In the

Supreme Court of the United States

BERNARD A. SAKRAIDA,

Petitioner,

v.

AG PRO, INC.,

Respondent.

No. 75-110

Pages 1 thru 50

March 3, 1976

Washington, D.C.

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Wednesday, March 3, 1976.

The above-entitled matter came on for argument at 1:10 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STEPHEN B. TATEM, JR., ESQ., Scott, Hulse, Marshall & Feuille, 11-D El Paso National Bank Building, El Paso, Texas 79901; on behalf of the Petitioner.

J. PIERRE KOLISCH, ESQ., 1004 Standard Plaza, Portland, Oregon 97204; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 75-110, Sakraida against Ag Pro, Incorporated.

Mr. Tatem, you may proceed whenever you're ready.

ORAL ARGUMENT OF STEPHEN B. TATEM, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. TATEM: Mr. Chief Justice, may it please the Court:

My name is Steve Tatem from El Paso, Texas, and I represent the Petitioner in this case, that has been sued for violating United States Letters Patent entitled "Dairy Establishment".

The patent was filed on November the 5th of 1963, and was finally issued on November the 14th of 1965.

It has been admitted in this case and so found by the Fifth Circuit that every element in this patent, consisting of 13 elements, is old in the art.

In a part of the Fifth Circuit opinion, which has validated this patent on the basis that it exhibits novelty and is not obvious, the court has specifically said that while this honorable court rejected its rationale in Graham, when it validated a patent, on the basis that an old result in a cheaper and otherwise more advantageous way, although the court rejected that proposition, the Fifth Circuit in this case confessed that it was ignorant as to what test, if any,

this court substituted for what it had struck out.

It is submitted that this case is controlled and governed by the decisions in this case, rendered by this Court in Anderson's-Black Rock, Graham vs. John Deere, A&P, and Lincoln Engineering.

It is our position that the Court of Appeals erred in setting aside the trial court findings on three different occasions, to the effect that this combination patent did not show novelty, nonobviousness, and that under Rule 52 they are supported by credible evidence, were not clearly erroneous, and they were reached by a proper application of the law to the facts.

QUESTION: Is it pretty well settled in the federal courts generally that findings of novelty vel non, utility vel non, obviousness vel non of a district court are subject to the standards of Rule 52, i.e., that there are findings of fact not of law?

MR. TATEM: Mr. Justice, it is my understanding, and I confess that I am not a patent attorney, this, by chance, is the first patent case that I have ever had the pleasure to be dealing with. But as I understand the law and this Court's enactment in the Graham case, while the three inquiries that are asked under Section 103 are considered factual inquiries, the final determination as to whether or not a patent is or is not valid is a question of law to which this Court and only

this Court is the final arbiter.

I am also of the opinion that the question of novelty would be in that same category.

QUESTION: Well, Mr. Tatem, I don't know if Justice Stewart feels completely satisfied with your answer to his question, but I, at any rate, am left with some uncertainty.

You say it is initially a question of fact, but in the last analysis it's a question of law. Does that mean only when it's so clear that reasonable people couldn't disagree, or only when it falls outside the clearly erroneous standard is it a question of law, or is this basically a question of law initially, rather than a question of fact?

MR. TATEM: Well, I believe that the validity of a patent is a question of law. In making that determination, whether it is the trial court or the Court of Appeals or this Court, of necessity, in reaching the question of whether or not it is nonobvious, there are certain factual inquiries that lay the predicate as to whether or not the final decision, obvious-nonobviousness, is one of law.

I think that it is relevant in understanding what is involved in this particular patent, and the only -- the only means that we're talking about in this particular patent that is allegedly new and outside the prior art, is the means to house or hold water at the upper end of a dairy barn in a pool, or on the floor, so that when it -- so that it can be

released suddenly, to flow downhill, and as it flows downhill the natural propensity of water removes manure that is on -- or on deposit on the concrete floor.

I think it is important for this Court to understand, first, what are the basic features of what I refer to as a standard Grade A dairy barn floor plan, and the reason for that is that they are fairly standard, they are regulated, in order to be able to sell and produce Grade A milk, you have to have certain sanitary conditions in order to be entitled to that type of production.

First, basic to a modern dairy is the fact that the floor is concrete, it is paved. It generally slopes downhill towards a drain. The reason for that is to allow or to assist water that is on the floor to be removed. The floor itself is contoured, or it is shaped to try to avoid puddles. There may or may not be grooves in the concrete. The grooves would allow or assist water to remove manure that may be deposited on the floor.

QUESTION: Would the diagram, this Exhibit A, show us what it's like, Mr. Tatem?

At page 27 of the Exhibit -- of the Appendix. That's the patent, I gather.

