

2001

Walter E. Mullins v. Ralph M. Evans and Royal Industries Corporation Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WALTER E. MULLINS, :
 :
 Plaintiff-respondent, :
 : Case No. 14407
 -vs- :
 :
 RALPH M. EVANS, and ROYAL :
 INDUSTRIES CORPORATION, INC., :
 a California corporation, :
 :
 Defendants-appellants, :

BRIEF OF DEFENDANTS-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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INDUSTRIES CORPORATION, INC., :
a California corporation, :
Defendants-appellants. :

BRIEF OF DEFENDANTS-APPELLANTS

NATURE OF CASE

This is an action by plaintiff-respondent to obtain a two percent (2%) commission payment from Ralph M. Evans, an individual, and Royal Industries Corporation, Inc., a foreign corporation. Plaintiff-Mullins' claim is based on a written letter memorandum signed by Ralph M. Evans, President of the R. M. Evans Company, an Arizona corporation, and concerned a machine owned and produced by the R. M. Evans Manufacturing Corporation, an Arizona corporation.

DISPOSITION IN LOWER COURT

The plaintiff-Mullins' Complaint for a two percent (2%) commission against the two defendant-appellants originally prayed for relief under the terms of a written contract. This Complaint was dismissed, with leave to amend, because it stated no claim against these defendant-appellants. Thereafter, plaintiff-Mullins filed

an Amended Complaint praying for relief under the terms of an alleged oral contract obligating these defendant-appellants. Plaintiff-Mullins was permitted a jury trial on the basis of this Amended Complaint.

Thereafter, at trial, even though plaintiff-Mullins admitted that his claim was based on the written contract, the trial judge permitted the case to go to the jury. A verdict was returned in the sum of \$6,040.00 against defendant-Ralph M. Evans as an individual, and the sum of \$47,160.00 against defendant-Royal Industries Corporation, Inc.

The trial judge had become ill and was hospitalized prior to the case having been submitted to the jury or jury instructions having been prepared and read. Further, a death in the judge's family during the course of the trial prevented adequate and appropriate consideration of jury instructions by the Court. However, upon the judge's return to the bench, he nonetheless denied defendants-appellants' Motion for a Judgment Notwithstanding the Verdict, in the Alternative, for a New Trial, or for a Remittitur on the Judgment. Thus, this verdict was permitted to stand and defendants-appellants appealed.

RELIEF SOUGHT ON APPEAL

The defendants, Ralph M. Evans, an individual, and the Royal Industries Corporation, Inc., seek to have the verdict reversed and remanded with instructions for a dismissal against each of them. In the alternative, each defendant-appellant seeks this Court to order a new trial or a remittitur.

STATEMENT OF FACTS

The evidence, when viewed in a light most favorable to the plaintiff-respondent, demonstrates the following facts:

1. Plaintiff-respondent, Walter E. Mullins, (hereinafter referred to as "plaintiff-Mullins") is a maintenance man for Chicago Bridge and Iron Company. He had no engineering training, did not hold himself out to be an engineer, and had completed the 11th grade in his schooling. (R-474, 486-487; A-3)

2. Plaintiff-Mullins denied having done any engineering on the machine, subject of the within litigation; he clearly and heatedly made this point as follows:

"A. Let's get this straight, right to start with; there was no 'engineer' in this. I am just a maintenance man--no 'engineer'. I don't know where this came from--get it straight before the Court, right now; there is no 'engineer' in this." (R-522; see also R-548, 828-829; A-3, 36; see also A-62, 217-218.)

3. In approximately 1965, plaintiff-Mullins began building a post forming machine for EFCO Corporation, a company of which defendant-Evans was then President. This machine is not part of the within litigation, but established a format of the parties' subsequent business dealings. This format was that the first machine prototype was constructed by plaintiff-Mullins at home on an hourly basis, during his spare time. Subsequently, the machines were built on a fixed fee basis. (R-487-488, 523-524, 559, 842; A-4, 37-38, 71, 226). Plaintiff-Mullins invoiced and was paid by EFCO as early as December 20, 1965. (R-842, 844; A-228).

4. The defendant-Evans formed two (2) Arizona corporations. One corporation was a manufacturing organization

known as the Ralph Evans Manufacturing Corporations and the second was one for sales of the manufactured goods; it was called R. M. Evans Company, Inc. These corporations superceded the EFCO Corporation's relationship with plaintiff-Mullins and his production. (A-40, 41; Exhibit D-1; A-53.)

5. In the spring of 1966, defendant-Evans informed plaintiff-Mullins of a new machine concept for laminating plastic to kitchen countertops by a device which operated similarly to the wringer rollers on an old style clothes washing machine; however, in this case the rollers were much larger and the bottom roller was segmented. This segmented bottom roller permitted the segments to be laterally separated as to permit the uneven portions (backsplash board, etc.) of the kitchen countertop to pass through, while maintaining constant pressure on the plastic as it was being laminated to the countertop. (A-55-57.)

6. Plaintiff-Mullins agreed to attempt to construct a prototype machine embodying the machine concept on an hourly rate in his spare time at home. (R-533, 566; A-47, 78.) After the first prototypes were constructed, plaintiff-Mullins agreed to construct and ship the machines on a fixed fee basis of \$425.00 per machine, which agreement was consummated in November, 1966. (R-570; A-83) Invoices for labor from plaintiff-Mullins on the first machines are not part of this suit; however, of significance is the fact that all invoices of plaintiff-Mullins, for his services above described, were addressed to and paid for by the R. M. Evans Manufacturing Corporation, after January 28, 1966. (R-846, 862; A-229, 239.)

7. After Plaintiff-Mullins had constructed a number of these postforming machines at his home, larger contracts were provided by the R. M. Evans

Manufacturing Company at a premises located in Murray, Utah. Plaintiff-Mullins only furnished personal services and all of the bills, including the rent and utilities, were paid by said corporation. (R-491; A-7.) Further, all materials and supply costs were paid by the R. M. Evans Manufacturing Company, Inc., either by billings submitted by plaintiff-Mullins, or by invoices forwarded to the corporation's Glendale, Arizona headquarters. (R-491, 537-538, 569, 575; A-7, 51, 81, 87)

8. At least by January 28, 1966, plaintiff-Mullins was fully aware that he was dealing with the Ralph M. Evans Manufacturing Corporation, an Arizona corporation. (R-568-570, 613, 583; A-80-82, 116, 95.) Plaintiff-Mullins acknowledged this fact by addressing correspondence to the "R. M. Evans Manufacturing Company, Attention Ralph M. Evans." (R-583; A-95.)

9. Before any machines were sold or produced and in early 1966, plaintiff-Mullins made preliminary drawings which were forwarded to the Ralph Evans Manufacturing Company. Plaintiff-Mullins in his own hand wrote the title: "R. M. Evans Manufacturing Company" on these drawings. (R-572, 613-614; A-84, 116-117; Exhibit D-18.) In addition, during 1966 plaintiff-Mullins: (a) Was paid by corporation checks, (R-536, 567; A-50, 79); (b) Billed and invoiced the Ralph M. Evans Manufacturing Company, Inc., when seeking payment for work completed, (R-537-538, 846; A-51-52, 228); (c) Pursuant to instructions received from the corporation, caused suppliers to bill the Ralph M. Evans Manufacturing Company, rather than Mr. Evans personally, (R-537, 567; A-51, 79); (d) Addressed all correspondence to that corporate entity, (R569,575,851; A81,232).

10. The first machine known as the "Evans EZY-BOND PINCH ROLLER" was completed and shipped by plaintiff-Mullins November 28, 1966. (R-862; A-238) This machine and all subsequent ones had identification tags placed on them by plaintiff-Mullins. These identification tags stated: "R. M. Evans & Co. Inc., Patent Pending." (R-602, 618, 621, 866-867; A-109, 119-120, 240-241; Exhibit D-30.)

11. In March of 1967, a dispute arose between plaintiff-Mullins and the Ralph M. Evans Manufacturing Company concerning quality control and delivery problems. Plaintiff-Mullins informed the corporation president, defendant-Evans, that if he thought it was so easy, he could take the production to Phoenix, Arizona. This suggestion was accepted; however, plaintiff-Mullins asserted an ownership interest in the machine and refused to surrender the parts, jigs, dogs, partially completed work, and other related materials. (R-502-503; A-18-19.) Plaintiff Mullins demanded \$10,000.00 cash for his asserted proprietary rights in this machine, now known as the "Evans EZY-BOND PINCH ROLLER." (R-504; A-20).

12. Plaintiff-Mullins was informed by defendant-Evans that there was no money in the corporation to pay the \$10,000.00; however, defendant-Evans offered to pay five percent (5%) of the net income of the R. M. Evans Company for one year and two percent (2%) of the manufacturing corporation's sales price of the "EZY-BOND PINCH ROLLER" as long as it made the machines, if plaintiff-Mullins would surrender the machine parts, jigs and partially completed machines. In addition, the corporation paid \$18,613.90 for work done by Mullins between July 1966 and March 20, 1967, the last date work was done. (R-870; A-239-240.)

the commission agreement was accepted

(R-503, 862-863; A-19, 238-240.) However, plaintiff-Mullins required that any such agreement would have to be reduced to a writing. (R-504-505; A-20-21.)

13. On or about March 24, 1967, the terms were reduced to a written memorandum. Plaintiff-Mullins' own testimony of this arrangement was as follows:

"A. I was asking for \$10,000.00 for the settlement on that Pinch-Roller, so he could have all the rights to the machine."

"Q. What did Mr. Evans say? No response to that?"

"A. He said, 'Walt, I can't afford that; I'm just getting started--started in business--and I owe you quite a bit of money; and when I get it paid off, and when I get it paid off, and--I can't afford that, but I will do this; I will give you two percent (2%) of the selling cost of that machine, as long as I build it.'"

"Q. On the sales price, you mean?"

"A. Yes."

"Q. What was your response to this suggestion?"

"A. I told him that it sounded like a fair and honest agreement, and if he would put it into writing, I would agree to it."

"Q. Did he, subsequently, send you a writing to that effect?"

"A. Yes, he did." (R-504-505; A-20-21.)

