

Fed. Circ. Judge Jabs Atty On 'Sloppy Lawyering' In Fee Row

By **Britain Eakin**

Law360 (November 2, 2020, 7:11 PM EST) -- A Federal Circuit judge pelted a Baggage Airline Guest Services Inc. attorney with questions Monday over procedural missteps in an unsuccessful suit accusing a competitor of infringing a patent covering technology for picking up lost luggage.

Attorney Stefan V. Stein of GrayRobinson PA argued at the remote hearing that although the company, known as Bags, lost its suit against Roadie Inc. when a lower court invalidated the patent in January 2019, the district court properly found the case wasn't exceptional.

Roadie countered that the district court should have found that the failure by Bags' attorney "to grasp meaningful technological and operational distinctions in the accused product's functionality" rose to the level of nefarious intent.

U.S. District Judge Kathleen M. O'Malley pressed Stein when he told the panel that the district court rightly determined the case was "not exceptionally meritless" and so fees weren't warranted.

"Is it your position that the judge was right that it was just sloppy lawyering on your part?" Judge O'Malley asked.

Stein said he "might dispute that comment," but the judge gave him little chance to elaborate, noting that the attorney filed the case twice in the wrong district. The first suit was dismissed, Stein noted, because Bags didn't own the patent at the time and so didn't have standing to sue.

"Right, which is sloppy in itself, right?" the judge said.

"There was nothing I could do about that," Stein said, adding that he filed a second suit once Bags obtained ownership of the patent.

Judge O'Malley noted that Bags didn't move to dismiss the first suit, leaving that task to Roadie, and filed the second suit again in Florida when the case properly belonged in Delaware.

The judge, however, suggested when questioning counsel for Roadie that the panel's hands might be tied since the district court had determined there was no nefarious intent.

"Given our standard of review ... how do we disagree with that?" she asked Roadie attorney Edward A. Pennington of Smith Gambrell & Russell LLP.

Pennington said the facts of this case are similar to others that have been deemed exceptional.

Roadie had asked the district court for judgment on the pleadings based on invalidity and noninfringement. The court granted the motion on invalidity, with the Federal Circuit **later affirming** the decision, finding Bags' patent was directed to the abstract idea of "coordinating and monitoring baggage delivery" and therefore not patentable under the U.S. Supreme Court's Alice test.

But the court declined to consider Roadie's noninfringement arguments since it found the patent

invalid.

Pennington argued that the district court should have, but didn't, factor in the soundness of Bags' infringement case in determining whether the case was exceptional.

Judge O'Malley asked the attorney if a court should, on a fee motion, go back and decide the merits of all other issues after invalidating a patent or ruling in favor of the challenger on one issue.

Pennington said "absolutely not," but noted that the issue of noninfringement was filed concurrently with the validity challenge and that it had been fully briefed and so could have been considered.

The dispute dates back to 2017, when **Bags accused** Roadie Inc., a rival transportation company that pairs customers who need items shipped to drivers already headed in that direction, of developing an app that infringes the patent.

Roadie says it launched as a startup in 2014, and called it "disheartening" in its appeal brief for big companies like Bags to get a free pass for attacking smaller companies and burdening them with unnecessary litigation costs.

Counsel for Roadie declined to comment Monday. Counsel for Bags did not return a request for comment.

The patent-in-suit is U.S. Patent No. 9,659,336.

Bags is represented by Stefan V. Stein of GrayRobinson PA.

Roadie is represented by Edward A. Pennington of Smith Gambrell & Russell LLP.

The case is Baggage Airline Guest Services Inc. v. Roadie Inc., case number 20-1540, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Christopher Crosby and Tiffany Hu. Editing by Jill Coffey.