MR. TATEM: Well, Mr. Kolisch has reproduced in a Supplemental Appendix, beginning on page 11, his patent --

QUESTION: Page 11 of what?

MR. TATEM: Of the Supplemental Appendix, which is this one.

Now, the patent is also in evidence and is a part of the single-volume Appendix, although I confess it is a little harder to read, because it's small.

QUESTION: That's the one I think I was looking at, Mr. Tatem, isn't it?

MR. TATEM: Yes, sir.

QUESTION: Well, then, it's also --

MR. TATEM: I would just refer you to the larger one, because it's easier; at page 11.

QUESTION: Yes. There's also a movie, I understand, from reading the briefs, now cut down to a two-and-a-half-minute movie, that the respondents at least tell us we ought to look at before we try to --

MR. TATEM: Well, in all candor, Mr. Justice, the two-and-a-half-minute movie was not in evidence. There is a larger one -- there is a larger movie, I think it was about 15 or 20 minutes.

QUESTION: That's what I understood from reading the brief, but that what's filed here is about a two-and-a-half-minute version. Maybe I misunderstood the brief. We can hear from Respondents.

MR. TATEM: There may be one that is filed. There may be one that is filed. But --

QUESTION: If there is one that is filed, do you object to the fact that some of us have looked at it?

MR. TATEM: Well, --

QUESTION: We thought it was in the record.

QUESTION: I thought it was -- there was a movie in the record, played for the court.

MR. TATEM: There was a movie in the record, Your Honor, but that was the one that was introduced in the trial crout before Judge Guinn in El Paso, and it's about 15 or 20 minutes.

Now, as I understand, the one that has been asked to be shown in argument is an edited movie, not from the same one, and we would object to that being shown, because it is an attempt to supplement the record. Or it is not the same movie that was --

QUESTION: Well, it's a reduction of the record; it has --

MR. TATEM: I don't know that it's from the same movie, Your Honor.

QUESTION: It goes to the record as an Appendix goes to the record. It's an abbreviation.

MR. TATEM: Well, --

QUESTION: Well, you say you don't know whether it's an abbreviation of the movie in the record; is that it?

MR. TATEM: That is true.

QUESTION: Well, is it your position that a Justice of the Court who had seen that two or three-minute movie ought to disqualify himself?

QUESTION: I don't think we should let Justice Rehnquist out of this case on that basis.

[Laughter.]

QUESTION: What is your reply to that question?

QUESTION: [Laughing] You've got two!

MR. TATEM: No, I don't want to disqualify any judge. I can't make a decision on that, because I haven't seen the movie that you're thinking about. I don't want you to disqualify --

QUESTION: I haven't seen it, Mr. Tatem. I gather from what you've said, you feel I ought not look at it.

MR. TATEM: If it's not the same movie in evidence; that's right.

QUESTION: Well, I --

MR. TATEM: But I wouldn't say that the movie is going to disqualify a judge that has looked at it.

QUESTION: I know, but I haven't seen it.

MR. TATEM: Yes, sir.

QUESTION: I didn't even know it was being shown. I didn't even know it was here.

MR. TATEM: If there's a movie that the Court wants to see, the one that was in evidence is 15 or 20 minutes.

QUESTION: Well, that's not here, I gather.

MR. TATEM: I think it is.

QUESTION: Oh, it is?

MR. TATEM: So far as I understand it, it is.

I was asked very specifically to have all of the exhibits from the Fifth Circuit up here, and I was under the impression that that was --

QUESTION: Well, in any event, if I look at any, I should look at that and not at the two-and-a-half-minute abbreviated version. That's your position.

MR. TATEM: That would be my position.

QUESTION: All right.

QUESTION: Counsel, the Respondent's brief says the two-and-a-half-minute film strip was shown to the Fifth Circuit at the argument on the merits, so you must have seen it then.

MR. TATEM: No, sir; I was not at the Fifth Circuit.

QUESTION: Oh, I see.

MR. TATEM: It was my understanding, as long as the matter has been raised, that the movie that was offered to the Fifth Circuit was from the same movie.

QUESTION: Yes.

MR. TATEM: We are not sure now. It may be. But I'm saying that there has been some question raised about it, and I am not in a position to say because I did not see the movie.

QUESTION: Well, I hope you and your fellow counsel get this straightened out, because I frankly had been planning to look at the movie, because I can often understand things better that way, by contrast, than looking at drawings and blueprints. And so if, promptly after the argument, you and counsel would get together, either saying this is properly a part of this case, or isn't; I would be interested in knowing, because I had been planning to look at the movie.

MR. TATEM: All right, sir.

MR. CHIEF JUSTICE BURGER: And indicate, if you will, which it was that the Fifth Circuit saw; that is, the two-and-a-half-minute abridged version or the full version. Because we should certainly have available to us whatever the Fifth Circuit saw, if we want to look at it.

MR. TATEM: All right, sir. I believe -- I may be wrong, but I thought the Fifth Circuit had two movies there. I may be wrong, but I thought all the exhibits were also before the Fifth Circuit.

All right. On top of the floor are cow stalls, feeding area, milking area, and holding area. And the cow, of necessity, needs to walk from various areas to the other on this concrete floor.

Also, in a standard dairy barn is some type of trough or tank which holds the water.

Now, I submit to the Court that in the mid-1960's,

when the application for this particular patent was submitted, and if we look at the definition of how Webster defines "flush", to mean a sudden release or washout, sudden rapid flow of water to flood, it would be most difficult to come up with a new idea that added to the sum of useful knowledge with a "flush system".

Because, by definition, we're dealing with water that must be suddenly released, as a rapid rate of flow, to wash out, to flow or to flood, in order to have a flush system, by definition.

The Respondent's expert, Mr. Huber, has given us a detailed explanation of how this flush concept works. It's in the Appendix beginning at page 114 through 116; but his basic concept is that when water begins to flow, it creates energy, which serves as a cleaning action. And that the natural propensity of water, as it flows downhill, is to have the bottom of the water onto the floor, the top surface of the water goes faster, and therefore, as the water flows downhill, it has a natural cleaning action.

The basic propensity of water is generally related to the amount of water released, or to the slope or the grade of the floor onto which it is released.

Now, when we get to this point in the record, and it was in the record before, it is in our briefs, we have cited this reference before, I think it is relevant, to discuss

this legend of Hercules. What did he do? It is recorded, it is only a legend, but it is recorded in Greek Mythology, that as Hercules, as his fifth labor,saw the conditions of the stables, he, at a single glance, diverted the stream, Alpheus, to clean the stables of the filthy manure on the floor.

QUESTION: Is that the basis for your claim of non-obviousness?

MR. TATEM: No, sir, it is not.

QUESTION: It helps, though, doesn't it?

MR. TATEM: It certainly does.

I would cite the Court --

QUESTION: How long did it take them to reduce that concept to practice?

[Laughter.]

MR. TATEM: Well -- well, I would say until the time of the bucket.

[Laughter.]

MR. TATEM: Because,it is submitted, and again I have to be in all candor with the Court, it seems that this tank is simply the release of -- we're talking about a tank that has 2,000 gallons of water; and releasing 2,000 gallons of water, of itself is going to bring about some action. And we maintain that that is not a novel idea, it does not add to the sum of useful knowledge.

But I do direct the Court's attention to some prior

art that is recorded and that is set out in some detail, beginning on page 5 of our Reply Brief.

The first of the patents is the McCornack patent, which -- again it is much more legible if you look in the blue Appendix, it's much larger, beginning on page 55.

The McCornack patent, by chance, is named "Dairy Plant", the patent we're talking about is "Dairy Establishment". The patent of McCornack was issued on June the 1st of 1937. But the McCornack patent deals with the idea of trying to save labor, both as to the milking and removal of manure operation and for disposing of the manure or slurry as a natural fertilizer after the operation is complete.

McCornack teaches that -- and they also use the word "flush" specifically in these specifications -- that the milking benches and gutters are washed, the water flows from the shields, flushes simultaneously by means of a common valve. McCornack teaches that what happens is, is that the operator who is located near the rear of the cows steps on a foot pedal in the floor that releases the water against the shields, which flows downhill.

I also cite the Court's attention to the patent of Bogert, which begins on page 5 through 7 of the Reply Brief. Bogert specifically deals with an apparatus for cleaning the surfaces of barns. Its application for patent was issued on March the 4th of 1941.

Now, in Bogert, Bogert refers to "a fluid cleaning medium", which, when you read the specifications, is water. Bogert refers to a "fluid cleaning medium supply tank", which is attached on the floor at the upper end of this particular barn, which, when a "cap valve" -- and I direct the Court's attention to the visualization of this, it's very similar to the top of a commode seat; it's on page 75. That's his basic layout.

But, be that as it may, this, if you will, commode seat is picked up by a chain which causes the water to be stored in this "fluid cleaning medium supply tank", to go downhill by gravity and then enter the various gutters.

Now, I want to point out specifically that in Bogert, which is the March 4, '41 patent, the cows were arranged so that the manure of necessity fell into a gutter, it did not flow onto the floor. So, therefore, the fluid from the "fluid cleaning medium supply tank" only flushed the gutter.

The patent in question, the cows are -- the manure is not necessarily deposited in such a manner. In other words, it is not accumulated solely in the gutter, so his tank is wider.

I want to refer the Court specifically to the language of the Patent Office, on page 13 through 15 of my brief.

