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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Fed. Circ. Tosses Bracewell Attys' Bid To Clear Names

By **Beth Winegarner**

Law360, San Francisco (October 30, 2015, 5:51 PM ET) -- The Federal Circuit on Friday threw out two former Bracewell & Giuliani LLP attorneys' appeal of a sanctions order in a patent suit labeling them liars, finding that a settlement in the suit brought by Tesco Corp. made it impossible for them to consider the appeal.

The majority said that a post-trial settlement between Tesco and defendants National Oilwell Varco LP, Offshore Energy Services Inc. and Frank's International LLC took away their ability to reconsider the lower court's sanction, which had been based on allegedly inaccurate statements Tesco's attorneys with Bracewell made during the trial. The attorneys, Glenn A. Ballard Jr. and John F. Luman III, **argued on appeal** that they hadn't been given a fair chance to offer evidence that they hadn't been dishonest.

"We agree that statements made in a judicial opinion can harm the reputation of attorneys, and that an attorney's reputation is one of his or her most valuable assets. But that concern alone is insufficient to justify our jurisdiction where there is no judgment that remains," Federal Circuit Judges Kathleen O'Malley and Raymond Chen said in the majority ruling.

"There is simply no Article III case or controversy that allows us to redress any reputational harm the Attorneys may have suffered," they wrote.

In a dissent, Federal Circuit Judge Pauline Newman said that every other circuit to consider similar appeals has found that a settlement doesn't bar an attorney's right to appeal a sanctions order.

"The victims should at least have the opportunity to tell their side of the story," Judge Newman wrote.

Grant Harvey of Gibbs & Bruns, representing Ballard and Luman, told Law360 Friday that he was disappointed in the decision.

"As the strong dissent demonstrates, the lawyers in this case have never had the chance to defend themselves with the evidence that exonerates them," Harvey said.

John Raley, an attorney for the defendants, agreed with the court's decision.

"The lessons of this case are self-evident. Tell the truth in court. If you learn that something you said is not true, correct the record immediately," Raley told Law360.

The underlying lawsuit revolves around a casing drive system used in the oil industry to

pick up, rotate and run casing in oil wells. Tesco alleged when it filed the infringement suit in 2008 that it has held patents on the system since as early as 2006.

But when the case went to trial in 2010, Kevin Nikiforuk, who created the casing drive system, testified "to the surprise of all present" that a marketing brochure developed by Tesco in August 2002 contained a depiction of his invention, according to an order last year dismissing the case.

Because federal law prohibits patenting an invention that has been on the market for a year or more, Nikiforuk's testimony, if true, "could easily have been the fulcrum in the trial, leading to a prompt dismissal of all of Tesco's claims," Judge Ellison said.

Judge Ellison granted a brief trial recess so Tesco's legal team could investigate Nikiforuk's claim and when trial resumed the following Monday, Ballard told the court that he had contacted the brochure's animator, who "unequivocally" stated that Tesco's casing drive system was not what was pictured in the marketing material, the order says.

The trial continued and jurors rendered a verdict in favor of some of Tesco's claims, but Judge Ellison refused to enter a final judgment due to "inconsistencies" in the jury's decision. Judge Ellison says he was also concerned about National Oilwell Varco's claim that Tesco had failed to produce the marketing brochure during pre-trial discovery.

To remedy the dispute over the brochure, Judge Ellison allowed attorneys for the oilfield defendants to conduct limited post-trial discovery and take the deposition of Dan Karr, the brochure animator Ballard had spoken with during trial, according to the order. That's when Ballard's alleged deceit came to light. Karr testified that he couldn't identify what was shown in the brochure because he had not been involved with creating the pamphlet, the order says.

U.S. District Judge Keith P. Ellison then **dismissed Tesco's suit with prejudice**, calling Ballard's mischaracterization of crucial witness testimony that hurt Tesco's case "an affront to this court, to the other parties and to judicial integrity."

Tesco appealed that ruling, but while the appeal was still pending, the parties reached a settlement and a mutual release of all defendants, according to Friday's order.

In October 2014, roughly a month after Judge Ellison handed dismissed the suit, Bracewell announced it had parted ways with Ballard and Luman by "mutual agreement."

National Oilwell Varco LP is represented by John Wesley Raley III, Robert M. Bowick and Bradford T. Laney of Raley & Bowick LLP.

Ballard and Luman are represented by Grant Harvey, Jeffrey C. Kubin and Ayesha Najam of Gibbs & Bruns LLP, and William F. Lee, Caitlin Looby, Richard Wells O'Neill, Katie Saxton and Michaela P. Sewall of Wilmer Cutler Pickering Haleand Dorr LLP.

The case is Tesco Corporation v. National Oilwell Varco LP, case number is 15-1041, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Jimmy Hoover. Editing by Emily Kokoll.