That writing was received by plaintiff-Mullins and stated as follows:

"Dear Walt:

"In reference to our conversation of March 24, 1967 regarding your commissions on the EVANS EZY-BOND pinch roller sales. (sic)

"As agreed, we will pay you a two-percent (2%) commission on all EVANS EZY-BOND pinch rollers manufactured in Glendale, Arizona. This commission to be based on the Mfg. Co. sale price of the pinch roller or \$1,165.00 per machine. ...

"...

"...

"Very truly yours,

"R. M. Evans and Co., Inc.
Ralph M. Evans, President." (R-505; A-21-22, Exhibit D-3, attached as Appendix "A".)

(Counsel for plaintiff-Mullins stipulated that the five percent (5%) of the profits of the R. M. Evans Manufacturing Company was fully paid and not an issue in this suit.) (R-590, 593-594; A-102.)

14. Plaintiff-Mullins also testified that his commission was to be two percent (2%) "...of the sales price, based on \$1,165.00, sales price." (R-596; A-104.) Further, plaintiff-Mullins stated specifically that the two percent would be paid only "as long as he (R. M. Evans and Co.) manufactured them." (R-597; A-104.)

15. Plaintiff-Mullins permitted agents of the Manufacturing Corporation to take a number of uncompleted machines, the jigs and other devices used in the construction of the machines to Phoenix for manufacture. (R-598; A-105-106.)

16. As stated above, plaintiff-Mullins was not an engineer and made no claim of performing engineering work. In his deposition taken December 21, 1970, and read into the record, plaintiff-Mullins submitted that he did not design the features of the machine; he stated:

"Q. But are you telling me you did not design features of that machine?"

"A. No, I didn't design them."

"...any design features of the Ezy-Bond machine solely your ideas?"

"A. I say, possibly, the frame aspect, you know, and the outer frame and shell."

"Q. What part do you believe is original with you?"

"A. Well, I just designed--I mean, I shaped the shape of it, you know--how it was shaped, about the only thing I can say."

"Q. Was there anything else in the Ezy-Bond machine which you regard as original with you or your idea?"

"A. No." (R-552; A-66.)

Thereafter at trial, plaintiff-Mullins did assert that he originated the idea of a safety device to lift the rollers in the event a man's body was caught, was his idea; he also testified that he selected materials for and designed the square drive shaft for the bottom segmented roller and designed the plate frame. (R-548; A-62.)

17. Plaintiff-Mullins admitted that this safety device was constructed by going to Mr. Ralph Walker of a pneumatic supply house. It was Mr. Walker who drew the pneumatic circuit and recommended the stock parts that would be required to raise the rollers, when a safety bar was pressed. Plaintiff-Mullins was at this time being paid on an hourly rate. (R-566; A-78.) That circuit system and the safety device concept was not unique, new or novel. The concept was patented first in 1958 and was part of the public domain. (R-651-652, 658, 779, 782; A-132-133, 135, 194, 196; Exhibit D-33) Also, plaintiff-Mullins admitted that the segmented roller concept was not his, but someone else's. However, the square drive shaft design was his. (R-828, 830; A-217-218, 222.)

18. On or about May 1, 1967, plaintiff-Mullins was informed by the Evans Manufacturing Company from Arizona of difficulties which were occurring with the machine due to uneven pressure

being applied on the kitchen tops. (R-584; A-96; Exhibit D-28.) Plaintiff-Mullins accepted responsibility for the square shaft design and the resulting difficulty with customers of the machine. (R-589; A-101.) Some thirty-one (31) machines constructed by plaintiff-Mullins had to be redesigned for a round drive shaft and milling of the rubber rollers. Also, other customer complaints received by the manufacturing corporation were forwarded to plaintiff-Mullins. (R-881, 883; A-254, 256.)

19. The square shaft concept of plaintiff-Mullins was abandoned between May and June, 1967, because redesign and correctional efforts on that system were not successful. (R-797, 879, 881; A-203, 252, 254.)

20. On or about August 23, 1968, a letter was forwarded to plaintiff-Mullins by the R. M. Evans Company, signed by defendant Evans as President. This letter enclosed a corporate check in the sum of \$1,182.78, as full payment for all amounts due or thereafter due to plaintiff-Mullins; it also outlined how the figure was arrived at, by deducting adjustments for defective square shaft machine repairs. The letter stated in part:

"I honestly feel, Walt, that you have been well paid for any design and development efforts which you put into the Ezy-Bond and do not feel further payment to you on this machine is justified. Therefore, effective May 1, 1968, we will no longer pay you commissions on each Ezy-Bond manufactured. Very truly yours, R. M. Evans and Company, Inc., Ralph M. Evans, President."
(R-508; A-24; Exhibit D-4, attached as Appendix "B".)

21. This letter was received by plaintiff-Mullins; it was read and understood by him to be a tender by the company of all sums due to plaintiff-Mullins. The check was knowingly endorsed,

cash and the funds used by plaintiff-Mullins. (R-625-626, 832, 839; A-121, 220.) Plaintiff-Mullins specifically agreed to a deduction for the thirty-one (31) defective square drive shaft machines. (R-878; A-251.)

22. On or about September 9, 1968, plaintiff-Mullins addressed a letter to the R. M. Evans Company, Inc., at its Glendale, Arizona address, attention Ralph M. Evans. In this correspondence he did not dispute the accord and satisfaction tender made by the Arizona corporation; rather, plaintiff-Mullins' letter requested that the corporation reconsider its position; he stated: "In looking at this from my side, don't you feel you should continue with our agreement?" (R-512-513; A-28-29; Exhibit D-6.)

23. Plaintiff-Mullins never tendered a return of the money received; rather he negotiated the check even though he was aware of the serious dispute concerning the value of his square shaft designed machine, which he knew was not working and was subsequently scrapped. (R-589; A-101.)

24. Concerning the machines which were constructed by plaintiff-Mullins, it was mutually agreed that said Mullins would produce a "...satisfactory, marketable machine..." (R-588; A-100.) The redesign of the EZY-BOND by the Ralph M. Evans Manufacturing Company resulted in additional costs of \$160.00 per machine or a total of \$4,960.00. (R-886; A-259.) In addition, incidental costs in the sum of \$3,004.72 and miscellaneous travel and related expenses totaling \$4,500.00 were incurred. Other claimed losses included credits given customers in the sum of \$493.10 and a loss of twenty customers at a loss of \$40,000.00. The total loss testified to by defendant-Evans by virtue of the breach of this understanding to

the Manufacturing Corporation was approximately \$49,593.00.

(R-884, 891; A-257, 264.) As above stated, the defendant agreed to a deduction of the two percent commission on the thirty-one (31) defective machines and accepted responsibility therefor. (See also R-892; A-265.)

25. Immediately prior to December 31, 1968, the defendant-Royal Industries Corporation, Inc. began negotiations for the purchase of the assets of the two Arizona corporations, Ralph Evans Company, Inc. and the R. M. Evans Manufacturing Company. They employed an independant certified public accountant firm to audit the assets and liabilities of the two corporations. After such an audit, a contract was consummated dated December 31, 1968. This contract provided that they would purchase the assets of these two corporations and transfer approximately 50,000 shares of investment stock to the stockholders as payment, plus assume designated and specifically enumerated liabilities attached as an Exhibit to that written contract. (R-808, 909, 911, 916, 919, 926; A-210, 273, 275, 278-279, 281, 284; Exhibit D-45.) This contract further provided that the law of California would apply to the transaction. (Exhibit D-45.)

26. The named liabilities to be assumed by defendant-Royal Industries, did not include the contingent claim of Walter Mullins; in fact, said defendant-corporation was not even aware of the existence of plaintiff-Mullins' asserted claim until subsequent to the filing of this suit on August 10, 1970. (R-2; R-916, 910-911, 918; A-278, 274-275, 280.)

27. At the close of plaintiff's case, the only evidence concerning the number of machines produced was the eighty-three (83)

machines which had been manufactured prior to the time that the assets of the two Arizona companies had been sold to defendant-Royal Industries. Therefore, the defendants each moved for a dismissal on the grounds that the plaintiff had failed to meet his burden of proof to establish any claim against these defendants. The Court took these motions under advisement and forced the defendants to present their affirmative case. (R-920; A-281-282.) Thereafter, evidence was presented by the defendants to establish that a maximum of approximately 463 machines had been produced, of which 83 had already been paid for, leaving a maximum of 380 machines upon which plaintiff-Mullins could base his claim for damages. (R-972, 991; A-294, 302.) A supplemental accounting made pursuant to motions after the trial demonstrates that the actual number produced was 393 machines. (R-1063; A-339.) If one multiplies that production number times \$23.30 (two percent of the \$1,165.00 manufacturer's sales price as per the written agreement), the result is \$9,156.90. This sum is the maximum amount of a verdict, under any reasonable construction of the facts, which could possibly have been rendered against any party, even the proper parties defendant-R. M. Evans Manufacturing Corporation or Ralph Evans Company. (R-1063)

28. On the last day of the trial (Thursday, June 26, 1975), a member of the trial judge's family died and, therefore, the judge informed the jury that due to his need to make funeral arrangements, the judge would no longer be able to handle the case; therefore, he would be referring the matter to Judge Hall. Thus, the jury was excused until Monday, June 30, 1975. (R-976; A-297-298.)

29. Prior to leaving Court Thursday, June 26, 1975, Judge Snow called the plaintiff's counsel and the defendant's counsel into

his chambers, individually and separately, and tried to induce the parties to reach an accommodated settlement, indicating (at least to defendant) that if the case were not settled, the case's jury instructions would be prepared by Judge Hall on Friday, June 27, 1975. Negotiations failed and arrangements for Judge Hall did not work out. (A-318) In the meantime, Judge Snow was confined in the LDS Hospital and he apparently attempted to put together the jury instructions, while confined in the hospital. (A-319) The judge noted: "That is a thing I tried to stay out of, that damned hospital. I went to the point I couldn't stand up." (A-319)

30. On Monday, June 30, 1975, at 9:00, Judge Croft made himself available to read the jury instructions prepared by the trial judge, Marcellus K. Snow; however, there were obviously improper instructions and counsel were referred to Judge Snow at the LDS Hospital. Counsel for the defendants arrived for the appointed hour of 1:00, however, due to some problem in finding parking, counsel for plaintiff did not arrive until approximately 1:30 o'clock. After the judge was injected with medication, counsel met with the trial judge from approximately 1:30 until 3:00 p.m. and discussed the problems with the jury instructions; however, all parties were under considerable time pressure because the jury had been told to report back at 2:30 o'clock p.m. to receive the instructions in the case. (R-979, 1040-1043; A-299, 318-321.) The trial judge stated, concerning this session and the objections to the jury instructions at a subsequent argument to vacate the verdict: "No question, everybody was in a hurry to get to it." (R-1043; A-321)

31. The jury had been in recess for over three and a half (3 1/2) days before the jury instructions were finally read to

them sometime after 3:00 o'clock on Monday, June 30, 1975. (R-1043; A-321.) This delay was in addition to numerous long recesses during the course of the trial. These delays caused the jury to become aggravated and, on at least one occasion, precipitated a juror to state to the defendant's counsel: "I know a couple of lawyers who are in trouble." This statement was apparently made because she was unable to meet her date because of late Court scheduling. (R-1044; A-322.)