In examining these prior art publications, the Patent

Office said this: "Since the patent to McCornack discloses that it is old in the art to flush cattle stalls and to collect the waste for fertilizer, it is held to be an obvious expedient under 35 U.S.C. 103 to provide the Kruetzer dairy establishment with such a flushing means and waste collection tank."

On page --

QUESTION: Before you go on, Mr. Tatem, I'm trying to get something clear from this opinion. There's some suggestions in the Fifth Circuit opinion that indicate that the Fifth Circuit, in effect, determined that you had not exercised due diligence and that this was not really newly discovered evidence, that --

MR. TATEM: No, sir. I --

QUESTION: -- and that you are, at least in part, penalized for that. What do you have to say about that?

MR. TATEM: Mr. Chief Justice, that is what the Fifth Circuit said. The prior art that I am talking about is not what the Fifth Circuit was talking about.

QUESTION: Well, was the Mission procedure fundamentally like yours?

MR. TATEM: It has been conceded by the Respondent that it was identical to their patent, but that we haven't -- I have not talked about Mission Dairy yet. Maybe it is necessary, at this point in time, for me --

QUESTION: Well, you come to it whenever you want, but just to be sure that you give us some information about that aspect of the case.

MR. TATEM: All right. What I simply wanted to do -- and it is my position that the record before, that was made before Judge Guinn, that went up to the Fifth Circuit with respect to the McCornack and Bogert patents, as well as the other evidence, was sufficient for this Court to apply the four Supreme Court cases I have brought to the Court's attention.

Let me bring up what happened procedurally.

In January of 1973, my client, who then was living in Florida, by chance met Mr. Herbert Meyer, who happened to be in Florida. At that particular time in January of '73, we had not received a decision, the second decision from the Fifth Circuit.

In February of '73, the Fifth Circuit reversed for the second time this patent application -- I mean this patent case.

We filed at that time, when we had received notice that the second case had been reversed, a motion for rehearing, addressed to the Fifth Circuit, raising the question that Mr. Sakraida had, only three weeks before, personally met the named man who owned the Mission Dairy in Gonzales, California. It was at that time that the Fifth Circuit directed us, since we

were the appellee, to bring this motion to the attention of the trial court, because they were the only medium through which we could act to get a record; so we did that.

We filed a motion pursuant to the direction of the Fifth Circuit with the trial court in El Paso. There was a different trial court that was sent from San Antonio, Texas, to El Paso to receive the testimony with respect to Mr. Herbert Meyer, Mr. Bud Sakraida, Mr. Chester Whitmore and Mr. Frank Souza. Those exhibits, together with the pictures from Herb Meyer's dairy are also before the Court as Exhibits A through K.

Following that hearing, Judge Wood, up until that time, had had nothing to do with this case, also entered findings of fact and conclusions of law. He found that the patent lacked novelty, it did not meet the test of obviousness; it was anticipated by this prior art, and that the Petitioner had exercised due diligence in discovering the name of the witnesses, because they arose simply out of a by-chance meeting somewhere in the State of Florida in January of '73.

QUESTION: What about the statement of the Fifth Circuit opinion -- if I'm reading the right opinion -- on page 3a of the Appendix. Sakraida testified that that occasion you speak of was the first time he had full knowledge of these facts; however -- this is the important part -- the evidence clearly establishes that prior to the original trial Sakraida

was aware that Mission Dairy was using a flushing system which was a possible source of prior art.

MR. TATEM: Well, --

QUESTION: And that Sakraida had sent one of his men over to look at it before the trial, and he reported he wasn't able to see it.

MR. TATEM: Well, Mr. Chief Justice, Judge Wood's findings on that very point --

QUESTION: Before or after this opinion?

MR. TATEM: Before. He was the trial court that accumulated that record, and attended that hearing.

-- appear in the record first at page 174 through 175. Second, they appear in the Appendix at page 268. But he is clear and he gave credence to our testimony that -- my light is on, do you want me to continue? All right.

QUESTION: We want to find out about it.

MR. TATEM: He gave credence to our testimony that until this by-chance meeting we never identified anything with respect to Mission Dairy.

QUESTION: But the Court of Appeals uses the term "clearly establishes", and they are referring to something that is contrary to what the district court found, which would suggest to me that they are making a determination of "clearly erroneous".

MR. TATEM: Well -- but, Mr. Chief Justice, the name

of Meyer is the link to Mission Dairy. Because until you find Mr. Meyer, you're not able to ascertain what it was that was in existence at Mission Dairy. Because Mr. Meyer held the key to that.

The testimony in the record is essentially to this effect. Between the date that the summary judgment was granted and the date of the merits, my client was living in the State of Florida. The Mission Dairy is in the State of California. The trial was pending in El Paso, Texas.

Through rumors, source unknown, the record is that Mr. Sakraida -- it was through a rumor suggested, it was suggested to him that he go to Mission Dairy and check out what it was that was there.

Since he was living in the State of Florida, he asked a man who sold milking equipment, a man identified as a Mr. Wisdom, who was living in the State of Oregon, that the next time he was down in the area to go by the dairy and try to find out what was there.

The testimony is that when he went to the Mission Dairy, he received a rebuff by the manager, a Mr. Dick Ripley. He was not -- he got to the premises, but he was not able to get in and supposedly find out about this flushing gate that they had.

He called our client about the rebuff, and we did not know anything more about it than what we'd been informed

about by Mr. Wisdom.

The name of Herbert Meyer is an assumption that the Respondent would have us believe was linked at the same time we went to Mission Dairy. There is absolutely no evidence in the Appendix as to where Herbert Meyer was, when Mr. Wisdom was in California, that we knew Mr. Meyer's name. And the trial court chose to believe us on those facts. And that's why that -- findings to that effect is so clear with respect to that.

QUESTION: Mr. Tatem, even assuming that the trial court was right in finding that this was newly discovered evidence, it wasn't prior art, was it? Because it wasn't that Mission -- doesn't the record show that Mission Dairy came into being after the patentee's device was reduced to practice, and less than a year before the application?

MR. TATEM: Mr. Justice Stevens, the evidence with respect to Herbert Meyer is that in January of '62 he had plans on file with the California Soil Conservation Service with respect to his idea.

QUESTION: But isn't there a finding, or isn't it undisputed that the Mission idea was reduced to practice in October?

MR. TATEM: As far as milking operations. It is our position that the Mission Dairy, though, is clearly evidence of ordinary skill in the art; and that was part of the basis

of what we were using it.

QUESTION: But you don't contend there was prior art?

MR. TATEM: We do. Because I think you -- I don't think --

QUESTION: On what theory?

MR. TATEM: The fact that the idea was known and made public a year prior to the application of this patent, and that is, when you go down to the California Soil Conservation people, or the Department of the Agriculture, and file your plans to get approval as to what you're going to build or do, that you have -- that you have reduced, in essence, or have publicized --

QUESTION: You say the filing of the plan for this big barn was a reduction to practice; is that what you're saying?

MR. TATEM: I'm saying he's publicizing his idea. Obviously there's a time lapse between when he actually filed the plan and when he actually got the equipment -- you see, the problem was not getting the dairy started, I mean he had -- some of this was getting the milking equipment there.

That is part of the problem.

QUESTION: I understand the practical problems, I'm just not sure I understand your legal theory.

Your legal theory is that the filing of the plans for

something that had not yet been reduced to practice was prior art.

MR. TATEM: Mr. Chief Justice, on page 14 through 16 of our Reply Brief, we have addressed that very point with several cases, the relevancy of Mission Dairy as prior art or evidence of ordinary skill in the art.

QUESTION: Well, I understood you to be arguing that it was not prior art, but it, nevertheless, was evidence that this was not a very inventive concept.

MR. TATEM: Well, --

QUESTION: Because somebody else simultaneously developed it. Which is a different argument.

MR. TATEM: We're saying that it was effectively publicized at the time he goes to California and files those plans. Now, that -- but that's just Herbert Meyer.

Chester Whitmore's plan was written in the Hoards Dairyman as early as '53. Frank Souza was building dairy barns as early as '46. And Emil Rovey, who is --

QUESTION: Well, this is all unrelated -- what I'm suggesting is, this is all unrelated to the question of whether it's newly discovered evidence. That's in the record without this additional stuff, is it not? Or am I wrong on that?

MR. TATEM: No, sir -- no, that is really not correct. Because Herbert Meyer was the key to us of locating these other three individuals.

QUESTION: But I take it, you don't feel it's critical to your case --

MR. TATEM: No, sir.

QUESTION: -- to win on the newly discovered evidence point?

MR. TATEM: No, sir. It is my position --

QUESTION: You say you're entitled to win --

MR. TATEM: On the record as first --

QUESTION: -- on the record as first made.

MR. TATEM: That's true.

QUESTION: And that those issues are properly here.

MR. TATEM: That's true.

QUESTION: Well, I would have thought, at least it's possible, that the preliminary question is whether or not the Court of Appeals was correct in its ruling on your 60(b)(2) motion. And if we disagree with the Court of Appeals, then, arguably, the correct disposition on our part would be to remand it to the Court of Appeals, with direction to consider that so-called newly discovered evidence.

Isn't that right?

MR. TATEM: Well, --

QUESTION: Which it never has done.

MR. TATEM: -- the first question seems to me to be the validity of the patent --

QUESTION: Well, I would think the threshold question

is whether or not the Court of Appeals should reconsider this case on all of the evidence that you've now tried to introduce, instead of only on part of it, because they held that your 60(b)(2) motion was not well taken.

MR. TATEM: Well, Mr. Justice, it is my position that the record is sufficient, as it was at the Fifth Circuit before we went back to the third hearing before Judge Guinn -- before Judge Wood.

I do think that this Court, if it feels that there is any doubt as to the validity of this case, it should consider this case -- it should consider the evidence that was offered before Judge Wood, and --

QUESTION: But it wouldn't be up to us to consider it in the first instance. The Court of Appeals has never considered it.

MR. TATEM: Because they have found, or they did not consider --

QUESTION: Because they found your motion was not well taken. So the Court of Appeals has never considered it in reaching its decision on the validity of this patent.

And if we hold that your motion was well taken, then the Court of Appeals should consider it. And in the first instance it's the -- as the district court did; the Court of Appeals then should review it on the full record and on what the district court considered. Which it has, up to now,

refused to do.

MR. TATEM: That is true.

MR. CHIEF JUSTICE BURGER: Well, your time is well over.

MR. TATEM: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kolisch.

ORAL ARGUMENT OF J. PIERRE KOLISCH, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KOLISCH: Mr. Chief Justice, may it please the Court:

My name is Pierre Kolisch, and I represent the patentees.

Very simply, my client's invention is for solving the problem of nontoilet-trained cows.

[Laughter.]

MR. KOLISCH: The prior art, which my brother Tatem has talked about, and particularly the McCornack and the Bogert patents --

QUESTION: Counsel, having brought that analogy in, I wonder if you think it would be appropriate for us to take judicial notice of the common variety of toilets available to everybody, in considering the obviousness of this case?

MR. KOLISCH: Yes, I certainly do, Mr. Justice Stevens. And, as you know, there is a completely different principle under which the ordinary toilet works.

QUESTION: What's the difference?

QUESTION: A water closet.

MR. KOLISCH: Well, the ordinary toilet, you have a bowl and then you have a pipe that comes down and bends around, and that pipe comes up to approximately the level of the water in the toilet, and that pipe always remains full of water. It acts as a blockage or a trap to the sewer.

And when you add more water, simply put more water in, whether by bucket or otherwise, then there is sufficient pressure and it just pushes down and it empties out the pipe that comes up.

QUESTION: But in common they have the hudraulic pressure, do they not?

MR. KOLISCH: Well, I think that any cleaning, whether it's by hose or whether it's by bucket or in any way, everyone has been trying to get rid of cow manure in barns for about thousands of years -- I can't tell you how long.

And we know -- I think this is a good place to start. We're considering a patent here which is made up, admittedly, of a combination of mechanical elements.

And whenever we deal with a patent of that type, there are a number of semantic and ideological pitfalls, which the courts, I believe, have had trouble wrestling with.

I would suggest to you that one way of approaching this patent, and perhaps avoiding some of these pitfalls, is

to consider, first, what these two inventors did, and then how they did it.

Now, the record establishes that the best way of cleaning dairy barn floors, up until the time of this invention, was by the use of power. Now, power, I mean the use of a power-driven blade, a front-end loader which would get all the manure together in a pile, and then the manure would be removed to some place and ultimately the manure had to be taken and placed on the fields surrounding it.

Now, in order to do a proper cleanup job, that type of a scraping operation had to be followed by a hosing operation. Now, the necessity for the hosing operation was -- and we're talking about commercial dairies, we're talking about dairies where there are hundreds of cows involved -- is that when you scrape a floor, which has been covered with manure, you leave a thin, slippery film, and this is exceedingly dangerous to the cows as well as to anybody who is walking on it.

So you have to follow up the scraping operation with a hosing operation.

Now, once you've done that, you then have to get rid of it. And still you haven't solved the problem.

Now, you could, of course, start by hosing, and that sometimes is done, but that won't work on a 300-foot alleyway, because once you start hosing, I think, as any of

you know, you are starting to splash things all over the place. And, besides that, all that you do by a hosing operation is to force it into piles. And in the end even your hose is not going to dislodge these piles.

So what did these two inventors do? They came along and they solved a problem, and the record shows that to clean up a comparable alleyway, three or four hundred feet long, would take four or five hours. Literally, in one minute, according to the patented invention, just as long as it takes to wave my hand, you've cleaned it.

Now, what you've done is you have substituted for hours of dirty, disagreeable, miserable labor, a shining clean floor that takes no time, no effort, no money, and satisfies all of the sanitary requirements, plus being ecologically extremely sound. Because what you've done, according to the system, is you've put the manure in a form so that it can be put through a sprinkler system and put on the surrounding fields.

Now, what I have described is precisely what Gribble and Bennett invented. This is what they contributed to the dairy industry.

Now, let me pick up where my brother Tatem did, with respect to these two prior art patents.

