

2001

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

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14407A

IN THE SUPREME COURT

OF THE STATE OF UTAH

WALTER E. MULLINS,

Plaintiff-Respondent,

Case

14407

v.

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

Defendants-Appellants.

REPLY BRIEF OF APPELLANTS

Appeal from a jury verdict granted in favor
of Plaintiff-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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WALTER E. MULLINS,)
Plaintiff-Respondent,)
v.) Case No. 14407
RALPH M. EVANS and ROYAL)
INDUSTRIES CORPORATION, INC.,)
a California corporation,)
Defendants-Appellants.)

Ralph M. Evans and Royal Industries Corporation, Inc.,
Defendants/Appellants, file herewith their reply to the Brief
of Respondent filed herein. While Appellants in no way concede
to or acquiesce in the position of the Respondent as reflected
in Respondent's Brief, it was initially believed that all matters
raised by Appellee in his Brief were either adequately treated
in Appellants' Brief or could be argued at the oral hearing.
Upon reflection, one matter should be covered in writing.
Accordingly, Appellants submit this Reply Brief.

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res judicata applies and the Respondent may not raise these issues a second time in this state matter.

More specifically, on page 7 and on page 38 Respondent contends that the Brinkman patent application was prepared without Respondent's knowledge and from drawings made at Respondent's shop without Respondent's knowledge. This issue was not an issue before the Trial Court below and no evidence was introduced below upon said issue. The point was at issue in Respondent's suit filed in Federal Court [Mullins v. Royal Industries, Civil No. 74-79, U.S. District Court, District of Utah] against Appellants. And the uncontroverted record in Mullins v. Royal, supra, of which this Court may take judicial notice, comprises the following:

1. An attorney (H. Ross Workman) who performed preparatory work on the Brinkman application testified as follows:

"5. Some time in late November or early December, 1966, I accompanied Mr. Foster to a plant where pinch rollers of a type investigated in respect to patentability were being manufactured for the purpose of gathering technical information upon which a patent application would thereafter be based."

"6. This pinch roller plant was located in the rear behind a builders supply company at about 6000 South State, Salt Lake City, Utah."

"7. Mr. Foster introduced us to at least one individual at the plant who was fabricating the pinch roller machines. This man appeared to know Mr. Foster. I was introduced to the man by Mr. Foster as being his assistant and he was informed that we had come to obtain technical information on the pinch roller machines for the purpose of preparing a patent application."

"8. I do not recall the identity of the person who was so fabricating pinch roller machines at said plant location, but I do recall that he explained in detail how the pinch roller machines were made, the parts used and how they were operated after they were installed."

"9. At that time, I made notes concerning the pinch roller machine on three separate sheets of yellow legal pad." Mullins v. Royal, supra, Affidavit of H. Ross Workman.

2. The draftsman who prepared the drawings testified:

"I did travel to said location [the Mullins fabrication plant] at approximately 6000 South State Street in the rear. At that time, I identified myself to the workers at that location for building the pinch roller machines as being the patent draftsman for Mr. Foster and indicated that I was there for the purpose of obtaining technical information adequate to prepare Patent Office Bristol Board drawings on the machines so that the patent application could be filed based on those drawings."

"6. At that time, the persons who were building said pinch rollers, and I do not recall any names in particular of said persons, did assist me in understanding the pinch roller machines, the manner in which it was being fabricated, the parts used to make the machine and the mode by which the machine was operated.

"7. I took notes during said conference with the persons fabricating said pinch rollers ..." Mullins v. Royal, supra, Affidavit of Mark Riches.

3. One of the employees who was present when Mr. Workman and/or Mr. Riches came to the Mullins plant was Lester D. Hunt, who testified:

"3. I became an employee of Walter Mullins dba M & L Fabricators, about October 1966 ..."

"22. During my employment by Mr. Mullins in Salt Lake City, I recall someone coming to the South State plant and making sketches of the pinch roller machines being manufactured at that location." ...

"24. Based on my contact with Messrs. Evans and Mullins, I understood in late 1966 and early 1967 Mr. Mullins expected that he would continue to manufacture the E-Z BOND machines all along and that he approved the acquisition by Mr. Evans of patent rights on the machine, because it would help him in his business of manufacturing the machines."

"25. It is my understanding that Mr. Mullins knew that a patent application had been or was about to be filed on the E-Z BOND machine because in about January 1967, Mr. Evans obtained name plate decals in Phoenix bearing the notation "EVANS E-Z BOND 'patent pending' and caused them to be delivered to Mr. Mullins."

"26. Mr. Mullins instructed those of us at the manufacturing plant as to exactly where said decals (with the notation 'patent pending') should be placed on each E-Z BOND machine prior to crating and shipping the machine."

"27. I recall Mr. Evans delivering to Mr. Mullins literature and instruction sheets concerning the E-Z BOND pinch roller machines. This literature and instructional material was present at the Salt Lake plant where the E-Z BOND machines were being manufactured. The literature and instructions had the notation 'patent pending' displayed thereon."

"28. At least some of said literature and instructions were placed with each machine following which the machine was crated for shipment. Mr. Mullins was aware of the literature and instructions and the contents of each."

"29. Mr. Evans told Mr. Mullins that he was advertising the E-Z BOND Machines in various trade magazines including Kitchen Business." Mullins v. Royal, supra, Affidavit of Lester R. Hunt.

In addition, Lester Hunt testified at the trial of this action that he "helped put decals" on the pinch roller machines, that Mr. Mullins showed Hunt "where to put the decals on", that the words "Ralph Evans Manufacturing Company" and the words "patent pending" were printed on the decals and that the decals were put on the machines

as early as "late 1966". See trial transcript pp. 334-336.

Thus, it is clear that Mullins, contrary to the assertions in his Brief, had extensive knowledge of the preparation of the Brinkman patent application and that Mullins was manufacturing machines bearing notices of the pendency of that patent application, which notices were affixed to the machines at the direction of Mullins.

Respondent claims on pages 7, 8, and 38 of his Brief that he (Mullins) is the owner of the invention patented by Brinkman. Again, this point was not at issue in the trial below but was at issue in the Federal suit. Mullins v. Royal, supra. Not only was there no "invention" issue in the trial forming the basis of this appeal but Mullins admitted during the course of his deposition taken December 21, 1970 in this matter that he invented nothing concerning the machine at issue, i.e.

"Q ... Did you design some of the features of the Easy Bond machine?

A No, that isn't what I'm claiming at all.

Q Tell me what you're claiming.

A All I'm asking for and claiming is the fact that I done some work for Mr. Evans. I built a machine for him. He agreed to pay me a certain amount to, oh, what do you say, pay me for the work that I done for him and the agreement was in the form of a contract.

Q Now, you say you did some work for him. What work is it that you have in mind?

A I'm talking about building the machine.

Q But you're telling me that you did not design features of that machine?

A No, I didn't design them.

Q Then did you at any point in time consider filing a patent application on any features?

A No.

Q And you did not file a patent application on any of these features?

A Never.

Q Which of the features do you regard as original with you?

A None that I know of.

Q None of them?" Deposition of Walter E. Mullins of December 21, 1970, pp. 10, 11.

To suggest to the contrary that Mullins was wrongfully deprived of an invention by sharp practices or fraud of the Appellant is highly misleading and prejudicial.

Respondent chose to litigate his claims to the Brinkman patent in the above mentioned Federal suit where he (Mullins) asserted seven different causes of action premised on Mullins' claim that he was the owner of the invention disclosed and claimed in the Brinkman patent. An eighth Federal claim (Cause of Action No. 7) in Mullins v. Royal, supra, was a qui tam action for penalties based on an allegation of patent mismarking. All eight of Respondent's Federal claims were dismissed with prejudice on two separate motions for summary judgment by the Appellants. No appeal was taken and the two summary judgments are final.

The disposition of two of those claims is of particular interest.

Respondent's fourth Federal cause of action claimed damage as a result of unfair competition by Appellant

in "wrongfully appropriating" Respondent's claimed invention. This claim was dismissed for the reason that the claim of unfair competition cannot be predicated on an allegation of copying a design of an article not protected by a patent. Mullins v. Royal, supra, Courts ORDER, dated August 29, 1975, p. 5.

Judge Aldon Anderson, in dismissing Respondent's fourth Federal cause of action noted that if Respondent desired to "challenge the existence and enforcement" of the Brinkman patent, he must do so by "challenging the patent's validity." Mullins v. Royal, supra, ORDER, dated August 29, 1975, p. 5.

Respondent's eighth Federal cause of action did challenge the validity of the Brinkman patent by seeking a declaratory judgment of invalidity. However, Respondent was unable to qualify said eighth cause of action for declaratory relief because no justiciable controversy existed. Mullins v. Royal, supra, ORDER dated August 29, 1975, pp. 8, 9.

Respondent has further suggested that Appellant has been guilty of sharp practices in that Evans was assigned the rights to the Brinkman patent at or about the time the patent application was filed. Again, questions involving U.S. Patents are for the Federal Courts. 28 U.S.C 1338(a). Mullins total defeat in Federal Court respecting all "invention" issues stands as a monument to the lack

of merit to such claims. These claims cannot be resurrected in this State matter. The principle of res judicata clearly applies. The mentioned assignment follows a usual and legitimate business practice in respect to the manufacture of goods embodying the claims of a U.S. Patent. The time of assignment merely corresponds to the time when the patent rights were purchased by Mr. Evans from the inventor, Lloyd Brinkman.

Respondent has fully litigated, on every legal theory he could dream up, his allegations that the Appellant wrongfully appropriated his "invention" and he wholly failed in this effort. Appellants should not be required again to defend against these fictitious "invention" issues which are entirely irrelevant, unsupported and prejudicial issues in respect to those matters before this Court on the present appeal.

Respectfully submitted,

Lynn G. Foster

Roger F. Cutler
Attorneys for Defendants-
Appellants

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing
APPELLANTS' REPLY BRIEF was served upon the Plaintiff-
Respondent by hand delivering a copy thereof to counsel:

Wallace R. Lauchnor
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Salt Lake City, Utah 84101

Postage prepaid this 10th day of December, 1976.

Sherr Ann Foster