United States Court of Appeals for the Federal Circuit

ARCTIC CAT INC.,
Plaintiff-Appellee

v.

BOMBARDIER RECREATIONAL PRODUCTS INC., BRP U.S. INC.,
Defendants-Appellants

2017-1475

Appeal from the United States District Court for the Southern District of Florida in No. 0:14-cv-62369-BB, Judge Beth Bloom.

Decided: December 7, 2017

JOHN A. DRAGSETH, Fish & Richardson P.C., Minneapolis, MN, argued for plaintiff-appellee. Also represented by NICHOLAS STEPHAN BOEBEL, Populus Law LLC, Minneapolis, MN; NIALL ANDREW MACLEOD, AARON MYERS, DIANE PETERSON, Kutak Rock LLP, Minneapolis, MN.

WILLIAM F. LEE, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, MA, argued for defendants-appellants. Also represented by JENNIFER JASMINE JOHN, MICHELLE LISZT SANDALS, LOUIS W. TOMPROS.

Before MOORE, PLAGER, and STOLL, *Circuit Judges*.

MOORE, *Circuit Judge*.

Bombardier Recreational Products Inc. and BRP U.S. Inc. (collectively, "BRP") appeal from the United States District Court for the Southern District of Florida's denial of judgment as a matter of law that the asserted claims of U.S. Patent Nos. 6,568,969 ("'969 patent") and 6,793,545 ("'545 patent") would have been obvious, that Arctic Cat Inc. ("Arctic Cat") failed to mark patented products, that the jury's royalty award was based on improper expert testimony, and that BRP did not willfully infringe the asserted claims. BRP also appeals the district court's decision to treble damages and its award of an ongoing royalty to Arctic Cat. We affirm the district court's denial of judgment as a matter of law as to obviousness, the jury's royalty rate, and willfulness. We affirm the district court's decision to treble damages and award an ongoing royalty to Arctic Cat. We vacate the court's denial of judgment as a matter of law as to marking and remand for further consideration limited to that issue.

BACKGROUND

The '969 and '545 patents disclose a thrust steering system for personal watercraft ("PWC") propelled by jet stream. This type of watercraft is propelled by discharging water out of a discharge nozzle at the rear of the watercraft. *E.g.*, '545 patent at 1:22–24. The rider controls the thrust of water out of the discharge nozzle by pressing a lever mounted on the steering handle. *Id.* at 1:38–40. A sufficient amount of thrust out of the steering nozzle is required for these watercraft to steer properly because decreasing the thrust of the water out of the discharge nozzle decreases the steering capability of the watercraft. *Id.* at 1:34–36, 1:51–55.

Because steering capabilities are affected by the amount of thrust applied, the patents explain that, to avoid obstacles at high speed, riders should apply constant pressure on the throttle lever while simultaneously turning the steering handle away from the obstacle. *Id.* at 1:59–61. This is counter-intuitive to inexperienced riders who often slow down to turn out of the way. *Id.* at 1:55–65. In these situations a rider may not be able to avoid the obstacle because steering capability has been decreased. *Id.* at 1:65–67. The patents seek to overcome this issue by automatically providing thrust when riders turn the steering system. *Id.* at 2:11–27. Claim 15 of the '545 patent is representative:

> A watercraft including:
>
> a steering mechanism;
>
> a steering nozzle;
>
> a thrust mechanism;
>
> a lever adapted to allow an operator to manually control thrust of said thrust mechanism, said lever mounted on said steering mechanism and biased toward an idle position; and
>
> ***a controlled thrust steering system*** for controlling thrust of said thrust mechanism independently of the operator;
>
> wherein said controlled thrust steering system activates said thrust mechanism ***to provide a steerable thrust*** after said lever is positioned other than to provide a steerable thrust and after the steering mechanism is positioned for turning said watercraft.

Arctic Cat sued BRP for infringement of claims 13, 15, 17, 19, 25, and 30 of the '545 patent and claims 15–17,

and 19 of the '969 patent, accusing the off-throttle thrust reapplication system in several of BRP's Sea-Doo PWC. BRP refers to its proprietary off-throttle thrust reapplication system as Off-Throttle Assisted Steering ("OTAS"). Before trial, BRP unsuccessfully moved for summary judgment on several issues, including that Arctic Cat's sole licensee Honda failed to mark its products with the licensed patent numbers.

At trial, the jury found both patents not invalid, awarded a royalty consistent with Arctic Cat's model ($102.54 per unit) to begin on October 16, 2008, and found by clear and convincing evidence that BRP willfully infringed the asserted claims. Based on the willfulness verdict, the district court trebled damages, a decision it further explained in a subsequent order.

After post-trial briefing, the district court denied BRP's renewed motion for judgment as a matter of law on all issues. It granted Arctic Cat's motion for an ongoing royalty, awarding $205.08 per unit. BRP appeals the district court's denial of judgment as a matter of law on validity, marking, damages, and willfulness, as well as its grant of an ongoing royalty and decision to treble damages. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

In appeals of patent cases, we apply the law of the regional circuit "to which district court appeals normally lie, unless the issue pertains to or is unique to patent law." *AbbVie Deutschland GmbH & Co., KG v. Janssen Biotech, Inc.*, 759 F.3d 1285, 1295 (Fed. Cir. 2014) (internal quotation marks omitted). We review rulings on motions for judgment as a matter of law under the law of the regional circuit. *Id.* The Eleventh Circuit reviews the denial of judgment as a matter of law de novo, viewing the evidence in the light most favorable to the non-moving party. *Howard v. Walgreen Co.*, 605 F.3d 1239, 1242 (11th Cir. 2010). "The motion should be granted only when the

plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action." *Id.* (internal quotation marks omitted).

I. Obviousness

Obviousness is a question of law based on underlying facts. *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1326 (Fed. Cir. 2016). In *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007), the Supreme Court cautioned that the obviousness analysis should not be reduced to "rigid and mandatory formulas." In *Graham v. John Deere Co.*, the Supreme Court set the framework for the obviousness inquiry under 35 U.S.C. § 103:

> Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

383 U.S. 1, 17–18 (1966). The *Graham* factors—(1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) objective considerations of nonobviousness—are questions of fact reviewed for substantial evidence. *See Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1047–48 (Fed. Cir. 2016) (en banc); *In re Cyclobenzaprine Hydrochloride Extended–Release Capsule Patent Litig.*, 676 F.3d 1063, 1068 (Fed. Cir. 2012). "When reviewing a denial of judgment as a matter of law of obviousness, where there is a black box jury verdict, as is the case here, we presume the jury resolved

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