32. In defendant's counsel's closing argument to the jury, he computed the damages he was seeking. In doing so, he took the evidence concerning the number of machines produced and multiplied those by \$40.00; thereby, on behalf of plaintiff-respondent, counsel prayed a maximum recovery of \$15,200.00. (R-991; A-302.)

33. The jury could not remember the number of machines produced and requested on three separate occasions that information during their deliberations. Shortly before midnight on June 30, the jury returned with a jury verdict in the sum of \$6,040.00 against Ralph M. Evans, personally, and \$47,160.00 against defendant-Royal Industries, Inc. Affidavits indicate that the jury arrived at that verdict by speculating that a total of 1330 machines had been purchased and multiplied that figure by \$40.00, for each machine. (R-436, 452; A-402, 360, 357.)

Subsequent motions to vacate the judgment, for a new trial, or for a remittitur of the judgment to conform to the evidence were denied by trial court. (R-392; A-336.)

ARGUMENT

POINT I

THERE EXISTS NO FACTS UPON WHICH TO BASE A JURY VERDICT AGAINST RALPH M. EVANS, AN INDIVIDUAL.

A. THE RULING OF THE LAW AND MOTION JUDGE THAT THE WRITING DID NOT OBLIGATE THESE DEFENDANTS-APPELLANTS MAY NOT BE OVERRULED BY THE TRIAL JUDGE; THEREFORE, THE ADMISSION AT TRIAL BY THE PLAINTIFF-MULLINS THAT THERE WAS NO ORAL AGREEMENT REQUIRED THAT DEFENDANT-RESPONDENTS' MOTION TO DISMISS BE GRANTED.

As stated in the Disposition in Lower Court Statement, the original complaint filed by the plaintiff-Mullins asserted a written contract binding the two named defendant-appellants. That complaint was dismissed because the written contract, subject of the suit, ran solely to two Arizona corporations which were not parties to the litigation. (R-2-3, 149; A-598.) The plaintiff-Mullins, was, however, permitted to amend his complaint, and thereafter, alleged that an "oral contract" personally obligated defendant-Evans. That Amended Complaint alleged:

"The plaintiff, for cause of action against defendants, and each of them, alleges as follows:

"1. ...

"2. That plaintiff entered into an oral contract with the defendant, Ralph M. Evans, wherein the defendant, Ralph M. Evans, was to pay two percent (2%) commission on all Evans Ezy-Bond Pinch Roller machines to be manufactured by defendant, Ralph M. Evans, ..." (emphasis added) (See Amended Complaint, R-147; A-404.)

However, at trial, plaintiff-Mullins unequivocally denied any oral understanding by stating that any oral statements had to be reduced to a writing. He said of the oral discussion concerning

commission:

"Q. (Cutler) What was your response to that suggestion (2% commission)?

"A. (Mullins) I told him that sounded like a fair and honest agreement, and, if he would put in writing, I would agree to it."

"Q. (Cutler) Did he, subsequently, send you a writing to that effect?"

"A. (Mullins) Yes, he did." (Exhibit P-3, attached as Appendix "A" was then identified as that writing and received in evidence.) (R-504-505; A-20-21.)

That agreement concerning a two percent commission was limited in the writing (and in the oral discussion concerning it) to machines manufactured by the Evans Companies. There was no evidence produced to establish any oral agreement and no evidence to show any manufactured by defendant-Evans, personally. Further, the written memorandum agreement, itself, was ruled by the lower Court as creating only a corporate obligation; therefore, it granted a dismissal in defendant-Evan's favor. (R-2, 3, 147; A-598.) This Court has consistently held that one District Judge is without power to overrule the Decision of another District Judge. It has succinctly observed:

"Generally, one District Judge cannot overrule another acting District Judge having identical authority and stature. We subscribe to such a salutary principle." State v. Morgan, 527 P.2d 225, 226 (Utah 1974); Peterson v. Peterson, 530 P.2d 821 (Utah 1974).

Thus, it is respectfully submitted that it was error to fail to dismiss the claim against Defendant-Evans. The plaintiff-Mullins' claim of an "oral" contract was unproven and the lower Court had no power to overrule the Summary Judgment awarded defendant-Evans on the written contract issue. Such an order was final and binding on Appeal

B. THE UNDISPUTED FACTS AND ADMISSIONS OF PLAINTIFF-MULLINS AND HIS COUNSEL DEMONSTRATE THAT PLAINTIFF-MULLINS' CLAIM IS BASED SOLELY ON A CORPORATE OBLIGATION RUNNING ONLY TO TWO ARIZONA CORPORATIONS, NOT PARTIES TO THIS LITIGATION.

As the case was presented at trial, the plaintiff-Mullins admitted that he had done business, not with Ralph M. Evans as an individual; rather, his dealings had first been with a corporation known as EFCO. Thereafter, he had done business for the R. M. Evans Manufacturing Company, Inc., an Arizona corporation. (Statement of Fact Nos. 7-9.) This testimony of Mr. Mullins was augmented by every piece of physical and documentary evidence introduced. For example, the preliminary drawings for the machine, subject of the claimed commission in this suit were made in the Spring of 1966 and prior to the construction of the first prototype machine. In plaintiff's own handwriting, the plans were identified as belonging to the: "Ralph M. Evans Manufacturing Company, Inc." (See Exhibit D-18)

Further, every billing for payment by plaintiff-Mullins was addressed to the corporation at its Arizona address. (Statement of Fact No. 7; Exhibits D-10, 11, 13, 15, 16, 20, 23, 35, 42.) Every payment received by Mr. Mullins was paid by a corporate entity; he had been receiving payment from this Arizona corporation for more than one year prior to the letter agreement of April, 1967. (Exhibit D-14; Statement of Fact No. 6.) In addition, plaintiff-Mullins was (pursuant to instruction from the corporation), directed to have every supplier of materials and parts bill the corporation, which they did at his instruction. (Statement of Fact No. 7; See Invoice Exhibits, Supra.) These facts are further illustrated by the following colloquy:

"Q. (Cutler) Well, isn't it true, Mr. Mullins, that as of May 1966, you had received information to change your billings procedures, and in fact you changed those as evidenced by billings you sent?"

"A. (Mullins) I don't recall this, but it could be true."

"Q. (Cutler) You testified yesterday, if my memory is correct, that you received information, from time to time, from the Evans Company concerning billing, and you relayed that information to your suppliers?"

"A. That is true." (A-80).

Plaintiff-Mullins then candidly admitted:

"Q. (Cutler) Mr. Mullins, is it not correct that all of your billings went to the companies, and every payment you received over this entire period, came from a corporate entity?"

"A. (Mullins) To my best recollection, yes..."
(A-82) (emphasis added)

Also, every correspondence between the parties was either addressed by plaintiff-Mullins to the corporation, attention Ralph Evans, President, or sent by the corporation to plaintiff-Mullins and signed by the corporation, by its President. (Exhibits: P-3, P-4, D-6, D-26, D-27, D-41, D-43; Statement of Fact No. 7.)

Thus, the evidence was clear and not in dispute that at all times plaintiff-Mullins was dealing with and understood he was dealing with corporate entities in relation to the Ezy-Bond machine development. In fact, plaintiff-Mullins succinctly stated that Ralph Evans never personally made a machine. This fact is demonstrated by the following colloquy:

"Q. (Cutler) ...did he (Ralph M. Evans) ever manufacture a machine, personally, on his own behalf?"

"A. (Mullins) Not that I know of." (R-603-604; A-110-111) (emphasis added)

The testimony of plaintiff-Mullins was also clear and undisputed that he originally wanted \$10,000 cash for his alleged proprietary interest in the machine known as the EZY-BOND PINCH ROLLER. When that sum could not be paid, because the manufacturing company was just getting started, his testimony was as follows:

"Q. (Cutler) You told him you wanted \$10,000, and he told you the company didn't have any money?"

"A. (Mullins) That's right." (R-596; A-104.)
(emphasis added)

Thereafter, in order to obtain the materials and machines in process, and otherwise transfer the production of the EZY-BOND Pinch Rolling machine to Phoenix, a contract was negotiated which called for:

(a) A 5% commission on the Ralph M. Evans Manufacturing Company, Inc. for a one-year period, ending March 31, 1967; and (b) A two percent (2%) commission on the EZY-BOND Pinch Rolling machine manufactured in Glendale, which commission was to be based on the "... Mfg. Co. sale price of the Pinch Roller or \$1,165 per machine."

(Exhibit D-3 printed as Appendix "A") (emphasis added) This letter was signed:

"R. M. Evans and Company, Inc., Ralph M. Evans, President." (emphasis added)

Plaintiff-Mullins confirmed these facts in his own oral testimony and stated:

"Q. (Cutler) Then, he suggested, as I understand your testimony, 'How about taking two percent--'."

"A. (Mullins) That is true."

"Q. (Cutler) Of the Company, or-- --?"

"A. (Mullins) The sale price of the machine."

"Q. -- --of the sale price, based on \$1,165 selling price?"

"A. (Mullins) That's right." (R-596; A-104)

The entire record demonstrates that since late 1965 (almost a year prior to the April 1967 memorandum contract) the plaintiff-Mullins dealt exclusively and solely with corporate entities, of which Mr. Evans served as an officer. Never did Mr. Evans personally agree or, personally, obligate himself to plaintiff-Mullins. Even the jury answers to special interrogatories showed that they found these facts from the evidence. See Point V Infra.