And these were, Mr. Chief Justice, in the record before the district court; it is undisputed that they are

properly before this Court.

I think they exemplify the best of the prior art. They show that the technology was to install pipes all over a dairy.

Now, the McCornack patent is extremely detailed and complicated piece of equipment. But basically what he showed was that there are partitions between the cows during their milking area -- they refer here to cow shields.

QUESTION: Is there a diagram in the record that shows --

MR. KOLISCH: Yes. I think if you were to look at the Supplemental record, on page 62, Figure 14 --

QUESTION: Supplemental Appendix, you mean?

MR. KOLISCH: Yes, I'm sorry; Supplemental Appendix.

QUESTION: And that's what page again?

MR. KOLISCH: Page 62.

QUESTION: Figure 14.

MR. KOLISCH: Figure 14, at the bottom, you will see a cow standing, and to the left you will see a number, 215. That is a standpipe that bends over the shield, No. 40, which is around the flanks of the cow; and, as Mr. McCornack describes, there is offal that goes on that, and how is that washed off? He has water running out of pipe 215. That's one of his washing means.

Now, if you will turn to page 66 of the same volume, you will see a plan view. This is Figure 25. And there the number 265 indicates a series of pipes which go into gutters, and those gutters are shown where the arrows are. There are a group of arrows. And those are gutters. And there is water running in those gutters from a series of pipes.

QUESTION: Whereabouts on that diagram on page 66 is 265? I don't seem to see it.

MR. KOLISCH: 265 appears in the lower lefthand corner, just above 260.

QUESTION: Oh. I've got it.

MR. KOLISCH: Those are pipes. And, again, we do not dispute that if the cows aren't careful enough to drop their offal in the gutter, it will be removed. I think --

QUESTION: Mr. Cornack -- or Mr. Kolisch, does the -- McCornack, I guess the name of this patent is -- does this contemplate the use of the flushing technique without prior cleaning by hand shoveling and the like?

MR. KOLISCH: No. It talks in the patent that there may be use -- that it may be necessary to use hand cleaning also, because this does not cover all the barn floor's area. It is simply --

QUESTION: But, let me change the question slightly, to the extent that this device is intended to flush portions of the barn, does the device contemplate that those portions

would previously be cleaned manually?

MR. KOLISCH: No. I think that under the McCornack patent, those portions where the water is discharged in the gutters and on the shield that supposedly they would be cleaned.

However, it is not the same concept as the invention.

QUESTION: What's the difference in concept?

MR. KOLISCH: Yes. The difference in the concept is the difference between taking a hose and --

QUESTION: But this is not a hose.

MR. KOLISCH: Which?

QUESTION: This does not describe using hoses.

MR. KOLISCH: McCornack's is a hose.

QUESTION: Oh, is it?

MR. KOLISCH: Oh, yes. It's water under pressure. It's a series of pipes, whether -- it all comes from water under pressure. They are just pipes that are --

QUESTION: But pipes as distinguished from hoses.

MR. KOLISCH: Well, I --

QUESTION: They are different, are they not? They are permanent installations through which the water flows.

MR. KOLISCH: Yes, they are permanent to that extent, a hose may be movable. But it --

QUESTION: So these are not hoses.

MR. KOLISCH: No. They are permanently fixed pipes, which are discharging --

QUESTION: So, is the difference in concept the different method of getting the water propelled through the gutters?

MR. KOLISCH: Well, it's a difference in the way in which the water acts once it is released, whether it's a pipe or a hose, the water comes out in the form of the artifice from which it is being discharged, and it is point impingement, and it must be, whether it comes from a pipe --

QUESTION: So the difference in concept is one huge flow rather than several separate flows simultaneously, is that it?

MR. KOLISCH: The invention eliminates all hoses, pipes, and gutters. There simply aren't any in the invention. No such thing as hoses, pipes and gutters, all of which are in the prior art and are necessary in the prior art; the same thing in --

QUESTION: The difference, then, is the difference between cleaning everything at once and cleaning only a portion of the barn?

MR. KOLISCH: Well, and also --

QUESTION: I'm trying to articulate what the difference is.

MR. KOLISCH: I appreciate that, Mr. Justice Stevens. But it is more than that, it is the way in which it is done. It's the difference between releasing a tidal wave or a flood

and having water come out of a pipe, or a hose.

Now, in both cases there's water --

QUESTION: But the water comes out of many pipes simultaneously?

MR. KOLISCH: Yes. But many pipes simultaneously, you simply have, perhaps, this type of effect: a spray effect, in effect. But it is not hydraulically, it does not operate in the same way at all. Because the pipe-discharged water simply cannot do the job which the flood release water does.

I think a good example is shown in the Bogert patent, which was another one. I think if you look at page 75, you see a top plan view.

