

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM C. FRAZIER, FRAZIER  
INDUSTRIES, INC., and AIRBURST  
TECHNOLOGIES, LLC,

Plaintiffs,

v.

LAYNE CHRISTENSEN COMPANY, and  
PROWELL TECHNOLOGIES, LTD.,

Defendants.

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ORDER

04-C-0315-C

In this civil action for patent infringement, plaintiffs William C. Frazier, Frazier Industries, Inc. and Airburst Technologies, LLC, have filed a motion pursuant to Fed. R. Civ. P. 59 for amendment of the July 21, 2006 judgment, for reinstatement of the verdict or alternatively, for the grant of a new trial. In addition, plaintiffs have moved to correct the record for appeal. The Rule 59 motion will be denied; the motion to correct the record will be granted.

Plaintiffs acknowledge that the court denied an earlier letter request for amendment of the judgment and have filed this motion to preserve the record. For the record, I confirm

the decision to deny the request to amend. As I said earlier, my new view of the proper claim construction played no part in the decision to grant defendant's motion for judgment as a matter of law. Thus, there is no reason to amend the record to incorporate a new construction, particularly since defendants had no notice that I would reconsider the claim construction and no opportunity to be heard on the matter.

Turning to plaintiffs' motion for reinstatement of the verdict, I explained at length in the July 17 order why the jury's verdict could not stand. Before deciding to enter judgment in favor of defendants, I gave careful consideration to each of plaintiffs' arguments in support of the verdict. I am not persuaded that the resulting judgment should be vacated. Nor am I persuaded that a new trial is necessary to allow plaintiffs an opportunity to introduce evidence of copying. Plaintiffs were limited in the evidence they wanted to introduce, not because I denied them the opportunity to address copying but because the evidence they sought to introduce was inadmissible for that purpose. For example, I denied plaintiffs the opportunity to introduce evidence from Paul Chelminski that defendant Layne Christensen inquired of Bolt Technology Corporation about using air guns for water well rehabilitation and was using them in the same process manner claimed in plaintiffs' patent. Plaintiffs offered no grounds for finding Chelminski qualified to testify about such matters.

Plaintiffs argue that they should have been allowed to ask the inventors about their understanding of the differences between their invention and the prior art because it was

reasonable for plaintiffs to believe that this testimony did not require experts. What plaintiffs believed is not determinative; the question for the court was whether the inventors were in a position to testify about the non-obviousness of their invention. They had not been named as experts before trial. Defendants would have been unfairly prejudiced if the inventors had been allowed to testify to their opinions about the differences between their invention and the prior art when defendants had no advance notice that they would be giving such opinions. In addition, there was no reason to believe that the inventors were equipped to testify about the prior art, particularly when they had listed no prior art of any kind in their patent application.

Plaintiffs contest the striking of all of the testimony of their expert, Fletcher Driscoll, and precluding them from putting in evidence about the years of experience that Examiner Neuder had had in the field of water well technology at the time he examined the '845 patent application. In the July 17 order, I discussed at length the reasons for striking Driscoll's testimony. It is not necessary to add to that exposition. As to Examiner Neuder's years of experience, plaintiffs have not explained why such evidence would have been relevant. Examiner Neuder did not testify and could not have done so under the rules of the United States Patent and Trademark Office.

Finally, plaintiffs complain about the court's allowance of the testimony of Gennady Carmi for defendants on the issue of what one of ordinary skill in the art knew about water

well technology at the time the patent in dispute issued. (Carmi testified that he had seen air guns used in Russian water wells while he was still in school in that country.) I do not understand this argument. Even if the decision to allow the testimony was improper, it was obviously harmless. The jury heard the testimony and found in favor of plaintiffs. Its verdict is incontrovertible proof that it was not influenced by the report of a prior use of air guns. The testimony had no influence on my opinion on obviousness, which focused exclusively on the written evidence of prior art in the United States and not on Carmi's observations of the use of air guns in Russian wells.

Finally, plaintiffs ask for permission to correct the record on appeal to add their proffer of the testimony the inventors would have given on the issue of non-obviousness had they been allowed to testify. Plaintiff's motion will be granted, so as to make the record complete.

Entered this 17th day of August, 2006.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge