

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

BRIGGS & STRATTON CORP.,

Plaintiff,

v.

KOHLER CO.,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

05-C-0025-C

A final pretrial conference was held in this case on February 3, 2006, before United States District Judge Barbara B. Crabb. Plaintiff was represented by David De Bruin, Chuck Crueger and John Flanagan. Also present was Deborah Spanic, corporate counsel for plaintiff. Defendant was represented by David Harth, Christopher Hanewicz and David Laub.

Counsel agreed to the proposed voir dire questions in the form distributed to them at the pretrial conference.

Counsel are working on jury notebooks that will include copies of the relevant patents and a copy of the claim constructions made by the court.

The introductory instructions will be amended by adding pages 10 and 11 from the

liability instructions.

Mr. De Bruin advised the court that plaintiff is not pursuing a claim that defendant infringed claim 13 of the '166 patent.

After extensive discussion of the significance and relevance of the non-final action by the EPO and IPER determination, I ruled that if either side introduces evidence of one of these decisions, the other side could introduce evidence of the action it believes is relevant. If plaintiff chooses not to put in any evidence about the IPER, defendant may not put in any evidence about the EPO non-final action. Mr. De Bruin agreed to advise Mr. Harth no later than 5:00 p.m., February 3, 2006, whether he intends to introduce the IPER action. In the event that plaintiff does decide to use the IPER action, defendant wants witness Steven Kunin restricted to testifying about the IPER and not about the entire USPTO process. However, Mr. De Bruin believes the USPTO process is relevant to showing how the IPER process corresponds to it. In that event, I will allow the testimony.

As to the use of facts found in summary judgment, counsel are to try to reach a stipulation about those facts that they believe are not in dispute. Plaintiff's motion for partial summary judgment is DENIED.

Defendant wants to put in evidence during the damages phase of this case showing that defendant's Command engine is a non-infringing alternative to its Courage engine. Defendant may call Dan Petrie to testify about horsepower testing of the Command.

I GRANTED plaintiff's motion to exclude testimony concerning the Intek 18.5 hp engine. However, if plaintiff tries to argue that testing on this engine historically overstates its horsepower rating, defendant has reserved the right to argue that the implication of such an argument is that plaintiff may be overstating its own horsepower.

Plaintiff's motion to exclude exhibits 517 and 559 and related testimony as undisclosed prior art is GRANTED as unopposed.

Plaintiff's motion to limit defendant's invalidity arguments to those made at summary judgment is DENIED as moot.

Plaintiff's motion to bar defendant's previously undisclosed animation and related testimony is DENIED. Plaintiff has had full opportunity to review the animations and to depose defendant's expert witness on them.

Plaintiff's motion to bar evidence from Klika (plaintiff's inventor) concerning the infringement or invalidity of the '166 patent is DENIED. However, Klika may testify only to explain the invention and what was intended to be conveyed by specifications in the claims. He may also provide background information including an explanation of the problems existing at the time of the invention and his solution to those problems. He may testify about how much movement is called for under the rails.

Plaintiff's motion to bar reference to defendant's '458 patent during the liability phase of this trial is GRANTED as unopposed.

Plaintiff's motion to bar testimony about foreign patent examiners is subsumed in the motion that I discussed at the outset of this order.

Defendant's motion to exclude portions of plaintiff's supplemental expert report has been WITHDRAWN by defendant.

Defendant's motion to exclude evidence concerning willful infringement from the liability phase is GRANTED with the exception that any evidence needed to impeach a witness during the liability phase will be excluded from this order.

Defendant's motion to deny plaintiff from relying on the doctrine of equivalents is DENIED.

Finally, defendant's motion to exclude Steven Kunin as an expert witness is not necessary. If the parties agree to put in all evidence of the foreign actions, Kunin will be called as a witness. If the parties decide not to put in such evidence, it will not be necessary to call Kunin.

Defendant asked for discussion of the definition of "slot." I determined that the definition was the one provided in the court's order. That definition was the one proposed by plaintiff and unopposed by defendant.

Witnesses will be sequestered with the exception of expert witnesses and one representative for each party. Michael Gray will be sequestered unless he is named as the company representative.

Counsel know that they are to advise the opposing party of the witnesses they intend to call the next day no later than the night before. They are to advise each other not only of the witnesses they are calling but the order in which they will be calling them.

Mr. De Bruin stated that he has subpoenaed originals of certain documents from defendant. Defendant's counsel saw no problem in having those in plaintiff's hands promptly.

Eight jurors will be selected from a panel of fourteen qualified jurors.

Mr. Flanagan advised the court that damages accruing to plaintiff after December 31, 2005, can be negotiated after the verdict. He also advised the court that he is working with defendant's counsel on the sealing of certain sensitive damages details.

Counsel expect that the liability phase of the case can be completed by the end of the day Wednesday, February 8, 2006.

Entered this 3rd day of February, 2006.

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