There exists no pleadings whereunder the Ralph M. Evans Manufacturing Company or its salesarm, the R. M. Evans Company, Inc. are joined as parties. Neither corporation is alleged to be an invalid, corporate organization for any reason. Further, there exists no pleading and no evidence to suggest that, for any reason, the corporate veils of these two organizations should be pierced and its officers held personally liable. In short, there exists no evidence upon which Ralph M. Evans, as an individual, is or may be held liable for any debt whatsoever against the plaintiff-Mullins.

This Court has said of a verdict against such a clear weight of evidence:

"If it clearly appears that there has been a miscarriage of Justice because the jury has refused to accept credible, uncontradicted evidence where there is no rational basis for rejecting it, or it is plain to be seen that the jury has acted under a misconception of proven facts, or has misapplied or disregarded the law, or where it appears that the verdict was the result of passion and prejudice, it is both the prerogative and the duty of the Court to set aside the verdict and grant a new trial."

EFCO DISTRIBUTING INC. v. PERRIN, 17 Utah 2d 375, 379, 412 P.2d 615 (1966).

Likewise, the verdict against defendant-Evans must be vacated as a matter of law or, at a minimum, a new trial ordered.

POINT II

THE VERDICT RENDERED WAS SO EXCESSIVE, EXORBITANT, AND CONTRARY TO THE EVIDENCE AS TO SHOW THAT IT WAS AWARDED UNDER INFLUENCE OF PASSION AND PREJUDICE OR BASED ON PURE SPECULATION. THUS, THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO AWARD A NEW TRIAL.

The only evidence presented at trial was that there were approximately 380 machines manufactured for which any commission could be claimed due. A subsequently filed accounting established the exact number to be 393. Thus, under any computation, the total damage award allowable under the evidence was \$9,156.90 ($\23.30×393), or if the trial evidence was used, \$8,923.93 ($\23.30×380).

Interestingly, even plaintiff's able trial counsel acknowledged this fact. However, contrary to the evidence, the testimony of his own client, and the clear statement of the written contract, he attempted to maximize his recovery by using a 2% commission based on the retail sales price of approximately \$2,000.00. Thus, in his closing argument to the jury, he utilized the evidence concerning the number of machines produced and multiplied that number times \$40.00 (2% of the retail sales price, rather than 2% of the manufacturing company sales price, as per the express agreement terms). He, therefore, argued to the jury:

"Now, whether or not they are getting more or not, I don't know; but at least \$20,000 (sic) per machine, two percent of that, it is only \$40. But if you deduct the--the 83 machines that they paid to Mr. Mullins or two which they didn't give him a commission because they had to repair the rollers, either way, that still leaves you with 380 machines. If you take an average selling price from beginning to end of \$2,000 apiece, that is \$40 per machine. After they deducted what they already paid him, they still owed Mr. Mullins \$15,200.

Now, if you take the situation and carry it to its logical conclusion, that sounds like a lot of money and it is. \$15,200 is a lot of money..."
Closing Argument of Mr. Lauchnor, R-991, A-302.
(emphasis added)

Without commenting on the propriety of arguing the \$40.00 base figure contrary to the agreement, it is clear there existed no evidence before the jury upon which any judgment could have been based which exceeded \$8,927.93. This Court can take judicial knowledge that able trial counsel, in framing his maximum request for the jury to the extent of inflating the commission from \$23.30 to \$40 (contrary to the evidence), was asking the maximum which he felt the jury could award. In the face of such undisputed and uncontradicted evidence, one must ask then how can a jury return a verdict of \$6,040 against Mr. Evans, plus an additional \$47,160 against third-party foreign corporation, Royal Industries Corporation, Inc. Affidavits of record demonstrate that the jury could not remember the evidence concerning the number of machines and on two separate occasions, while impanelled, requested the Court to tell them the number of machines produced. When that information was not supplied and the hour became late, they simply guessed.

Also, how a jury could be thus so confused in engaging such wild speculation, is better understood from the delays and incredible course of events of this particular trial. First, it appears clearly on the record and more clearly in the mind of the writer, the frequent and long delays in the course of the trial. The record demonstrates frequent and excessively long breaks, which although scheduled for ten-minute midmorning and midafternoon breaks, usually extended for 30-45 minutes each. Lunch breaks, likewise, were extended. These difficulties were exaggerated when on Thursday, July 26, the last day of the trial, the judge informed the jury that

a member of his family had died. (R-976; A-297.)

Thereafter, on Thursday evening, after the jury was excused, the judge attempted to induce the parties to settle by talking to each counsel privately; he indicated that if settlement could not be reached by the following morning, Judge Hall would be attempting to prepare jury instructions on the case. (See Statement of Fact No. 29.) This event was further complicated when later the trial judge became ill and was confined to the LDS Hospital. While thus confined, he attempted to prepare jury instructions from his hospital bed.

These instructions were so obviously defective that even a different judge noted the merit to some of the defendant-appellants' objections and suggested that some accommodations would have to be made by a mutual conference with the trial judge at his hospital bed. This conference was had from about 1:30 until approximately 3:00 p.m. on Monday, June 30, 1975. The jury had reported at 10:00 a.m. and was, thus, left to cool their heels until 3:00 p.m. that afternoon. Thereafter, the jury was impanelled, arguments had and the case presented to them at approximately 5:00 p.m., at which time they were taken to lunch. They did not start deliberations until after 6:00 p.m. (See Statement of Fact No. 30.) Thus, in addition to the long internal delays, it was almost exactly four days from the close of the evidence until the case was submitted to the jury.

The frustrations of the jury for these inconveniences, delays, and unusual circumstances was evident to all. One single female juror even remarked, while attempting to phone her date, that she knew a couple of lawyers who were in trouble if she missed that engagement. (See Statement of Fact No. 31.) Although spoken half
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in jest, it illustrates the cumulative frustration of delay piled

on health and personal problems of the trial judge, which clouded this trial. The cumulative effect clearly prevented an impartial and fair hearing on the issues, as is demonstrated by this excessive verdict. In short, the unusual situation of this trial resulted in this most bizarre judgment, which exceeded by almost four times the plaintiff's own dreams.

Utah Law provides:

"There is a basic distinction between an insufficient or informal verdict and a verdict regular on its face, which awards inadequate damages, appearing to have been given under the influence of passion or prejudice. Rule 59(a) (5). In the latter case, a new trial must be granted to correct the error." Langton v. International Transport Inc., 491 P.2d 1211, 1215 (Utah 1974) (emphasis added).

Further, this Court has clearly said:

"It has long been established that where the award is in excess of damages shown by the evidence it will not be permitted to stand. In such instances the Courts exercise their inherent supervisory powers over jury verdicts, which derive from their powers to see that justice is done; and make corrective orders necessary for the purpose. This is done by the trial court, or upon failure to do so, by this court on appeal. BODON v. SUHRMANN, 8 Utah 2d 42, 45, 327 P2d 826 (1958). (emphasis added); See also, DUFFY v. UNION PACIFIC R. CO., 118 Utah 82, 218 P2d 1080 (1950); STAMP v. UNION PAC. R.R. CO., 5 Utah 2d 397, 303 P2d 279 (1956); MECHAM v. FOLEY, 120 Utah 416, 235 P2d 497 (1951).

It is submitted that the admission of counsel for plaintiff-Mullins alone demonstrates that the verdict is excessive and unsupported by any evidence. Further, the bizarre events of the judge's hospitalization and family problems created delays and difficulties which prevented a fair trial. Thus, Utah sense of justice and fair play demand that the verdict be vacated and a new trial ordered.

POINT III

THE JURY INSTRUCTIONS GIVEN BY THE COURT IMPROPERLY STATED THE LAW, WERE UNCLEAR, CONTRADICTORY AND CONFUSING TO AN EXTENT THAT THE SUBSTANTIAL RIGHTS OF THE DEFENDANTS WERE ADVERSELY AFFECTED.

A. THE COURT'S ERRONEOUS INSTRUCTIONS

As previously stated, the Trial Judge attempted to assemble jury instructions while confined in the LDS Hospital. After these instructions were developed, without the benefit of discussing them with counsel, a brief conference was permitted at his hospital bedside, for something less than an hour and a half. This conference was under considerable time pressure because of the long delays and the fact that the jury had been requested to report back at 2:30 p.m. by the substitute trial judge. At any rate, the following illustrates the patently erroneous and inconsistent instructions which prejudiced the defendants:

1. Instruction Number 30

(Quoted in full in appendix)

This instruction is patently prejudicial for the following reasons:

(a) There existed no evidence whatsoever that Royal Industries Corporation, Inc. agreed to pay any commission. Rather, the evidence is abundantly clear and undisputed that Royal Industries purchased the assets of the R. M. Evans and Company, Inc., an Arizona corporation and had no knowledge of the claim of the plaintiff-Mullins until suit was filed years later. (See Statement of Fact No. 26.) Their agreement, by its own explicit terms, purchased only those assets listed and assumed only those obligations enumerated in that contract. (Statement of Fact No. 25; Exhibit D-45.)

b) The instruction makes no differentiation between machines which would have been manufactured prior to the acquisition by Royal Industries and those produced prior thereto.

c) There is no reservation or credit to be given for machines which had been produced and paid for, contrary to the undisputed testimony showing that there were only 380 machines for which commission was claimed to be unpaid.

2. Instruction Number 31

"The agreement in question was drawn by the defendant, Ralph M. Evans, on behalf of R. M. Evans & Company, Inc. You are instructed that any ambiguities in the said agreement shall be resolved against the defendants, Ralph M. Evans and Royal Industries Corporation, Inc., and in favor of the plaintiff, Walter Mullins."
(emphasis added)

Objections:

(a) The instruction acknowledges that the agreement on which plaintiff-respondent sued was drafted on behalf of the R. M. Evans and Company, Inc., an Arizona corporation, not a party to the suit. Utah Law does provide that a written document will be construed against the party who drafted it; however, when did it become the law that such a rule of construction applies against third parties who did not draft it and never knowingly assumed responsibility for it? The writer has discovered no case law to support this instruction.

(b) This instruction also illustrates and reinforces the idea of merged identity, which permeated these instructions. Mr. Evans, the two Arizona corporations (not parties to this action), and Royal Industries are treated and referred to as one entity. Thus, each has been prejudiced in having a fair determination of

their separate individual rights.

3. Instruction Number 32

"Royal Industries Corporation, Inc. purchased the assets, including physical plant and equipment, of R. M. Evans & Company, Inc. You are instructed that Royal Industries Corporation, Inc. may have acquired expressly or by implication all the obligations and liabilities of R. M. Evans & Company, Inc. and became legally responsible for all agreements, contracts, and other obligations of the said acquired company." (emphasis added)

Objections:

(a) The instruction tells the jury that Royal Industries "may" have "expressly" acquired all the "obligations" of the R. M. Evans & Company, Inc. There is not one scintilla of evidence to support this instruction. Rather, the only evidence produced was that they assumed only those obligations expressly identified and attached as exhibits to the Contract of Purchase. (See Exhibit D-45; Statement of Fact No. 26.)

(b) The instruction suggests that Royal Industries "may" have acquired the "obligations" of the R. M. Evans & Company, Inc. by "implication." The word "implication" is not defined; it is ambiguous, misleading and calls for jury speculation. By what legal standard is the jury to determine when one may assume the debts of another by "implication?" However, more prejudicially, the instruction, in conjunction with others, suggests (contrary to law) that a contract of purchase of assets by one corporation makes that organization automatically liable for undisclosed and unknown executory contracts and claims.

4. Instruction Number 33

"You are instructed that if you find from a preponderance of the evidence that the defendant, Royal Industries Corporation,

acquired all of the physical assets of the Ralph M. Evans & Company, Inc. and that the Royal Industries Corporation thereafter continued in business the manufacture of said pinch roller machine in the name of the Evans Division of said corporation, that said transaction amounted to a merger of said corporations and you are further instructed that the defendant, Royal Industries Corporation, Inc., not only acquired the assets of the Evans Company but also acquired its liabilities and obligations." (emphasis added)

Objections:

(a) Earlier, the jury was told that Royal "may" have assumed the plaintiff-Mullins' commission obligation by "implication." Now it is informed that, as a matter of law, there was a "merger," whereunder Royal assumed the "liabilities and obligations" of a third corporation.

(b) The Court here rules as a matter of law that there was a "merger" of Royal Industries and the R. M. Evans Company when Royal purchased, named and specified assets and acquired listed liabilities of two Arizona corporations. Further, the Court improperly rules as a matter of law that Royal Industries was obligated to honor an executory agreement it expressly did not assume.

Certainly, purchasing named assets and assuming named liabilities can, under some circumstances, create a "merger" between two corporations. 19 Am. Jur. "Corporations" §1546. However, in the case before the bar the evidence was undisputed that the two Arizona corporations survived. (A-296) Also, the purchasing organization did not just substitute itself for the Arizona ones. Royal Industries is a public issue corporation with thousands of products and shareholders; it has many products which were not handled by the Arizona corporations. Further, neither of the

Arizona corporations was named as a party and plaintiff-Mullins introduced no evidence to show whether or not these organizations had funds to pay his claims.

Rather, the record demonstrates that some assets and claims belonging to those Arizona corporations were assigned to defendant-Evans as part of this litigation to assert as a counter-claim. (A-291; Exhibit D-44.) Further, there was no claim of fraud and it was unchallenged that full and fair consideration was given for the assets acquired by Royal. (A-279.) In fact, the case law is clear that a mere sale of assets and use of the name is not sufficient to establish a merger. This Court has correctly summarized the law as follows:

"As a general rule, a separate and distinct corporation which has succeeded by a valid purchase and transfer to the property and franchise of another corporation is not liable, merely by reason of succession, for... the general contracts of another corporation. It is not liable at all for such debts or on such contracts, in absence of a special agreement to pay or assume the same..., unless it affirmatively appears that the transfer... constitutes in fact or law, a fraud upon creditors, or the circumstances attending the creation of the new corporation, and its succession to the property... are such as to warrant a finding that it is in reality a confirmation of the old corporation. (citations omitted) There is no presumption that obligations are assumed. (citations omitted) Liability depends either on fraud or assumption." Cooper v. Light and Power Co., 35 Utah 570, 574, 102 P.202 (1909).
(emphasis added)

Further, this Court has stated that such issues are questions of fact, to be resolved by the finder-of-fact. This point is made clear in the similar case of Parker v. Telegift International, Inc., 29 Utah 2d 87, 505 P.2d 301 (1973). Here, employees of corporation "C" sued corporation "A" for wages earned before "A" became involved.

Their claim was based on the fact that corporation "B" had purchased all of the stock of "C" and "A" (the defendant) had, in turn, purchased all of the stock of "B"; thus, they asserted a merger theory. This court rejected their claim, since they had failed to convince the finder-of-fact; it observed:

"The burden was upon the appellants to convince the trial court (a judge sitting without a jury) that the stock purchases were not bona fide stock deals or that such dealings were mergers of corporations "A" and "C". This they failed to do." Parker v. Telegift International Inc., id. at P. 302.

In the case before the bar, there was no fraud plead nor proved. The evidence is unrebutted and clear that Royal did not assume this claimed obligation; in fact, it knew nothing of it until suit was filed, more than one and one half years after its contract of purchase of the assets of the Arizona corporations. (A-277-278.) At best, the plaintiff-Mullins has raised an issue of fact concerning "merger", which fact should have been for the jury to determine, not the Court to rule as a matter of law.

5. Instruction Number 34

"You are further instructed that a corporation can only act through its agents or employees. Therefore, if you find from a preponderance of the evidence that defendant, Ralph Evans, became an officer or managing director of the Evans Division of the defendant, Royal Industries Corporation, Inc., any actions or conduct by Mr. Evans in the performance of his job or position with said corporation was, in fact, the conduct of the corporation and it is liable therefor."

Objections:

(a) The evidence presented is clear and unequivocal that Mr. Ralph Evans, as an individual, was acting at "arm's length" when he sold the assets of two Arizona corporations, of which he was

President, to Royal Industries. (R-915; A-278-279.) He was not their agent and neither he nor they considered him such. At that point of time, Mr. Evans was a vendor and Royal Industries was a wary purchaser, who even employed independent auditors to evaluate the financial aspects of the purchase. (Statement of Fact Nos. 25 & 26.)

This litigation does not and never did present an issue concerning the conduct of Mr. Evans as an agent or employee of Royal Industries after sale was consummated; therefore, the sole issue before the Court was Mr. Evans' relationship to Royal Industries before the sale of named and listed assets of two Arizona corporations of which he was President. This instruction is totally without factual basis and improperly states the law by telling the jury that Royal Industries is liable for Mr. Evans' dealings with the plaintiff-Mullins, before Mr. Evans ever accepted employment with Royal Industries.

Such an instruction charges Royal Industries with and makes it a principal party to a contract negotiated and executed years before they had any dealings with Mr. Evans. In short, this creates a new theory of agency, whereby a principal now becomes vicariously responsible for the acts of an employee, before that employee was ever hired. The absurdity of that position and its prejudicial effect in this case is obvious.

6. Instruction Number 35

"If you find from a preponderance of the evidence that the defendant, Royal Industries Corporation, Inc., knew or in the exercise of reasonable care should have known of the contractual obligations flowing from R. M. Evans & Company to the plaintiff herein, and that they, in effect, merged the R. M. Evans & Company into Royal Industries Corporation, Inc. with such knowledge, you should find that the defendant, Royal Industries Corporation is liable for any obligations owed to the plaintiff by R. M. Evans & Company."

Objections:

(a) Nowhere in the pleadings is there any allegation that a new negligence theory will be relied upon. Further, there were aduced no facts to support a negligence theory that Royal somehow breached an alleged duty of due care of investigation concerning nondisclosed contractual obligations when they purchased the Company assets. Such an instruction is entirely outside the scope of the pleadings. Also, there is not one scintilla of evidence to suggest that Royal Industries could have done anything more than it did to become aware of the existing debts and obligations of the R. M. Evans & Company, when it acquired assets and named liabilities.

(b) Again, the Court talks of "merger." However, the jury is left to divine how the "merger" could occur in law; such an instruction is an invitation for the jurors to speculate on what legal principles are to be applied to make such a finding.

7. Instruction Number 36

"In the event you find the evidence in favor of the plaintiff and against the defendants, you should calculate the number of EVANS EZY-BOND PINCH ROLLER machines that have been manufactured by the defendants to date and award to the plaintiff a sum equal to two percent (2%) of the sale price of each machine. In the event the evidence shows that the said machines were sold for an amount less than \$1,165.00 per machine, you should award the plaintiff damages equal to the two percent (2%) of said sum on those machines sold for a lesser price."

Objections:

(a) The undisputed testimony was that defendant, Ralph M. Evans, had personally manufactured nothing. (See Admission of Plaintiff-Mullins Supra at P. 19.) This instruction again emphasizes the Court's erroneous lumping of the defendants into one entity,

thus inviting a judgment against the individual, Ralph M. Evans.

(b) There was no evidence concerning the number of machines manufactured solely by Royal Industries Inc. This instruction calls for speculation as to number of machines manufactured by that organization.

(c) The agreement dated April 11, 1967 attached in "Appendix A", clearly states that the amount of any Royalty would be 2% of \$1,165 or \$23.30; also, this fact was admitted by the plaintiff-Mullins. (See Quote Supra at P. 20.) There was no evidence of any other figure to be used and this instruction only tends to confuse and cloud an otherwise sufficiently complicated case. Further, it permitted counsel for Mullins to improperly argue that the royalty should be based on the retail sales price of approximately \$2,000.00 and, thus, inviting the erroneous verdict of this appeal.

8. Instruction Number 39

"You are further instructed that if you find from a preponderance of the evidence that it was the intent of the parties, that is, Ralph M. Evans, and the corporation of which Mr. Evans was President, that the two percent (2%) commission agreement was to be binding on both Mr. Evans individually and the corporation of which he was President and, further, that in the event the machine was to be produced by third parties through authority of defendants, Ralph M. Evans and the corporation over which he was President, then you should find the issues in favor of the plaintiff and against the defendant Ralph M. Evans."

Objections:

(a) There was absolutely no evidence introduced to suggest that Mr. Evans personally agreed to pay anything. As previously outlined in some detail, the entire record demonstrates that

any royalty obligation was purely a corporate one. This instruction invites the jury to speculate and find personal liability against Mr. Evans.

(b) The instruction makes no distinction between the Arizona corporations of which Mr. Evans was President, when the 2% commission agreement was negotiated, and the defendant corporation, Royal Industries, of which Mr. Evans later became a division President. The Court's failure to distinguish the parties again leads the jury into confusion. The free use of the word "corporation" when coupled with the other instructions, which merger identities, is clearly confusing and prejudicial.

9. Instruction Number 41

"You are further instructed that knowledge or information acquired by an officer of a corporation or a managing director of a corporation in the course of the conduct of business is imputed to the corporation. Therefore, a person need not prove that all of the officers or directors of a corporation were aware of a business transaction. It is sufficient to show that in the conduct of the corporate affairs a managing director or officer had knowledge of certain business dealings. Such knowledge on the part of said officer is imputed to the corporation as though the entire corporation was fully aware of the transaction, after said person became an agent, officer, or director of the corporation."

Objections:

(a) Like the objection to instruction Number 34 Supra, the judge has created a new retroactive agency theory, whereunder an employer becomes responsible for the acts of his agents which occurred prior to employment. There is not one scintilla of evidence to suggest that after Mr. Evans became an agent of Royal Industries during the time that he had any contrac-

tual dealings with plaintiff-Mullins; rather, the complete contrary is true. All of plaintiff-Mullins' claims arose on alleged events which occurred while Mr. Evans was acting as President of the two Arizona corporations, not parties to this litigation. This instruction again compounds the previous errors and again mixes defendants. The instruction suggests that Royal Industries is liable, under contract, for the acts of Mr. Evans years before he was even employed by them.

B. REQUESTED BUT UNGIVEN INSTRUCTIONS

The errors above enumerated were further compounded by the Court refusing to give instructions requested by the defendant-appellants. Without enumerating all of them, some significant ones are listed as follows:

1. Instruction Number 19

"You are instructed that officers of a corporation are not personally liable for acts performed, including agreements entered into, on behalf of the corporation except in certain circumstances not in issue in this lawsuit."

The failure of the Court to render this instruction permitted the jury to confuse the individual corporations and to allow it to speculate and render a judgment against Ralph M. Evans, as an individual, for liabilities incurred by the corporate entity.

2. Instruction Number 29

"You are instructed that, as a matter of law, the evidence does not support Plaintiff's claim that the Defendant, Ralph M. Evans, as an individual, had entered into a contract with Plaintiff to pay Plaintiff a 2% commission on pinch roller machines manufactured by Ralph M. Evans and you may not, therefore, find for the Plaintiff and against the Defendant Ralph M. Evans."

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

See discussion of THIS SUBJECT Print I Supra

3. Instruction Number 31

"You are instructed that, as a matter of law, the evidence does not support Plaintiff's claim that the Defendant, Royal Industries, Inc. had knowingly assumed liability for the obligation of Ralph Evans Manufacturing Co. to the Plaintiff to pay a 2% commission on pinch-roller machines manufactured by Ralph Evans manufacturing Co."

For the clear and un rebutted evidence supporting this point, see Point II Supra.

4. Instruction Number 33

(Quoted in full in Appendix)

Objections:

(a) This instruction accurately states the law of contract which requires the person seeking enforcement to be free of substantial default. See 7 Am. Jur. Pleading and Practice Forms (Rev. Ed.) Form 101, p. 366; 17 Am. Jur. "Contracts" §365 at p. 807, § 425-430 at p. 880. Also, it sets forth defendants rights each to be tried separately as distinguished from being lumped together as was done by the Court, compounding the confusion of identity problems.

5. Instruction Number 34

(See Appendix for full Quote)

Objection:

(a) This instruction would again help clarify the jury's mind that before a "commission" was due from Mr. Evans as an individual, he must have produced the machine upon which commission payments were claimed due or otherwise received some consideration to be liable for the debts of another.

6. Instruction Number 41

"You are instructed that if you find that
Ralph M. Evans agreed to pay a commission

on pinch roller machines which was intended as compensation for any design ideas which were not new or novel you will find for the said Ralph M. Evans and against the Plaintiff, no cause of action.

The law of contracts requires that there be legal consideration exchanged. Under the facts of this contract dispute, plaintiff-Mullins claims to have proprietary rights in the machine for the consideration of the royalty payment obligation. The failure to give this instruction, allows the jury to award damages where no benefit was conferred to support a contract obligation against Mr. Evans, personally.

This same objection also applies to requested instruction number 42, which (in fact) was a signatory on the memorandum agreement. Thus, the Court effectively excluded the jury from being instructed on the "consideration" aspect of this case.

7. Requested Instructions 45 and 46

(Quoted in full in Appendix)

Both of these instructions properly state the law which permits rescission of a contract for breach. There was no adequate explanation to the jury of this right to rescind on the grounds of substantial nonperformance or breach of contract. (See 17 Am. Jur. 2d "Contracts" §484, 504.) Under the defendants' theory of the case, the defendant had designed a square shaft machine which was unworkable and which contract was terminated August 23, 1968. (See Statement of Fact No. 20.) The jury never was adequately instructed on the right of one to rescind for a prior material breach by plaintiff-Mullins.

8. Requested Instruction Number 49

"You are instructed that if you find that the Defendant Ralph M. Evans entered into an oral

agreement with Plaintiff for the payment of commission on pinch roller machines to be manufactured by Evans, and if you also find that Ralph Evans Manufacturing Co. entered into a written agreement to pay Plaintiff a 2% commission on pinch roller machines to be manufactured by Ralph Evans Manufacturing Co., you will find for Ralph M. Evans and against the Plaintiff if you find that the written agreement with Ralph Evans Manufacturing Co. was intended to replace the oral agreement with Ralph M. Evans."

Objections:

(a) This refusal in conjunction with the other refusals concerning the alleged "oral agreement" compounded the confusion concerning oral and written contracts. This refusal allowed the jury to speculate concerning oral discussions between the Plaintiff-Mullins and the defendant-Evans as an individual which were superceded by the writing of April 11, 1967.

9. Requested Instruction Number 63

"If you find that Ralph M. Evans was not employed by, an agent for, or a director, officer, or manager of, Royal Industries, Inc. at the time that Royal Industries, Inc. acquired the assets of Ralph Evans Manufacturing Company and R. M. Evans and Company, you are instructed that the said Ralph M. Evans could not have been acting for Royal Industries, Inc. in respect to the acquisition of said assets."

Objections:

(a) This refusal concerning the proper explanation of agency principles again was compounded by the actual instructions of the Court, which improperly imposed vicarious liability upon an employer for acts done prior to the date of employment.

10. Requested Instruction Number 66

"If you find that the Plaintiff was initially employed by either Ralph M. Evans, Ralph Evans Manufacturing Company or R. M. Evans and Company to manufacture pinch

roller machines and that Plaintiff was also hired to solve the problem as to how said machines should be designed and constructed in order to (1) incorporate a safety device and (2) perform the function for which said machine was intended, you are instructed that any novel or original designs or inventions developed by the Plaintiff in the course of said employment are the property of the employer Ralph M. Evans, Ralph Evans Manufacturing Company or R. M. Evans and Company, depending on which one you find to be the employer."

Denial of this instruction prevented the defendant-appellants' theory of being adequately presented to the jury. There was an issue of fact as to whether the plaintiff had developed any idea for which compensation was possible or whether he had been employed on an hourly basis to develop the machine and, thereafter, to manufacture them at a fixed cost per copy. The refusal of this instruction denies the opportunity of the jury to consider the defendants' position. Certainly, these parties, on the evidence advanced, were entitled to have an instruction concerning a lack of consideration; thus, no commission payment was legally due because the underlying contract was void.

POINT IV

THE SPECIAL INTERROGATORIES SUBMITTED TO THE JURY WERE INCONSISTENT WITH ONE ANOTHER AND INCONSISTENT WITH THE GENERAL VERDICT RENDERED; THEREFORE, THE LOWER COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT THE DEFENDANTS A NEW TRIAL.

Rule 49(b) of the Utah Rules of Civil Procedure clearly provides direction concerning inconsistent jury answers to interrogatories on a general verdict. These rules provide:

"When the answers (jury answers to interrogatories) are inconsistent with each other and

one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the Court shall return the jury for further consideration of its answers and the verdict, or shall order a new trial."
Rule 49(b), Utah Rules of Civil Procedure
(emphasis added)

This Rule was specifically amended to change the old permissive language of "may" to the mandatory "shall."

However, even before that language amendment in October, 1965, this Court made it clear that it was not acceptable for the jury to indicate that it believed two inconsistent and irreconcilable facts. In reversing lower court refusal to grant a new trial on the grounds that special interrogatories were inconsistent, this Court succinctly stated:

"The answers given by the jury and their verdict point out clearly, and amplify, the inconsistency. We believe that this situation is one contemplated by Rule 49(b), U.R.C.P. and that the trial court erred in denying the motion for a new trial." Schweitzer v. Stone, et. al., 13 Ut. 2d 199, 371 P.2d 201, 204 (1962) (emphasis added); See also, Weber Basin Water Conservancy District v. Nelson, 11 Ut. 2d 253, 358 P.2d 81 (1960); Milligan v. Capital Furniture Co., 8 Ut. 383, 335 P.2d 619 (1959).

The following illustrate the inconsistent answers to special interrogatories returned by the jury. Because the jury returned after midnight, and because the trial judge was in the hospital, and unable to evaluate them with the evidence presented, they were not resubmitted to the jury by the substitute judge. Rather, counsel stipulated that all issues of error were reserved for a motion for new trial and consideration by the trial judge when he was able. (A-312, 314.)

"24. Was Plaintiff Walter Mullins paid by Ralph Evans personally?

yes _____
no X
undecided _____

"25. Was Plaintiff Walter Mullins paid by a corporation?

yes X
no _____
undecided _____

"26. Was Plaintiff Walter Mullins providing services in developing or constructing the pinch roller machine for a corporation known as the Ralph Evans Manufacturing Company, Inc.?

yes X
no _____
undecided _____

"27. Was Plaintiff Walter Mullins providing services in developing or constructing the pinch roller machine for Ralph Evans as an individual?

yes X
no _____
undecided _____

(Jury Answers to Interrogatories, A-563.)

