after the jury's retirement. No motions were made for a mistrial or complaints entered at that time (R 982).

The instructions were then given to the jury who retired, deliberated and returned a verdict in favor of the plaintiff. They also answered the special interrogatories requested by appellants.

POINTS URGED FOR AFFIRMANCE

POINT I

THE EVIDENCE SUPPORTS THE JURY'S VERDICT AGAINST APPELLANTS.

POINT II

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR A NEW TRIAL.

POINT III

THE INSTRUCTIONS GIVEN TO THE JURY WERE PROPER.

ARGUMENT

POINT I

THE EVIDENCE SUPPORTS THE JURY'S VERDICT AGAINST APPELLANTS.

Ralph Evans and Mr. Mullins commenced the manufacture of the machine in question. It was the two individuals who were working together with the idea of future profits in mind. Thereafter, Evans formed two wholly owned family corporations to make and sell the machine in conjunction with Mullins' efforts (R 712, Exhibit D-45). At the commencement of their business relationship, Evans agreed that he offered a partnership to Mullins and wanted him to move to Arizona. When this move was rejected, he indicated he would pay Mullins a percentage of the profits on the machine. He later reduced their agreement to writing (R 724-725, Exhibit P-3). After a short time, the two companies owned by Evans, his wife and children were sold to Royal Industries. Evans was asked:

"Q. Was the R. M. Evans a corporation as such dissolved and the business purchased by the Royal Industries?

"A. Yes. The assets were purchased by Royal Industries.

"Q. You mean the physical facilities as well as the customer business, etc.?

"A. That is right.

"Q. When the R. M. Evans Corporation was sold to Royal Industries, that is, their assets, did you sell all of the R. M. Evans Company to Royal Industries?

"A. Yes.

"Q. So the R. M. Evans Corporation now is merely a shell with no business or assets?

"A. That is right.

"Q. Or customers or anything of that nature?

"A. That is right.

"Q. Could you tell us if the facilities of the Evans Company, by that, I mean the physical plant, etc., the equipment, etc. -- did all of this go with the sale to the Royal Industries?

"A. Yes.

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

"A. No." (R 710-711)

Thereafter, the machine in question was manufactured and sold from the same plant using the same employees and the same advertising brochures, with the exception of a slight change in name (Exhibits P-5 and P-7).

Royal Industries agreed to purchase the Evans Companies,

lock, stock and barrel (Exhibit D-45). Royal assumed all contractual obligations of the Evans Companies after August 31, 1968 (Exhibit D-45). The machines produced thereafter were subject to the two per cent commission agreement as a contractual obligation assumed by Royal under the merger agreement (Exhibit D-45). Mr. Ted Freedman, the corporate Vice President of Royal Industries, testified as follows:

"Q. In the case of buying these assets of these two corporations, did the negotiations concern also assuming some of the liabilities or all of the liabilities of these two corporations?

"A. Yes, the negotiations did involve that.

"Q. Was that considered part of the purchase price?

"A. Yes." (R 909)

Mr. Alton Cherry, a former stockholder of the Evans Companies, testified that meetings were held with the Evans corporation officers, and at those meetings, they did discuss the fact that they were selling both assets and liabilities. He was asked by appellants' own counsel on direct examination as follows:

"Q. You, then as a stockholder--a former stockholder--of R. M. Evans Company, you have any knowledge as

to the nature of the sale to Royal Industries; was that a sale of the business, sale of the assets?

"A. Oh, my understanding is--as a stockholder, I sat in on the majority of the meetings--and it was a sale of everything. It was a sale of assets; liabilities were assumed." (Emphasis supplied.) (R 803)

Mr. Freedman understood that Royal Industries was buying all of the assets, liabilities and contracts of the Evans Companies. He further testified:

"Q. Did you understand from the investigation and your inquiry of the matter that there had been a full disclosure so far as Royal Industries knew of all liabilities and assets, and also of all contract obligations which would be a part of that agreement?

