IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FISKARS, INC. and
FISKARS, OY AB,

Plaintiffs,

v.

HUNT MANUFACTURING CO.,

Defendant.

OPINION AND ORDER

97-C-0255-C

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Defendant Hunt Manufacturing Co. has moved for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(5) or (6), arguing that it is no longer equitable that the judgment should have prospective application or, in the alternative, that good reasons justify granting defendant relief from the operation of the judgment. This suit was brought originally by plaintiffs Fiskars, Inc. and Fiskers, OY AB, who sued defendant for infringement of plaintiffs' U.S. Patent No. 5,322,001 for a heavy duty paper trimmer. A jury found in favor of plaintiffs and awarded damages in the amount of $193,131 for lost profits; $1,183,243 for projected lost profits caused by price erosion; and $1,856,552 for projected lost profits resulting from future price erosion. Defendant appealed from the judgment; its appeal was denied on July 24, 2000.

While the appeal was pending, defendant filed a motion for relief from judgment, together with a motion to stay a decision on the motion pending resolution of the appeal. I granted the motion to stay and then lifted it once the appeal was denied.

Defendant supports its Rule 60(b) motion with the argument that it now has evidence of market acceptance of a non-infringing substitute for the infringing paper trimmer it had been selling at the time of trial and that the existence of this evidence presents exactly the factual circumstance for which Rule 60(b) was intended. According to defendant, it is not evidence that was available at trial, "yet it proves beyond question the inequity of the jury award." Br. in Supp. of Mot., dkt. #296, at 8; suppl. br., dkt. #304, at 10. Defendant adds that because the judgment has yet to be paid, "there is no 'unscrambling of the past' that must occur." Id. Defendant states that the non-infringing device was available at the time of trial but had not yet been put on the market so defendant did not know whether it would achieve consumer acceptance. As soon as the trial ended, defendant started shipping the alternative device that has proved to be successful. In defendant's view, the jury based its award of damages on its belief that plaintiffs would have had no competition were it not for defendant's infringing trimmer; the success of the non-infringing trimmer shows that the jury's award of future lost profits was inequitable.

Subsection (5) of Rule 60(b) allows a court to relieve a party from a final judgment

when, among other things, "it is no longer equitable that the judgment should have prospective application." The rule is directed to injunctive decrees; money judgments are not "prospective" even before they are satisfied. See 12 James Wm. Moore, Moore's Federal Practice § 60.47[1][b] (3d ed. 1997) (money judgment may not be reopened under Rule 60(b)(5) even if judgment debtor has not yet paid it). See also Cincinnati Insurance Co. v. Flanders Electric Motor Service, 131 F.3d 625, 630 (7th Cir. 1997) (holding that later change in state law does not require setting aside judgment of declaratory relief based on federal court's interpretation of law; judgment was declaration of rights and duties existing at time insurance contracts were executed; "'virtually every court order causes at least some reverberations into the future . . . even a money judgment has continuing consequences, most obviously until it is satisfied . . . . That a court's action has continuing consequences, however, does not necessarily mean that it has "prospective application" for the purpose of Rule 60(b)(5)'") (quoting Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988)).

Despite this precedent, defendant argues that it is not barred by the prospective judgment limitation in Rule 60(b)(5) because it filed its motion for relief while this case was on appeal and before the judgment had been paid. It concedes, as it must, that it has found no cases from this circuit that permit a court to provide equitable relief to a plaintiff in such circumstances. Instead, it cites Bros Inc. v. W.E. Grace Manufacturing Co., 320 F.2d 594 (5th

Cir. 1963), a case from another circuit that arose in very different circumstances from this one and that did not involve Rule 60(b)(5). In Bros, the alleged infringer moved to reopen a judgment enjoining it from further infringement by showing that in another case involving the same patent tried in another circuit, the trial court had found that the patentee had described the invention at issue in a printed publication more than one year prior to the patent application. This determination by another court that the patent was invalid, the strong probability that the patentee had misrepresented the facts about the printed publication in the Texas litigation, the strong public interest in the validity of patents and the fact that the infringer had filed its motions for equitable relief before any of the litigation was complete convinced the Fifth Circuit to remand the case to the district court to consider whether relief was available and warranted.

Defendant's failure to find any cases granting relief from money judgments under Rule 60(b0(5) is hardly surprising. Rule 60(b)(5) was never intended to provide an avenue for relief from an award of money damages because of developments post-dating the trial. The rule recognizes the imperfect nature of a lawsuit, which can never achieve either a perfect re-creation of past events or a precise determination of future damages. The most prescient judge or jury cannot predict with any certainty what is yet to happen; at the most the factfinder can make a rough approximation of future losses or pain and suffering and assess some monetary

compensation. Because the process is imprecise, it is inevitable that there will be many instances in which the approximation will turn out to be inaccurate. A young plaintiff injured in an automobile accident may develop debilitating complications never guessed at during trial; another injured plaintiff may recover more quickly and thoroughly than her attending physicians would have expected. In neither case does the legal system provide an error-correcting mechanism; if it did, it would be necessary to hold additional trials in many instances. In this case, as an example, reopening the previous award would require a second trial to evaluate the new device, determine whether its existence requires a different evaluation of lost profits and whether any new award should be made and in what amount.

The reasons for not reopening money judgments are obvious: if the courts concerned themselves with fine tuning previous judgments, they would be unable to address new cases; defendants would never know the exact extent of their liability; and plaintiffs could not know whether they might be required to return money previously awarded. The benefits of finality outweigh the benefits of greater accuracy in assessing damages. I conclude that defendant has made no showing that it is entitled to relief from judgment under Rule 60(b)(5).

Rule 60(b)(6) permits a court to vacate a judgment whenever it would be appropriate to do so to accomplish justice. See Klapprott v. United States, 335 U.S. 601, 614-15 (1949). However, such a power is to be exercised only in "extraordinary circumstances." See

Ackermann v. United States, 340 U.S. 193, 199 (1950) (distinguishing case from Klapprott and explaining that Klapprott involved extraordinary situation far different from merely failing to defend charges because of inadvertence, indifference, or careless disregard of circumstances). Defendant Hunt does not contend that misrepresentations were made during the trial or that plaintiffs concealed evidence that would have been helpful to defendant's case. Its only complaint is that later events have cast doubt on the accuracy of the jury's determination of plaintiffs' damages. Defendant could have introduced its non-infringing product at trial so that the jury could have considered its potential effect upon plaintiff's future sales. The fact that defendant did not yet have evidence of market acceptance would have lessened the force of the alternative product but would not have eliminated it altogether. As prospective consumers, the jurors could have evaluated the marketability of the product and might well have lowered their estimation of plaintiffs' lost future profits as a result. Defendant acknowledges that it could have used its alternative product in this manner. See, e.g., Grain Processing Corp. v. American Maize-Products Co., 185 F.3d 1341, 1351 (Fed. Cir. 1999) ("[O]nly by comparing the patented invention to the next-best available alternative(s) – regardless of whether the alternative(s) were actually produced and sold during the infringement – can the court discern the market value of the patent owner's exclusive right, and therefore, his expected profit or reward, had the infringer's activities not prevented him from taking full economic advantage

of this right.")

Defendant has failed to suggest anything extraordinary about its circumstance that would bring it under subsection (6) of Rule 60(b). Therefore, its motion for relief from judgment will be denied.

ORDER

IT IS ORDERED that defendant Hunt Manufacturing Co.'s motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(5)or (6) is DENIED.

Entered this 2nd day of January, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge