

No. 01-1108, -1109

In the
United States Court of Appeals
for the Federal Circuit

HAROLD L. BOWERS, d/b/a HLB TECHNOLOGY,

Plaintiff-Cross-Appellant,

v.

BAYSTATE TECHNOLOGIES, INC.,

Defendant-Appellant

*Appeal from the United States District Court
for the District of Massachusetts
in CV-91-40079
Judge Nathaniel M. Gorton*

REPLY BRIEF FOR PLAINTIFF-CROSS-APPELLANT
HAROLD L. BOWERS

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I. BAYSTATE'S NEW ARGUMENT IN ITS REPLY BRIEF SHOULD BE IGNORED

On page 15 of its reply brief, Baystate for the first time asserts that Bowers's reverse engineering claim does not apply to the Windows version of Draft-Pak because Bowers's witnesses never testified concerning the Windows version. Because Baystate failed to raise that argument in its opening brief, the argument is waived. *See Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800, 17 USPQ2d 1097, 1102 (Fed. Cir. 1990). Even had it properly raised it, the argument is without merit. Evidence was in fact introduced showing that the Windows version of Draft-Pak was reverse engineered from Geodraft. The evidence included: screen captures from the Windows version of Draft-Pak [A2318-A2354]; Mr. Spencer's testimony that the several versions of Baystate's software which he examined were reverse engineered from Geodraft [A659-A660, A677]; copying of arbitrary or unusual default entries (datum letters "A", "B", and "C", .001 default tolerance, inappropriate "None" choices for secondary datum) [A2330; *see also* Addendum to Bowers's initial brief, Tab 3]; and the selection and arrangement of icons [compare A3038 and A2330; *see also* Addendum to Bowers's initial brief, Tab 3].

II. BAYSTATE WAIVED ITS RIGHT TO CHALLENGE THE FORM OF THE VERDICT

Baystate argues that it was entitled to wait until after the jury was discharged to first raise its argument that the damages were duplicative. In support, Baystate cites *Garshman Co. v. General Electric Co.*, 176 F.3d 1 (1st Cir. 1999).

Garshman is distinguishable and inapplicable. Unlike *Garshman*, Baystate invited the very error of which it complains, because it proposed the jury verdict form that it now claims led the jury to allegedly award duplicative damages. No such “invited error” was present in *Garshman*. To the extent that *Garshman* is inconsistent with the First Circuit’s decision in *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 201-02 (1st Cir. 1996)(cited in Bowers’s opening brief), the latter is controlling. *Coastal Fuels* has not been overruled, nor was it discussed or distinguished in *Garshman*. Baystate’s failure to object to the form of the verdict before the jury was discharged is squarely controlled by *Coastal Fuels*.

In a footnote on page 27 of its reply brief, Baystate attempts to distinguish *Coastal Fuels* on the ground that the defendant in that case “did not ask the trial court to avoid duplicative damages before entering

judgment.” That distinction is of no help to Baystate. The court in *Cunningham v. Williams Telecommunications Systems, Inc.*, 928 F. Supp. 110 (D. Mass. 1996)(Gorton, J.) succinctly summarized the law of the First Circuit on this point:

The First Circuit Court of Appeals has made it clear that a party who fails to object to any alleged verdict inconsistency or defect after the verdict is read and before the jury is dismissed waives its right to object to an inconsistent verdict. See *Toucet v. Maritime Overseas Corp.*, 991 F.2d 5, 8 (1st Cir. 1993); *Pontarelli v. Stone*, 930 F.2d 104, 114-15 (1st Cir. 1991); *Austin v. Lincoln Equipment Associates, Inc.*, 888 F.2d 934, 938 (1st Cir. 1989). This is because the only efficient time to cure any alleged inconsistency is after the jury announces its verdict and before it is excused. *Toucet*, 991 F.2d at 8. In this case, had either counsel raised the issue in a timely fashion, *i.e.* after the verdict was recorded and before the jury was discharged, this Court could have considered the alleged inconsistency and determined whether to reinstruct the jury and return it for further deliberations. **After the jury was discharged without objection from either counsel, however, the parties effectively waived their rights to argue that the jury’s separate award of damages on each count was inconsistent.**

Id. at 113, emphasis added. The *Cunningham* court concluded that it had a duty under the Seventh Amendment to harmonize the jury’s findings and rejected the defendant’s argument that the jury’s damage award constituted an impermissible double recovery. *Id.* As in *Cunningham*, had Baystate alerted the district court that the jury’s verdict might have been construed as

awarding duplicate damages, the court could have issued a curative instruction or polled the jury. Instead, Baystate remained silent.

Under First Circuit jurisprudence, a special verdict must be upheld if there is a view of the case that makes the jury's answers consistent. *McIsaac v. Didriksen Fishing Corp.*, 809 F.2d 129, 133 (1st Cir. 1987); *Insurance Co. of North Am. v. Musa*, 785 F.2d 370, 377 (1st Cir. 1986). There is such a view of the jury's findings without adopting Baystate's "double recovery" argument. Bowers presented evidence of damages in the amount of \$7,722,739 solely attributable to copyright infringement and breach of the license agreement. [A5324] The jury awarded \$1,948,869 for copyright infringement and \$3,831,021 for breach of contract, for a total of \$5,779,894 solely attributable to copyright infringement and breach of the license agreement. [A14] Thus, the total amount of damages awarded for both combined causes of action was 75% of what Bowers sought, even though the evidence supported a higher amount. Baystate contends that the only view of the verdict is that the jury must have duplicated damages between the two causes of action. However, it is equally likely that the jury awarded 75% of the damages requested by Bowers and split the award 66% to 33% between the two causes of action, as suggested by the verdict form (*i.e.*, 33% to the copyright claim and 66% to the breach of contract claim). This view of the

verdict must be upheld. *See Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490 (2d Cir. 1995):

While it is possible that the jury impermissibly compensated Indu Craft twice for the same injury, it is equally rational to believe that the jury found that Indu Craft suffered \$3.25 million worth of injuries and merely allocated that amount between the two different causes of action, one for breach of contract and one for tort. . . . A jury's award is not duplicative simply because it allocates damages under two distinct causes of action. . . . As a consequence, the judgment must be reversed and the jury's prima facie tort award reinstated.

Id. at 497.

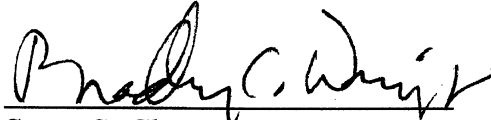
There is no "double recovery." The jury's decision to follow Baystate's proposed verdict form, which suggested allocating the damages across three distinct causes of action, is consistent and supported by the evidence.

III. CONCLUSION

For the foregoing reasons, the jury's award of damages for copyright infringement should be reinstated.

Respectfully submitted,

Dated: July 25, 2001



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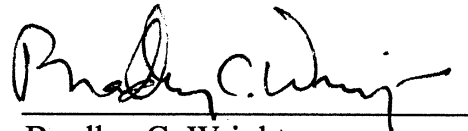
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 26, 2001, two copies of the foregoing REPLY BRIEF FOR PLAINTIFF-CROSS-APPELLANT HAROLD L. BOWERS were served on counsel of record as follows:

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Via Federal Express



Bradley C. Wright

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing REPLY BRIEF FOR PLAINTIFF-CROSS-APPELLANT HAROLD L. BOWERS complies as follows with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. This brief has been prepared using Microsoft Word 2000, in proportionally spaced 14 point Times New Roman typeface for text and proportionally spaced 14 point Times New Roman typeface for footnotes.

2. Exclusive of the exempted portions of the brief as described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 1082 words, as calculated by the word-counting utility of Microsoft Word 2000.


Bradley C. Wright

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