"A. Yes, that was my understanding. And I had no reason to not believe that that was the case." (R 912)

Mr. Freedman then went on to discuss the various accountants and other persons employed to review all of the corporate records. He was further asked on cross-examination:

"Q. And it was Royal's understanding at the time they made the purchase of these two corporations controlled by Mr. Evans that they were buying assets, liabilities, physical plant, everything, is that true, except for the stock?

"A. Well, it was my understanding we were buying the assets, liabilities as disclosed to us."

He further testified:

"Q. And you thought at that time, didn't you, Mr. Freedman, that you were getting all of the liabilities as revealed by the company records?

"A. We had no reason to believe that they were not all the liabilities.

"Q. The fact still remains, does it not, Mr. Freedman, when the deal was made your company thought they were getting all of the liabilities and the assets in one lump; that is true, is it not?

"A. Yes. We thought that the liabilities were all that the Evans Companies had."
(R 919, 927 and 929)

Ralph Evans testified that all of the records were available for review, including the Mullins agreement. He thought they had been thoroughly reviewed by Royal personnel or accountants on their behalf prior to the purchase (R 899, 962, 963 and 964).

As far as all of the parties to the merger were concerned, there had been a complete purchase of the corporations and a merger of all assets, liabilities, contracts, etc. The agreement specifically recited an assumption of "all of its rights, title and interest to its agreement, contracts, ... with other parties" (Exhibit D-45).

The Mullins agreement recites unequivocally that Mullins

would receive a two per cent commission on the sales price of the machine. It states "As agreed, we will pay you a two per cent (2%) commission on all EVANS EZY-BOND PINCH ROLLERS manufactured in Glendale, Arizona." (Exhibit P-3) If there is ambiguity in the amount of commission to be paid, said ambiguity should be resolved against the appellants as the contract was drawn by them (Seal vs. Tayco, Inc., 16 Utah 2d 323, 400 P.2d 503).

It is generally held that where a corporation merges or purchases all of the assets and assumes the obligations and contracts of another corporation, said acquisition includes all obligations, whether they are inadvertently omitted from a list or not. See Sudakovich vs. Central Bank of Bingham, 62 Utah 24, 218 P.2d 113, wherein the Utah Supreme Court stated:

"We do not agree with appellant's contention that the defendant assumed only such liabilities as were listed and acknowledged. There was no limitation expressed in the offer of defendant and it must have been understood by the receiver, the bank commissioners, and the court as well, that the settlement included every person who might be found to be a depositor with the bank."

In the instant case, Royal has clearly indicated in its agreement of merger that it was buying everything except those

certain enumerated obligations. The Mullins contract was not excluded. See also annotations at 15 ALR 1181 and 149 ALR 816. See also Hogan vs. Price River Irrigation Company, 55 Utah 170, 184 P. 536; Forbes vs. Thorpe, 209 Mass. 570, 95 N.E. 955.

In the Forbes case, supra, the Massachusetts court ruled that where all assets are transferred to another corporation, together with liabilities expressly assumed, said corporation cannot retain the property acquired and at the same time avoid the payment of the debts which it agreed to pay as part of the purchase price simply because the amount of the debt was misrepresented. The court stated the purchaser clearly cannot keep the advantages of a transaction and avoid the obligations.

In appellants' brief, they cite the case of Parker vs. Telegift International, Inc., 29 Utah 2d 87, 505 P.2d 301. That case is not in any way comparable in facts with the instant case. In Parker, only the stock was sold, not its assets, contracts, or liabilities. In the instant case, appellant, Royal Industries, purchased everything. We would also agree with the general rule that where a corporation purchases nothing but assets and excludes contracts, obligations, and other liabilities, such may be done if valid consideration is given to the stockholders of the selling corporation. The general rule is cited in Cooper vs. Utah Power & Light Company, 35 Utah 570,

102 P.202 that there is no presumption that obligations are assumed by purchase of assets only. However, in the instant case, the merger agreement was intended to assume and merge all of the assets, liabilities, and contracts. For this reason, Ralph Evans, individually, and Royal Industries are liable to the plaintiff to perform their obligations under the contract.

From 1969 to April of 1972, 350 machines had been manufactured and sold (R 974-975). Evans claimed that during 1972, they had lost some customers because of problems with the roller device in the machine and the company loss was about \$40,000.00 in sales. At that time (1972), the machine was selling for about \$2,000.00 (R 955-956). Evans admitted that at no time did Mullins ever tell him he would guarantee the machine to work without having problems (R 958). The selling price of the machine continued to climb as the inflationary trend progressed (R 932). On Page 22 of appellants' brief, they represent to the court that there are at least 393 machines sold and that a minimum amount owing to Mullins under the contract would be \$9,156.90, computing the commission at the sale price in 1968. They totally disregard the fact that the contract calls for a 2% commission on the sale price of each machine. Appellants' interrogatories asked the jury this specific question. See Interrogatory No. 2 (R 481).

The jurors answered said question in the affirmative (R 578). The jurors also found in Interrogatory No. 1 that appellant Evans personally agreed to pay two per cent commission to Mullins.

From the time the machines were originally constructed until April of 1972, there were almost 400 machines sold. This was for a period of approximately 3-1/2 years. From April of 1972 until the time of trial, late June of 1975, another three years had elapsed. From this, the jurors could easily conclude that approximately 400 more machines had been made and sold if not more. The machines were being sold around the world.

Appellants' counsel cites part of the argument to the jury given by counsel for the respondent wherein a \$40.00 commission figure was used as part of counsel's argument to the jury. This was based upon a sale figure in 1972 of \$2,000.00. The argument, of course, was in no way an indication to the jury that this was the maximum amount coming to Mr. Mullins but merely given to the jurors and so understood as an approximation of the amount of commissions due at the time of the answers to interrogatories in 1972.

The appellants were in sole and complete control of the books concerning the number of machines manufactured and the

gross sales figures on the machine. Counsel suggests that a post-judgment accounting was made establishing the number of machines actually sold to the date of trial. The only accounting claimed to have been made by the appellants is a self-serving affidavit by one of the appellants, Ralph Evans. The affidavit was signed on the 8th day of April, 1976, claiming a certain number of machines had been sold. This affidavit was filed almost nine months after the case had been tried. It was not filed in accordance with any order of the court for an accounting nor was it filed at the request of the plaintiff. It was a self-serving affidavit filed after the case was on appeal, apparently in an attempt to influence this Court, although not part of the trial evidence (R 1062). Plaintiff tried to establish the current selling price of the machine at the time of trial but appellants objected thereto and the court sustained the objection (R 956). Appellants were and are in sole possession of all of the documentation as to selling price. Because of their own objections, appellants refused to allow respondent to elicit the sales figures from appellants' office personnel. They were asked to produce the sales evidence on the number of machines sold to date of trial and the sales figures as they were in sole and exclusive possession of the same. They refused to do so. The evidence in their exclusive control was purposely

The court then went on to state:

"It has also been held that the burden of producing evidence at a trial should be shifted once it is shown that the defendant's control over the accounts was exclusive." (Wilson vs. Moline, 229 Minn. 164, 38 N.W.2d 201.)

It is respectfully submitted that there was ample evidence to show that at least in 1972, the sale price on the machine in question was \$2,000.00 and there had been sold approximately 385 machines. The jurors well could have concluded that at least a like amount of machines were made in the following three years and sold at a price admittedly in excess of \$2,000.00 per machine. It was the statement of appellant Evans that the price continuously rose on the machines due to inflation.

In any event, it was the duty of the appellants who were in exclusive control of the records to bring forth the records during the time of trial as to the actual total gross sales figure on the machine in question. They refused to do so. They therefore should not now be allowed to complain.

According to Exhibit D-45, the merger agreement, the financial statement of the Evans Companies show that they were grossing in sales in excess of \$900,000.00 a year at the time of the merger. There is ample evidence from the figures given

at the time of trial from which a jury could conclude that well over \$50,000.00 in commissions was owing to Mr. Mullins for 6-1/2 years of sales.

POINT II

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR A NEW TRIAL.

The appellants, after the jury's verdict had been rendered, then moved for a new trial, claiming ambiguities in interrogatories and the answers given thereto. In their brief, they recite those to which they object.

Interrogatory No. 24, as referred to on Page 42 of their brief, asks whether or not plaintiff Mullins was paid by Mr. Evans personally to which the jurors answered "No." The uncontradicted evidence was that the checks were drawn on the corporate account and the jurors obviously so found.

Interrogatory No. 25 asks whether or not Mullins was paid by the corporation. The jurors answered "Yes" to this question which obviously is correct---the funds were paid in the form of corporate checks from the Evans family-owned corporation.

No. 26 asks whether or not the plaintiff was providing services in the manufacture of the machine for the Evans Corporation to which the jurors answered "Yes." Obviously,

Mr. Mullins started his work with Mr. Evans personally and after the incorporation, continued working with Mr. Evans and for his family corporation. There is nothing inconsistent about this answer.

Question No. 27 asks whether or not Mr. Mullins was also providing services in developing the machine for Mr. Evans as an individual to which the jurors answered "Yes." The evidence is clear that such was the case. Mr. Evans, as an individual, solicited Mullins to help make the machine and also, later on informed him that he and his family had formed a corporation for the production and sale of the machine. There is no inconsistency in the answer.

On Pages 42 and 43 of their brief, they refer to the answers given to Interrogatory Numbers 1 and 30. Their questions are ambiguous in that they refer to certain payments but do not specify what payments. The jurors answered these questions; however, the interrogatories were requested by appellants and they should not now be allowed to complain about their construction.

They complain about the answer to Interrogatory No. 1 wherein the jurors found that there was a contract entered into whereby Mullins was to be paid two per cent of the sales price

of the machine to which the jurors answered "Yes." There appears to be nothing ambiguous about that answer.

In regard to Interrogatory No. 28, the jurors answered the question as being "Undecided." Appellants were apparently asking the jurors to make a determination as to what the thoughts were of Mr. Mullins. The jurors apparently had not decided what his thoughts were and evidently found the question ambiguous.

Question No. 29 complained of is also consistent with the other answers given by the jurors. The question asks whether or not the plaintiff understood that defendant Evans was acting solely in his capacity as an officer of the corporation to which the jurors answered "No." He was also acting on his own behalf.

On Page 45 of their brief, they complain about an answer given to Interrogatory No. 43 wherein it was asked of the jurors if Royal Industries knowingly agreed to assume and fulfill the terms of a letter memorandum dated April 11, 1967. The jurors answered "No." One of the witnesses for Royal Industries stated that he did not knowingly recall the particular agreement with Mr. Mullins at the time of the merger. Evans said the Mullins agreement was available for review along with the other corporate records. The jurors' answer in such event was not inconsistent. This does now however mean that the merger agreement and the

understanding of the parties did not contemplate the acceptance of the Mullins' contract in accordance with the terms and provisions of Exhibit D-45.

This Court has repeatedly stated that judgments will be sustained if supported by any substantial evidence and reasonable inferences to be drawn therefrom. Jensen vs. Eddy, 30 Utah 2d 154, 514 P.2d 1142.

This Court has also stated that the amount of damages awarded by a jury is a matter of discretion. Hirabelli vs. Daniels, 44 Utah 88, 138 P. 1172.

It has also repeatedly been held that a jury's conduct cannot be impeached by affidavits of the jurors unless their conduct is the direct result of a quotient or chance verdict. A juror is not permitted to impeach a verdict by giving an affidavit that the other jurors did not understand the evidence. Stringham vs. Broderick, 529 P.2d 425; Vernon Smith vs. Wilmer Barnett, 17 Utah 2d 240, 408 P.2d 709; Hathaway vs. Marks, 21 Utah 2d 33, 439 P.2d 850. Nor will the courts go behind the jury's answers to interrogatories to analyze or speculate as to the manner in which the jurors arrived at their decision. Weber Basin Water Conservancy District vs. Nelson, supra. See also Hepworth vs. Covey Brothers Amusement Company, 97 Utah 205, 91 P.2d 507. All of the issues raised by appellants in their

Motion for a New Trial were duly considered by the trial court. The motion was denied, and properly so.

POINT III

THE INSTRUCTIONS GIVEN TO THE JURY WERE PROPER.

The instructions given to the jury were almost verbatim as requested by appellants herein. Of course, the court did give some of respondent's requests and denied others.

On Page 26 of appellants' brief, they continually refer to the court's preparation of the instructions in the hospital. Such is not the case. The instructions were prepared by Judge Snow and given to Judge Croft before Judge Snow went into the hospital. The only discussions about instructions in the hospital were those discussions concerning certain objections that appellants voiced about the instructions which were reviewed by Judge Snow at the hospital. Some of the court's instructions were omitted by agreement of counsel and the court.

Appellants complain of Instruction No. 30. This instruction told the jurors that if they found the issues in favor of respondent, they should, by a preponderance of the evidence, determine the machines sold and the amount of damages suffered by respondent. There was nothing erroneous in this instruction. The argument against giving such an instruction by appellants is based

solely on their own view of the evidence and obviously not based upon the evidence as found by the jurors.

Instruction No. 31 to which they object is clearly the law. It merely tells the jurors that since defendants drew the agreement, any ambiguity should be resolved against them. This is fundamental contract law. Seal vs. Tayco, Inc., supra. Appellants attempt to claim that Royal Industries should not be held to the same burden of the instruction since it merely assumed the agreement by contract and was not a party to it. It is respectfully submitted that Royal assumed the agreement and all of the necessary rights and obligations therein. They certainly are not in the position to claim that any ambiguities should be resolved in their favor.

Instruction No. 32, which was objected to by appellants, correctly states the law. The court instructed the jurors that if they found that Royal Industries purchased the obligations and assets of the Evans Companies that they may have acquired the obligation, either expressly or by implication, and could become legally responsible. The facts clearly indicate by the merger agreement and testimony that there was such an assumption of obligations and contracts and such instruction was clearly the law of the case (Exhibit D-45).

Instruction No. 33 merely told the jurors that in such an acquisition, as is evidenced by Exhibit D-45, there was a merger or as such, the transaction amounted to a merger, and that Royal Industries not only acquired the assets of the Evans Companies but also acquired their contractual obligations. This, of course, is the law.

Counsel then complains of the instructions regarding merger or acquisition of assets and cites Parker vs. Telegift International, Inc., supra, which has previously been referred to and is not appropriate to the facts of this case. In the Parker case, there was no transfer of assets, contracts, obligations, or anything of this nature. It was merely a purchase of corporate stock.

Instruction No. 34 applied to Mr. Evans as he later on admittedly became what was termed as the President of the Evans Division of Royal Industries and as such, managed the division. This was the division which continued making the machine in question and any conduct and knowledge of Mr. Evans after that time became the conduct of the corporation. This instruction referred to his knowledge of machine sales.

Instruction No. 35 is merely a recitation of what is the law. The corporation, Royal Industries, obviously intended to

purchase all of the contracts of the Evans Companies and knew, or should have known, when they purchased everything but three or four enumerated obligations, as set forth in the purchase agreement, they were purchasing the Mullins obligation. They cannot accept the benefits of producing the Mullins machine without paying his commission. Their own merger document, Exhibit D-45, clearly shows their intention to acquire all contractual obligations regardless of those being enumerated and it specifically excluded only certain obligations involving potential litigation. The Mullins agreement was not so listed and therefore, logically must be assumed to have been part of the purchase agreement and merger.

Instruction No. 36 merely told the jurors that they were to assess the damages in the event of a finding in favor of the plaintiff and the damages should be two per cent of the sales price of each machine. Such was the interpretation placed on the agreement by appellants in their request to the court for answers to certain interrogatories. The court, in addition thereto, told the jurors that in the event the value of the machine and its sales price fell below the figure of \$1,165.00, that such an award should be made on the lesser price.

It would logically follow that in the event the price

went above this figure, the jurors would also assess damages accordingly.

In reference to Instruction No. 39, the jurors again were told that if it was the intent of all of the parties concerned that the two per cent commission was to carry over to whoever made the machine by virtue of authority from Evans that said commission would apply. The jurors also were clearly told they must make such a finding of fact before they should find the issues against Evans personally. The jurors so found. It should also again be noted that the agreement about which the court was talking refers to Evans and his corporations as "we," indicating more than one party was to be bound (Exhibit P-3).

