

No. 18-52

IN THE
Supreme Court of the United States

PAUL ANDREW LEITNER-WISE,
Petitioner,

v.

LWRC INTERNATIONAL, LLC, *et al.*
Respondents.

**PETITIONER'S REPLY
IN SUPPORT OF CERTIORARI**

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**PETITIONER'S REPLY
IN SUPPORT OF CERTIORARI**

Paul Andrew Leitner-Wise has petitioned this Court for a writ of certiorari. Respondent LWRC International, LLC opposes this petition, relying solely upon a document which is demonstrably inoperative. The District Court accepted this document as dispositive without following the proper procedures for summary judgment, and denying Leitner-Wise discovery or a trial on the issue. Subsequent litigation with other parties has revealed an earlier assignment, more contemporaneous with Leitner-Wise's royalty agreement. This matter should be remanded back to the District Court for trial on the two assignment documents as the lower courts remain in error as to their reliance on one without consideration of the other and the circumstances of Leitner-Wise's contracting for royalties in consideration of such assignment.

INTRODUCTION

Petitioner Paul Leitner-Wise has brought a series of claims to enforce his intellectual property rights and royalty agreements regarding his patented inventions. In this first such lawsuit, the District Court converted a motion to dismiss into a motion for summary judgment without notice or the movant complying with any of the requirements of a motion for summary judgment. The District Court dismissed Leitner-Wise's claims without a trial or discovery, relying entirely upon a claim by the

Defendants that an October 31, 2006 assignment negated a prior royalty agreement providing the Petitioner would receive a one half percent royalty on all sales of products utilizing his inventions. The Federal Circuit subsequently affirmed this dismissal without opinion.

Following the decision by the Federal Circuit in this case, an earlier assignment was produced for the first time in discovery in a different lawsuit involving the Petitioner and another party. This assignment, predating the October 31, 2006 assignment by more than a year and made shortly after the execution of the royalty agreement, demonstrates the assignment of all of Leitner Wise's patent rights nearly contemporaneous with the royalty agreement. As Leitner-Wise had already assigned these rights for consideration in August of 2005, there could be no further rights which could be the subject of the October 31, 2006 assignment. The August 2005 assignment and royalty agreement control, and Leitner-Wise remains entitled to his unpaid royalties to the present day.

**FURTHER REASONS FOR GRANTING
CERTIORARI
OR A SUMMARY REMAND**

Certiorari, or a summary remand, should be granted for the following further reasons:

STATEMENT OF FACTS

As fully set forth in his petition for certiorari filed on June 28, 2018, the Petitioner is a prolific inventor who made a royalty agreement in 2005 in exchange for the assignment of intellectual property rights in certain of his inventions.

Following the Petitioner's departure from the company he founded, unknown person(s) broke into his office and removed all copies of the contracts for royalties and other compensation he now seeks to enforce. Such contracts remained missing until a copy of the Petitioner's employment agreement was discovered in an immigration attorney's file in late 2014. The Petitioner filed suit against these Respondents thereafter.

Prior to answering the Petitioner's Complaint, the Respondents moved to dismiss, producing an assignment dated October 31, 2006 purporting to relinquish all of the Petitioner's rights to the enumerated intellectual property without mention of meaningful consideration. Despite the Respondents offering no statement of material facts not claimed to be in dispute otherwise required for summary judgment and no notice made by the District Court of its intention to convert their motions to summary

judgment, the District Court granted summary judgment on February 28, 2017. App. 12a.

On February 12, 2018 the Federal Circuit affirmed the judgment of the District Court without opinion. A defendant in a subsequent lawsuit produced to the Petitioner for the first time a copy of a previously undiscovered assignment. This newly discovered assignment addressed the same intellectual property, but was dated more than a year earlier than the one relied upon by the District Court to dismiss this lawsuit. Pet.'s Ex. A.

ARGUMENT

I. The significance of the subsequent discovery of the 2005 assignment.

The existence of the earlier assignment completely undermines the basis for the District Court's summary dismissal of the Petitioner's lawsuit.