Thus, the jury found that the plaintiff-respondent was never paid by Mr. Evans personally. Rather, he worked for and was paid by a corporate entity. However, at the same time, inconsistently, they then find that plaintiff-Mullins was providing services for Ralph Evans as an individual on the same machine.

This inconsistency is further underscored by their answer to interrogatories numbers 1 and 30. These questions were answered as follows:

"30. When Ralph Evans discussed certain payments to be made to Plaintiff Walter Mullins on or about March 24, 1967, was it the understanding of both parties to

the conversation that Mr. Evans was personally agreeing to make the payments?

yes _____
no X
undecided _____

- "1. Was there a contract entered into between Ralph Evans, personally, as an individual, and the Plaintiff, Walter Mullins, whereunder the said Ralph Evans agreed personally to pay the Plaintiff 2% of the sales price of the EZY-BOND pinch roller name by the R. M. Evans Manufacturing Company, Inc.

yes X
no _____
undecided _____

(Jury Answers A-564, 557)

Therefore, the jury has now found that Ralph Evans personally entered into a contract and at the same time has found that he did not enter into a contract. Further, the Court has referred to "Appendix A" which clearly shows that the only evidence before the jury was a letter agreement dated April 11, 1967 for the payment of a 2% "commission." These answers to interrogatories are not only internally inconsistent, but 30 is inconsistent with the verdict rendered against Mr. Evans, personally.

The foregoing inconsistency is compounded by the obvious difficulty the jury had with the principal of agency. This confusion is explainable by the erroneous instructions given by the Court as above explained; however, the problem is evident from the jury answers to interrogatories 28 and 29. They read as follows:

- "28. When Ralph Evans discussed certain payments to be made to Plaintiff Walter Mullins on or about March 24, 1967, was he acting solely in his capacity as a President of a corporation and if so, did Plaintiff Walter Mullins understand that

fact or would a reasonable man have under the circumstances understood that Mr. Evans was acting only on behalf of a corporation?

yes _____
no _____
undecided X

"29. When Ralph Evans discussed certain payments to be made to Plaintiff Walter Mullins on or about March 24, 1967, did Plaintiff Walter Mullins understand Mr. Evans was acting solely in his capacity as an officer of a corporation?

yes _____
no X
undecided _____

(Jury Answers to Interrogatories, A-564.)

The jury has thus admitted that it was undecided whether Ralph M. Evans, as an individual, was acting as the President of a corporation when he executed the April 11, 1967 letter of memorandum agreement; further, it was undecided as to whether that fact was understood by the plaintiff-Mullins. The glaring inconsistency of such a finding at the same time a verdict against Mr. Evans, personally, is apparent.

It is to be noted that if Mr. Evans was acting solely in his capacity as President, there obviously can be no personal liability for a contract executed on behalf of that corporation. If, on the other hand, the parties did not have a meeting of the minds on that issue, there was no contract which could be enforced under general contract principles. Clearly, under these answers, there was no finding by the jury to support a verdict against Mr. Evans, as an individual.

Interrogatory Number 43 provided:

"43. Did Royal Industries, Inc. knowingly agree to assume and fulfill the terms of a letter memorandum dated April 11, 1967?

yes
no X
undecided

(Jury Answers to Interrogatories, A-567-568)

Under the law discussed in Point III Supra at P. 30, no verdict could be rendered against Royal Industries without a finding that they assumed that contract or that there was a merger. Thus, answering this interrogatory "no" required the verdict against Royal Industries to be dismissed, absent a factual determination of the merger issue.

It is respectfully submitted that the internal inconsistency of the Answers to Interrogatories by the jury and their inconsistency with the verdict as rendered, requires that a new trial be awarded. The denial of defendant-appellants' request for a new trial was clearly an abuse of discretion.

POINT V

THE LETTER OF AUGUST 23, 1968, THE CHECK TENDERED THEREWITH, AND PLAINTIFF-MULLINS' ACCEPTANCE THEREOF, CONSTITUTED AN ACCORD AND SATISFACTION OR A RELEASE OF ANY OBLIGATION; THEREFORE, ANY EXISTING ALLEGATIONS BETWEEN THE PARTIES WAS TERMINATED.

As is more particularly set forth in the Findings of Fact, the plaintiff-Mullins designed a machine incorporating a square shaft concept, which proved unworkable and had to be scrapped completely in May of 1968. Plaintiff-Mullins accepted the responsibility for the difficulties with the square shaft machine and the deduction of any payment allegedly due for 31 of the defective machines.

On August 23, 1968 the Ralph M. Evans Manufacturing Co. Inc., by its President, wrote Mr. Mullins a letter offering a compromise settlement of his claims and gave notice that the corporation was no longer manufacturing a square shaft machine. The letter stated in part:

"The EZY-BOND pinch roller has undergone considerable changes. The square shaft proved most unsatisfactory and several other severe changes in the overall machine were necessary for dependable production."

"Subcontract costs on this machine as well as the EZY-form had been and are presently about one half of what they were before moving the factory to Glendale. I honestly feel, Walt, that you have been well paid for any design and development efforts that you have put into the EZY-BOND and do not feel further payment to you on this machine is justified. Therefore, effective May 1, 1968 we will no longer pay you commission on the EZY-BOND manufactured."
(See Appendix "B" attached)

Prior to sending this letter, there had been a substantial dispute and discussion concerning problems concerning the EZY-BOND square shaft machine. Customer complaints had been forwarded and Mr. Mullins had accepted responsibility for a number of the machines which were defective. (See Statement of Facts 19-20.) Significantly, Mr. Mullins testified that he received the letter quoted above, understood and read the same prior to negotiating the check which accompanied it. (Statement of Fact No. 21.)

This Court has observed:

"...(W)here 'the money is advanced by a third party and accepted by the creditor in satisfaction of a debt, it is a good accord and satisfaction; that by getting such payment, the payee received something he might not otherwise have received, and this constituted a benefit to him such as would be sufficient consideration to support the accord and satisfaction.'" Badger & Co. v. Fidelity Bldg. and Loan Ass'n., 94 Ut. 97, 95 P.2d 669, 677 (1938).

It is respectfully submitted that the acceptance of this check, tendered as full payment to the plaintiff-Mullins, was an accord and satisfaction of all claims under the alleged agreement. He was on notice that a new type machine was being manufactured and made no objection to that tender, until subsequent to the date payment had been received and the check negotiated by him. Thus, plaintiff's claim was extinguished as of August 23, 1968. There is no basis for his claim in the within action and the Lower Court erred in not dismissing plaintiff's case as a matter of law.

POINT VI

THERE WAS NO EXCHANGE OF CONSIDERATION TO SUPPORT THE APRIL 11, 1967 MEMORANDUM AGREEMENT; THEREFORE, IT IS VOID AND NO RECOVERY MAY BE GRANTED UNDER IT.

Plaintiff-Mullins' own witness established that the "safety" gate or lifting mechanism was not new or novel; rather, it was a part of the public domain. In fact, it had been invented and patented as of February 18, 1958. Once the patent expires, an idea becomes a part of the public domain and anyone is free to use it without fee. Further, the plaintiff-Mullins admitted that he didn't engineer or design the machine features. (Statement of Fact Nos. 16, 17, & 18.) In addition, plaintiff-Mullins admitted that the segmented roller concept was not his idea; rather, that idea was brought to him by Mr. Evans, who in turn obtained it from Mr. Brinkman, under whose assignment of patent the machine was manufactured. (Statement of Fact No. 17.)

In addition to the foregoing, it is significant that the two percent commission arrangement was negotiated on or about March 24, 1967 when plaintiff-Mullins refused to surrender partially

completed machines, parts, jigs and dies needed to manufacture the machine. He demanded \$10,000 cash as a condition precedent to him to surrendering these items, in order that their manufacture could be transferred to Arizona. (See Statement of Fact No. 13.) Importantly, it is without dispute that Mr. Mullins had been fully paid for his labor in developing the machine at the agreed hourly figure. Also, the building in which they were stored was rented in the name of and all payments made by the Ralph M. Evans Manufacturing Company, an Arizona corporation and, all parts, supplies and other items were not paid by Mr. Mullins; rather, they were all paid by the Arizona corporate entity. (See Statement of Fact No. 7-13.)

One must then ask what consideration was received by the Manufacturing Company or Ralph Evans. Mr. Mullins had no novel or patentable idea to market, the preliminary design work had been completed, on a fixed fee basis, were fully paid. He had no claim to labor, material or overhead expenses in that they were all paid by the Arizona corporate entity. The pneumatic system of the safety gate had been drawn by Mr. Ralph Walker, a sales agent of industrial supply company. This company supplied all of the stock parts to construct that system and his compensation was paid by the Manufacturing corporation, when it paid for the parts and supplies ordered. Mr. Mullins was compensated for his time on an hourly basis. Further, the pneumatic circuit used was not unique or novel in any regards. (See testimony of Ralph Walker; R-779, 782, Exhibit D-22, Figure 4; see also Statement of Fact No. 17.)

In short, the Arizona corporations which negotiated the return of their own property received no benefits or consideration other than the return of their own property wrongfully detained.

The two percent commission promise was made solely to obtain custody of the machine and parts which were being wrongfully withheld in Salt Lake by plaintiff-Mullins.

The law on consideration is clear and summarized as follows:

"The general rule is that a promise to do that which the promisor is already legally bound to do, or the performance of an existing legal obligation, does not constitute consideration, or sufficient consideration, for a contract. ... Doing or promising to do that which one is already bound to do is not a legal detriment, ... It has accordingly been decided that a contract made by the owner in order to obtain possession of property which is unlawfully withheld from him is without consideration and void." Am. Jur. 2d "Contracts" §119 and cases therein cited. (emphasis added)

It is, therefore, respectfully submitted that as a matter of law the defendant-appellants, and each of them, should have been dismissed from the action. The alleged agreement claimed by the plaintiff-Mullins was not supported by adequate legal consideration.

POINT VII

BY PLAINTIFF-MULLINS' OWN TESTIMONY, THE COMMISSIONS WERE NOT DUE AFTER THEY WERE MANUFACTURED BY A THIRD PARTY.

The memorandum dated April 11, 1967 and the agreement between the parties is undisputed with regard to its duration. It was admitted that commissions would be paid only so long as they were manufactured by the Ralph M. Evans Manufacturing Company, or, viewing the evidence most favorably to plaintiff-Mullins, by Ralph Evans, personally. Therefore, the Court erred in rendering a verdict against Royal Industries, and for any machines manufactured after December 31, 1968, the date Royal Industries purchased assets of two Arizona corporations.

The plaintiff admitted and stipulated that the two percent commission payment was only to be paid so long as the Ralph M. Evans Manufacturing Company made them. He stated under oath:

"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.) (emphasis added)

He also admitted that Ralph Evans never manufactured anything personally; therefore, it is clear he was referring to the manufacturing corporation.

Further, the testimony is clear and undisputed that Royal Industries purchased the assets of the Ralph M. Evans Manufacturing Company on December 31, 1968. Neither Mr. Evans nor the Ralph M. Evans Manufacturing Company has manufactured any of the machines since that date.

Therefore, by plaintiff's own understanding of the terms of the alleged agreement between the parties, the agreement has been satisfied and terminated. Thus, it is respectfully submitted that the Court erred in permitting the jury to render a verdict against Royal Industries, and in particular, render any judgment against it or Mr. Evans for machines manufactured subsequent to December 31, 1968.

CONCLUSION

In this case: "Confusion now hath made its masterpiece." (Macbeth, Act II.) The incredible chain of events during the course of this trial, starting with long trial delays apparently caused by the ill health of the judge and capped by a family tragedy, resulted in what could be called a bizzare verdict.

This verdict was rendered personally against a corporate President in the sum of \$6,040.00 on an alleged written corporate obligation. The verdict also awarded \$47,160 against a third-party, stranger to the written document, after it had purchased named assets of that corporation and partially paid for them by assuming specifically named liabilities, of which plaintiff-respondent's claim was not included. Further, the total verdict exceeded by almost four (4) times the generous and imaginative computation plaintiff-respondent's able trial counsel presented during his closing arguments.

The verdict was obviously excessive and awarded contrary to the undisputed evidence. Further, it was so excessive as to demonstrate that it was awarded under the influence of bias, prejudice and passion. In addition, it was computed on pure speculation and conjecture, contrary to undisputed evidence establishing that (at most) a commission of approximately \$8,000 could be found due.

This trial verdict was based on inconsistent and erroneous jury instructions. Among many other errors, the trial court created a new theory of agency that makes an employer liable for the acts of employees occurring before employment. Also, the trial judge took issues of fact concerning a corporate merger question from the jury; yet, inconsistently had instructions allowing the jury to speculate that one corporation could "by implication" assume debt of another, without informing the jury on the legal standards for such an assumption. More prejudicially, the totality of the instructions confusingly intertwined the two Arizona corporations, not parties to the suit, and these two defendant-appellants in such

a manner as to deprive them of a hearing on their individual defenses to the charges against them.

In addition, the answers to jury interrogatories were inconsistent with one another and the verdict itself. They demonstrated that the delay and confusion caused by the death in the Judge's family and his hospitalization fatally wounded this judicial proceeding.

Other errors, include the invalidity of the underlying writing relied upon by plaintiff-respondent, and the Court's refusal to properly present defendants' theories to the jury. However, without belaboring the innumerable prejudicial errors, this case must be reversed with instructions to dismiss the defendant-appellants. At a minimum, a new trial must be awarded to preserve Utah's reputation for fairness and its concern for due process of law, even against two non-residents of the State.

Respectfully submitted,

Lynn G. Foster

Roger F. Cutler
Attorneys for Defendant-Appellants

APPENDIX

CONTENTS

	Exhibit
1. Letter Dated April 11, 1967	A
2. Letter Dated April 23, 1968	B
3. Court's Jury Instruction No. 30	C
4. Defendant-Appellants' Requested Jury Instructions Nos.:	
(a) 33	D
(b) 34	E
(c) 45	F
(d) 46	G

August 23, 1968

Mr. Walter Mullins
594 E. 6270 S,
Murray, Utah 84107

Dear Walt;

Enclosed you will find our check in the amount of \$1182.78. This check represents the following: payment on EZY-BOND machines per your letter.

52 @ \$23.30 ea. (83 less 31 defective)	\$1211.60
--	-----------

5% commission on net profits of RALPH EVANS MFG. CO., INC. to March 31, 1967 (\$8504.57 net profit -- payment for 11 months)	389.80
--	--------

\$1601.40

Less moving expenses for L.Mullins	<u>418.62</u>
------------------------------------	---------------

Total due	\$1182.78
-----------	-----------

The EZY-BOND pinch roller has undergone considerable changes. The square shaft proved most unsatisfactory and several other severe changes in the overall machine were necessary for dependable production.

Subcontract costs on this machine as well as the EZY-FORM have been and are presently about one half what they were before moving the factory to Glendale. I honestly feel, Walt, that you have been well paid for any design and development efforts that you put into the EZY-BOND and do not feel further payment to you on this machine is justified. Therefore, effective May 1, 1968 we will no longer pay you commission on each EZY-BOND manufactured.

Very truly yours,

R. M. EVANS & COMPANY, INC.

Ralph M. Evans
President

April 11, 1967

*After 4
9-11-70
/5*

Mr. Walter Mullins
594 East 6270 South
Murray, Utah

Dear Walt:

In reference to our conversation of March 24, 1967 regarding your commissions on the EVANS EZY-BOND pinch roller sales.

As agreed, we will pay you a two-percent (2%) commission on all EVANS EZY-BOND pinch rollers manufactured in Glendale, Arizona. This commission to be based on the Mfg. Co. sale price of the pinch roller or \$1,165.00 per machine. Said commissions to be paid to you each month beginning with pinch rollers manufactured after April 1, 1967.

In reference to the five-percent (5%) commission to be paid to you on the net profits of Ralph Evans Manufacturing Company, Inc. for the period ending March 31, 1967. The net profits will be computed and finalized sometime in the month of April 1967. You will be notified of this amount at the earliest possible date and the amount due will be paid to you during the first quarter of the calendar year 1968.

I trust that you will find the above in accordance with our verbal agreements on these items.

Very truly yours,

R. M. EVANS & CO., INC.

Ralph M. Evans
President

EME/ph

JURY INSTRUCTION NO. 30

It is the contention of the plaintiff that R. M. Evans & Company, Inc., and thereafter Royal Industries Corporation, Inc. by written agreement had agreed to pay to the plaintiff a two per cent (2%) commission on all EVANS EZY-BOND pinch roller machines manufactured after April 1, 1967. Therefore, if you find from a preponderance of the evidence that such an agreement was entered into, then you should determine from the evidence how many of such machines were manufactured by the defendants since said date and award damages to the plaintiff pursuant to the said agreement or agreements.

JURY INSTRUCTION NO. 33

You are instructed that in order for Plaintiff to be entitled to recover from the Defendant Ralph M. Evans upon an oral contract to pay a commission of 2% on pinch roller machines to be manufactured by Ralph M. Evans, you must find by a preponderance of the evidence, each of the following:

(1) Ralph M. Evans promised to pay Plaintiff a 2% commission on all pinch roller machines to be manufactured by Ralph M. Evans personally, and

(2) Ralph M. Evans acted for himself as an individual and not as an agent or representative for R. M. Evans and Company or for Ralph Evans Manufacturing Company, and

(3) Plaintiff gave to Ralph M. Evans legal consideration, as this term is defined for you in instruction No. ____, in exchange for said promise to pay said commission, and

(4) Plaintiff had not breached any of the terms of said Agreement including those terms pertaining to an express or implied warranty of merchantability or an express or implied warranty of fitness for a particular purpose, as such terms are explained to you in Instructions No. ____ and ____, and

(5) Ralph M. Evans unjustifiably breached any such agreement, and

(6) The amount of damages sustained as a result of said breach, if any.

If any of these elements are not proved by Plaintiff by a preponderance of the evidence, you are instructed to find for the Defendant Ralph M. Evans and against the Plaintiff, no cause of action. If you find that each exists, you are instructed to determine if there was a valid rescission or an Accord and Satisfaction as hereafter explained to you before determining damages, if any.

JURY INSTRUCTION NO. 34

You are instructed that if you find that all of the elements of a contract existed between Plaintiff and Ralph M. Evans, as an individual, before you can find for the Plaintiff, you must also find that Ralph M. Evans breached said agreement.

In order to find that the said Ralph M. Evans breached said agreement you must find that he had:

(1) Manufactured pinch roller machines as an individual and not as a representative of R. M. Evans and Co. or Ralph Evans Manufacturing Co., and

(2) Unjustifiably failed to pay a commission to the Plaintiff. You are instructed that if there was a valid rescission as explained in Instruction No. ____ or an Accord and Satisfaction as explained in Instruction No. _____, the failure to pay would be legally justified.

JURY INSTRUCTION NO. 45

You are instructed that if you find that the Plaintiff entered into a written agreement with Ralph Evans Manufacturing Co. for the payment of a 2% commission on pinch roller machines to be manufactured by Ralph Evans Manufacturing Co. and that said commission was to be paid for Plaintiff's design contributions to said pinch roller machine you will, nevertheless, find for the Defendant Royal Industries, Inc. and against the Plaintiff if you find (1) that the square shaft was a design contribution of the Plaintiff, (2) that the machines which utilized said square shaft was not marketable until re-built, with a round shaft and (3) that Ralph Evans Manufacturing Co. terminated said agreement because of the difficulties with the square shaft.

JURY INSTRUCTION NO. 46

If you find from a preponderance of the evidence:

(1) That the Plaintiff entered into a legally binding contract with either Ralph M. Evans or Ralph Evans Manufacturing Co., and

(2) That Plaintiff gave a warranty of merchantability or a warranty of fitness for a particular purpose as those terms have been explained to you, and

(3) That Plaintiff has breached either of said warranties,

You are instructed that the Defendant Ralph M. Evans or Ralph Evans Manufacturing Co., or its agent, may rescind or terminate said agreement upon that ground and if you find that the said Ralph M. Evans or Ralph Evans Manufacturing Co. notified Plaintiff that said agreement was being terminated on that ground you will find for the Defendants and against the Plaintiff, no cause of action.