In Instruction No. 41, the court gave the general instruction to the jury regarding knowledge of corporate officers concerning business of the corporation. Such is a generally acknowledged stock instruction and a correct statement of the law. It not only applied to Evans but to other officers of Royal Industries that searched the records of the Evans Companies in preparation for the merger agreement, and so testified.

Appellants then complain about certain requested instructions that were not given by the court. They object to their

Requested Instruction No. 19 as not having been given. This request is both ambiguous and effectually takes away the issue of facts from the jury and was properly refused.

Requested Instruction No. 29 is also tantamount to a directed verdict and was properly refused. There obviously were many issues of fact to be decided by the jury as was evidenced by appellants' request that the court submit 46 special interrogatories to determine these issues. The court granted their request and gave all the special interrogatories.

Requested Instruction No. 31 also was tantamount to a directed verdict as to certain issues and was properly refused.

In reference to Requested Instruction No. 33, the court essentially instructed the jury on all of the issues contained therein. The request however contains certain phraseology which takes away from the jury certain issues of fact and was adequately covered in the other instructions.

Requested Instruction No. 34 also was properly refused in that the court covered the issues encompassed within said request in other instructions and said request ignored the family ownership of the Evans companies and other pertinent matters.

The other requested instructions by the appellants were given in substance as they pertain to the issues but insofar as

they were couched in such terms as to be inadequate, they were properly refused.

Appellants further claim that the jurors' answers to the special interrogatories requested by them were inconsistent. This matter has been reviewed previously herein and no further comment deemed necessary. The question of whether or not there was an agreement by Mullins to accept payment from Evans in full as claimed was decided by the jurors' answers to special interrogatories where they found the issues in favor of Mullins. They were issues of fact and disposed of the matter of accord, satisfaction or release.

Appellants further claim there was no consideration to support the contractual agreement for the payment of the two per cent commission. The evidence is virtually uncontradicted that Evans wanted Mullins to become a partner with him in the construction of the machine and when Mullins refused to move his residence and quit his job to become such a partner, it was then decided that in exchange for his design ideas, work and other development efforts, he should receive the 2% commission. Some payments were actually made by appellants. Mullins accepted the same and is still willing to accept his commissions as payment for his development of the machine. The jurors so found. Counsel claims that Mullins held the property of Evans

and, in effect, exacted an agreement from him to pay commissions before he would release the unfinished machines, jigs, and other tools. The jury found to the contrary.

Counsel then claims that the selling agreement and commission payments were only to be made as long as they were manufactured by Evans. The facts clearly indicate they are still being manufactured under Evans Division of Royal Industries which was a merger of the Evans Companies. They are being made at the same place of business as they were originally manufactured in Arizona and even using the same photographs, name, etc., as previously indicated. Such an argument is without merit. The jurors so found in their answers to appellants' interrogatories.

CONCLUSION

In conclusion, it is respectfully represented by respondent herein that he was the victim of sharp practices from beginning to end. His partner, Evans, through legal counsel, Lynn G. Foster, made drawings of the machine being developed by Mullins and submitted the same for patent without Mullins' knowledge. The patent was placed in the name of a third party with an immediate transfer to Evans upon its issuance to circumvent any claim by Mullins. This is very clearly documented in the evidence. Not knowing all the facts, Mullins agreed to

accept two per cent of the sales price of each machine sold by Evans and his companies as adequate consideration for Mullins' inventive efforts. Damages were so awarded by the jury.

The merger with Royal Industries by Evans and his family-owned companies did not change the agreement in any manner. The merger agreement fully contemplated an assumption of all contracts.

The evidence is clear that almost 400 machines were made prior to the answers to interrogatories in April 1972 and three years further production and sales were as yet unaccounted for. Appellants steadfastly refused to produce evidence as to what the sales figures were to allow the jury to give an exact verdict if they saw fit. They required the jurors to calculate the production based upon the answers to interrogatories as to prior sales figures and the increase in prices and award a judgment accordingly. They should not now be allowed to complain of such calculations through their own misconduct. The verdict and judgment rendered in the lower court should be affirmed.

Respectfully submitted,

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