Contemporaneously with his departure, Plaintiff executed additional contracts with LWRC. On October 31, 2006, Plaintiff signed a document entitled "Termination of Employment" which included a provision releasing LWRC "from any and all claims.... including, but not limited to, all claims arising out of [Plaintiff's] employment, all claims arising out of the Employment Agreement.... [and] all breach of contract and other common law claims." ECF No. 15-6 at 1-2. An additional contract entitled "Intellectual

Property Assignment Agreement By And Between Paul Leitner-Wise and Leitner-Wise Rifle Co. Inc.” (hereinafter, “Intellectual Property Agreement”) included a provision stating that [Leitner-Wise] hereby transfers and assigns to [LWRC] all of [Leitner-Wise's] right, title and interest to any and all Intellectual Property ownership interest [Leitner-Wise] may have throughout the world in and to the Assigned Intellectual Properties.” ECF No. 15-8 at 2. “Assigned Intellectual Properties” is separately defined in the contract to include the '581 patent. *See* ECF No. 15-8 at 1.7. Furthermore, a section in the same contract entitled “Payment and Communication,” stated that “the consideration for the assignment and other rights granted to [LWRC] under this Agreement consists of good and valuable consideration, the sufficiency of which is hereby acknowledged by [Leitner-Wise] pursuant to a separate Equities Purchase Agreement, and the consummation of the transactions contemplated thereby, there being no further consideration *or royalty payable* in respect thereof” ECF No. 15-8 at 3 (emphasis added).

App. 8a-9a (footnotes omitted).

Here, the assignment relied upon by the District Court states that

Plaintiff “sell(s) and assign(s) to Leitner-Wise Rifle Company. Inc....their entire right, title

and interest” in the '581 patent. ECF No. 1-3. The unambiguous language in this grant demonstrates an intent to transfer, without reservation, all rights in the '581 patent from Plaintiff to LWRC. There is no reference to a license agreement as the Plaintiff now alludes to in his Opposition motion, or to any reservation of substantial rights.

...

Even if the Court were to construe the language in the assignment stating that Plaintiff was relinquishing his rights to the patent “[i]n consideration of the sum of One Dollar (\$1.00) or equivalent *and other good and valuable* consideration.” ECF No. 1-3 (alteration and emphasis added), to refer to the royalties that Plaintiff was owed pursuant to the employment agreement executed the prior year, that would not save his claim. The retention of a right to royalties does not limit the assignment unless the retention of royalty rights was a reservation of a substantial right, such as the right to exclude others from making the patented product. Here, the plain language of the assignment transferring the “entire right, title and interest” shows that there was no reservation of a substantial right. Thus, the Court finds that the unambiguous language of the assignment demonstrates that Plaintiff transferred all rights to LWRC in 2006, depriving him of standing to bring this claim. Defendants' motions are therefore granted as to Plaintiff's patent infringement claim.

App. 19a-20a (footnote, citation omitted).

The proposition that Leitner-Wise relinquished all of his contracted royalty rights upon an assignment in 2006 is defeated entirely if he is now able to demonstrate that the operative assignment *occurred a year earlier*, following in short order the execution of the royalty agreement in question. If Leinter-Wise assigned these rights pursuant to a royalty agreement in 2005, he had no further rights in the same intellectual property to assign again in 2006. See *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1365 (Fed. Cir. 2010) (party cannot assign a patent without holding title at the time of transfer).¹

The District Court's conclusion that Leitner-Wise simply walked away from a contractual right to royalties that had already perfected the year before has always defied logic. “[T]he terms of the Employment Agreement provide otherwise. Generally, courts should not deviate from unambiguous provisions unless they lead to 'absurd results.’” *Advanced Video Techs. LLC v. HTC Corp.*, 879 F.3d 1314, 1319 (Fed. Cir. 2018) (quoting *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 67 Cal. Rptr. 2d 850, 855 (Cal. Ct. App. 1997)). Leitner-Wise has repeatedly argued that if the 2006 assignment was operative, it was devoid of consideration and

¹ This also negates LWRC International, LLC's oft repeated claim that a subsequent equities purchase agreement with a third party could in any way alienate Leitner-Wise's right to royalties on intellectual property already assigned. Opp'n Br. at 5-6.

illusory. This new demonstration that Leitner-Wise had already assigned such rights the year before pursuant to the more contemporaneous royalty agreement and could assign them no further resolves this fallacy.

II. The District Court's error in granting summary judgment.

As fully argued before the Federal Circuit, the District Court failed to abide by the Rules of Civil Procedure in summarily dismissing Leitner-Wise's claims without discovery or a trial. Under Federal Rule of Civil Procedure 56, “[a] party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought.” LWRC International, LLC filed no statement of facts it asserted were not in dispute. The words “dispute” and “disputed” do not appear anywhere in LWRC International, LLC's September 6, 2016 memorandum. LWRC International, LLC attached several documents to its September 6, 2016 motion, but never asserted that such documents were not the subject of reasonable dispute. The documents which LWRC International, LLC continues to rely upon were not attached to Leitner-Wise's Complaint or

otherwise part of the pleadings.²

Leitner-Wise specifically objected to LWRC International, LLC's failure to comport with Rule 56.

LWRC International, LLC makes no attempt to recite material facts which cannot be reasonably disputed. Its sole affidavit is silent as to the authenticity of any pre-2008 document it now offers to the Court and no such document could be construed as self-authenticating. It makes no argument for the conversion of a Rule 12 motion to Rule 56.... Those allegations it does make within the motion lack either citations to record evidence or even an assertion that they cannot be genuinely disputed. It appears LWRC International, LLC's motion relies solely on Rule 12 and cannot yet rise to a motion for summary judgment.

ECF Docket # 18 at 5.

² There is no small irony in LWRC International, LLC's present claims that it simply would have previously provided Leitner-Wise with copies of the operative documents had he asked for them. Opp'n Br. at 4 n.2. It isn't clear why Leitner-Wise would have known LWRC International, LLC to possess contracts to which it was never a party. But more importantly, at no point in the course of this litigation, did LWRC International, LLC ever disclose the earlier 2005 assignment, which of course, undermines its claims entirely. See Opp'n Br. at 3. LWRC International, LLC has thrived off of this asymmetry of information to have Leitner-Wise's claims improperly dismissed solely upon its revisionist version of these events.

The Federal Rules of Civil Procedure require “[i]f on a motion under Rule 12 (b)(6) or 12 (c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” FED R. CIV. P. 12 (d). “Ordinarily, this means that a district court ‘must give notice to the parties *before* converting a motion to dismiss pursuant to Rule 12 (b)(6) into one for summary judgment and considering matters outside the pleading.’” *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 67 (2d Cir. 2008) (quoting *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999)).

LWRC International, LLC's documents were not a part of the pleadings and the District Court never gave any notice that it would consider such documents in support of the motions to dismiss. LWRC International, LLC's argument that Leitner-Wise did not raise an evidentiary objection to the documents is undermined by the passage quoted above in his Opposition to the motions to dismiss, and the complete lack of notice by the District Court that it would consider such documents not a part of the pleadings in granting summary dismissal.

The claim that Leitner-Wise waived all of his rights to the royalty payments anticipated by the Employment Agreement when he signed the severance documents associated with his departure from LWRC is flatly contradicted by the language of the Employment Agreement, which expressly states his rights to royalties would survive such severance.

The discovery of the 2005 assignment demonstrates that any such rights had already been assigned pursuant to and in consideration of the Employment Agreement.

Despite providing no notice to Leitner-Wise that the District Court intended to rely on documents not attached to the pleadings, the Court disingenuously stated that “Plaintiff has failed to put forward even an affidavit asserting that, as a signatory to these documents, he has a different interpretation of their meaning than the interpretation LWRCI has put forward.” App.24a As described above, LWRC International, LLC never complied with Rule 56 (c) to provide a statement of material facts not in dispute and never meaningfully argued for conversion. LWRC International, LLC having never moved for summary judgment, Leitner-Wise was never afforded a reasonable opportunity to present material pertinent to his challenge to the documents and he had no obligation to comply with Rule 56 (c) or (d) to refute a non-existent claim of material facts not in dispute. See App.24a (District Court's criticism of Leitner-Wise to the contrary).

III. This Court's duty to remand back to the District Court to consider the matter with a more complete and accurate record.

“Prior to the 1948 amendments to the Rules of Civil Procedure, newly discovered evidence was not grounds for relief under 60(b), although it might be a ground for a new trial under Rule 59.” *Peacock v.*

Board of School Commissioners, 721 F.2d 210, 213 (7th Cir. 1983). “60(b)(2) was added to allow relief from judgment within a reasonable time, not to exceed one year, on grounds of 'newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” *Id.* (quoting 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2859 (1973)).

While the Petitioner's new evidence meets the traditional criteria of being in existence at the time of “trial”, but yet could not have been previously discovered by the Petitioner's due diligence, it now certainly falls outside the one year limitation of the Rule. FED. R. CIV. P. 60 (c)(1). But this limitation is intended to preserve finality of judgments, see *Ross v. Meyer*, 2018 U.S. App. LEXIS 15356 at *9, 2018 WL 2750234 (3d Cir. June 7, 2018) (“Rule 60(b) balances our respect for finality of judgments with 'extraordinary circumstances creating a substantial danger that the underlying judgment was unjust.” (quoting *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 630 (7th Cir. 1997))), and this matter has been continuously under the jurisdiction of the federal appellate courts since March 23, 2017, just three weeks after the District Court's dismissal. Further, this Rule specifically contemplates “independent action” outside of a motion for relief from judgment. FED. R. CIV. P. 60 (d)(1). Such “action may or may not be begun in the court which rendered the judgment.” *Id.* Advisory Committee Notes on 1946 Amendments. “With reference to the question whether, as the rules now exist, relief by *coram nobis*, bills of review, and so

forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery.” *Id.* (citations omitted). “It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.” *Id.* “[I]t would be impossible to specify all of the scenarios in which justice might require vacatur of a judgment.” *Ross, supra* (quoting *Budget Blinds, Inc. v. White*, 536 F.3d 244, 254 (3d Cir. 2008)).

“This Court is charged with supervisory functions in relation to proceedings in the federal courts.” *United States v. Shotwell*, 355 U.S. 233, 242 (1957) (citing *McNabb v. United States*, 318 U.S. 332, 340 (1943)). Such supervision “implies the duty of establishing and maintaining civilized standards of procedure and evidence” and “not confined to ascertainment of Constitutional validity.” *McNabb, supra*.

Now, “the proper forum for this is the District Court because of its intimate familiarity with the record and its facilities for sifting controverted facts.” *Shotwell*, 355 U.S. at 245.

The District Court will make such new findings of fact on this issue as may be appropriate in light of the further evidence and the entire existing record (see *Carroll v. United States*, 267 U.S. 132, 162 [1925])... If the District Court decides, on the basis of its new findings, to adhere to its original decision

on the motion to suppress, it will then enter new final judgments based upon the record as supplemented by its new findings, thereby preserving to all parties the right to seek further appellate review, including respondents' right to have reviewed by the Court of Appeals alleged errors in the original trial which that court did not reach in the previous appeal.

Shotwell, 355 U.S. at 245-246.

In response to LWRC International, LLC's ongoing undue reliance upon an inoperative document in defense of Leitner-Wise's claims, Leitner-Wise does not ask this Court to do anything now beyond allow the District Court to consider its decision upon a more fully developed record, particularly where the Petitioner has acted with a great disadvantage in his lack of possession of the operative documents due to their theft. The District Court's hasty move to summary judgment without necessary notice has thwarted the fact finding function of the judiciary and left upon the record an incorrect and unjust result.

CONCLUSION

For these reasons, and for such other reasons as this honorable court finds to be good and sufficient cause, a writ of certiorari should be granted to Petitioner Paul Leitner-Wise. Should the Court find that reliance upon the 2006 assignment to be dispositive of these issues, this matter should be remanded to the United States District Court for the District of Maryland for consideration of the Petitioner's newly discovered evidence.

Respectfully submitted, this 22nd day of August, 2018,

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ASSIGNMENT

WHEREAS, Paul Leitner-Wise (hereinafter referred to as ASSIGNOR) has invented certain new and useful improvements in the inventions and patent applications listed in Appendix A hereto (hereinafter referred to as THE INVENTIONS);

WHEREAS, The Leitner-Wise Rifle Company, whose post office address is 1033 N.Fairfax Street, Suite 410, Alexandria, VA 22314 (hereinafter referred to as ASSIGNEE), is desirous of acquiring the entire right, title and interest in and to the same in the United States and throughout the world;

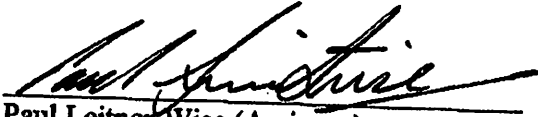
NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, we, ASSIGNOR, by these presents do sell, assign and transfer unto said ASSIGNEE, the entire right, title and interest in and to said INVENTIONS and Patent Application throughout the United States of America, including any and all United States Letters Patent granted on any U.S. Patent Application, and any division, continuation, continuation-in-part and reissue of said U.S. Patent Application; and the entire right, title and interest in and to said INVENTIONS throughout the world, including the right to apply for patents and inventor certificates in respect thereof and to claim priority pursuant to rights accorded ASSIGNOR under the terms of the Paris International Convention and all other available international conventions and treaties; and the entire right, title and interest in and to any and all patents, patents of addition, utility models, patents of importation, revalidation patents and inventor certificates which may be granted throughout the world in respect of said INVENTIONS.

ALSO, ASSIGNOR hereby agrees to execute any documents that legally may be required in connection with the filing, prosecution and maintenance of said application or any other patent application(s) or inventor certificate(s) in the United States and in foreign countries for said INVENTIONS, including additional documents that may be required to affirm the rights of ASSIGNEE in and to said INVENTIONS, all without further consideration. ASSIGNOR also agrees, without further consideration and at ASSIGNEE'S expense, to identify and communicate to ASSIGNEE at ASSIGNEE'S request documents and information concerning the INVENTIONS that are within ASSIGNOR'S possession or control, and to provide further assurances and testimony on behalf of ASSIGNEE that lawfully may be required of ASSIGNOR in respect of the prosecution, maintenance and defense of any patent application or patent encompassed within the terms of this instrument. ASSIGNOR'S obligations under this instrument shall extend to ASSIGNOR'S heirs, executors, administrators and other legal representatives. If no serial number is listed above for the captioned patent application, the Assignor hereby authorizes the ASSIGNEE or the ASSIGNEE'S legal representative to insert into this Assignment the Serial Number or other information which may be necessary to identify the patent application or patents to which this Assignment relates.

ASSIGNOR hereby authorizes and requests the Commissioner of Patents and Trademarks to issue any and all United States Letters Patent referred to above to

ASSIGNEE of the entire right, title and interest in and to the same, for ASSIGNEE'S sole use and behoof; and for the use and behoof of ASSIGNEE'S legal representatives and successors, to the full end of the term for which such Letters Patent may be granted, as fully and entirely as the same would have been held by ASSIGNOR had this assignment and sale not been made.

August 5, 2005
Date


Paul Leitner-Wise (Assignor)

APPENDIX A

TITLE	STATUS	PATENT OR APPL. NO.	FILING DATE
Improved Ammunition for Pistols and Carbines	Pending Non-Provisional Application	10/577,427	Jan. 15, 2004
Improved Ammunition for Pistols and Carbines	Pending International PCT Application	PCT/US2004 /00853	Jan. 15, 2004
Modular Receiver System	Pending Provisional Patent Application	60/591,103	July 27, 2004
Shell Cartridge	Unfiled		
Improved Rifle Bolt	Unfiled		
Improved Weapon Ejection Port	Unfiled		
Improved Gas Operated Weapon System	Unfiled		
Ballistic Linear Generator	Patent Granted	6,744,154 B2	
Fixed Magnet Generator	Unfiled		
Bolt-Action Rifle	Unfiled		