Page 75, you see cow stalls to the left and to the right, and these are indicated at 5 and 6. Then behind each of the cows there is a gutter, No. 12 and No. 13.

In between those gutters there's a cow walkway. The lines which you see, dotted lines in there, are embedded underground pipes which run under the cow walkway and then discharge at a plurality of places into the gutters, 12 and 13.

The water from -- the water for those pipes comes from a large tank, and that's shown on page 77, at Figure 7.

QUESTION: We're in a different patent now, aren't we? The Bogert one.

MR. KOLISCH: Yes, I'm talking about Bogert now,

because it's still the same principle as McCornack, and I think these are illustrative of the prior art.

Figure 7 on page 77 of the Supplemental record -- I'm sorry, Supplemental Appendix, shows the large tank and there are pipe connections which come in and are shown at the bottom, with numbers 17, 18, 19, 20 and 21, and the water simply runs out from these pipes, under pressure, and is fed into the gutter at various places.

Now, this -- now, the problem, for instance, with Bogert and all the others, and that's why I started somewhat facetiously in saying that the invention had to do with cows who were not toilet or gutter trained.

Bogert, I will assume, works perfectly well as long as the cows remain positioned over the gutters. But, as we all know, cows don't remain that way, and when the cows roam, walk up and down this broad alleyway, which is marked 9, there isn't any way of cleaning them, there isn't any provision, there isn't any suggestion as to how to get rid of that. And that, of course, was the genius of this invention. For the first time it was -- a dairyman was enabled to wash all of his floor areas immediately without the use of any labor, without the use of any power.

Here was a situation where you could get rid of it, all of the problems and all of the help that you had in connection with the removal of --

QUESTION: It washes the entire area?

MR. KOLISCH: Yes.

QUESTION: Where the cows are standing?

MR. KOLISCH: Yes.

Now, when the cows are not in their stalls, it is -- the cows in these commercial dairies do not go out to the surrounding fields, they are maintained in a confined area, where they are milked and then they go from their milking, they go to a loafing area, and then they return to their stalls. And a cow is a marvelous creature of habit, and it will return to its own stall. And each cow has its own stall.

QUESTION: Well, where is the cow when you do all this, flush the water?

MR. KOLISCH: The cow can be any place.

QUESTION: You're going to flush it -- you're going to flush where the cows are standing?

MR. KOLISCH: No. I --

QUESTION: Well, where is he? He's not there. He's not there where the flushing is going on.

MR. KOLISCH: He may be, Mr. Justice Marshall.

QUESTION: Well, does he get flushed out with the rest of it?

MR. KOLISCH: No, he won't.

[Laughter.]

MR. KOLISCH: That's one of the beauties of the

invention --

QUESTION: Well, I mean, I see on these pictures you've handed around here, this area up there is not being flushed.

MR. KOLISCH: Yes. Now, what we have in these pictures --

QUESTION: Well, it's not being flushed.

MR. KOLISCH: Well, that's the before picture.

[Laughter.]

MR. KOLISCH: The picture up at the top is the before.

Now, we have --

QUESTION: And the one down at the bottom is what?

MR. KOLISCH: That is after.

Now, what we have in these pictures --

QUESTION: Well, where were the cows between before and after?

[Laughter.]

MR. KOLISCH: The cow may be in its stall, or it could be standing in the alleyway. All it does is wash its feet. As a matter of fact, the cows are quite happy to have their feet washed.

[Laughter.]

MR. KOLISCH: It removes the offal, and you look at me quizzically, and I don't blame you; I didn't believe it

would work, either. As a matter of fact, when this thing was first presented to me, I said it's incredible, I just don't think it will work.

First of all, how --

QUESTION: You mean, with this heavy water coming down there -- at what pressure is it under?

MR. KOLISCH: There's no pressure. The water just is permitted to run. That's --

QUESTION: Well, what is this here in there?

MR. KOLISCH: Well, what you see, this wave coming out is --

QUESTION: Yes, yes.

MR. KOLISCH: The wave is --

QUESTION: The wave comes from pressure, doesn't it?

MR. KOLISCH: Well, there is a head, because you have about two and a half feet of water, and then you drop --

QUESTION: Yes, and the cow just peacefully stands there.

MR. KOLISCH: That's right. And if you --

QUESTION: You've got some peaceful cows out there.

[Laughter.]

MR. KOLISCH: If you will look at the movies, I think in the movies you see cows actually standing when this water is running.

Now, I had the same incredulous feeling that you did

when I was presented with this invention, and it wasn't until I went out to a dairy and saw a 300-foot --

QUESTION: Well, that I'm not going to do.

MR. KOLISCH: I beg your pardon, sir?

QUESTION: That I'm not going to do.

MR. KOLISCH: I didn't think that was possible.

[Laughter.]

QUESTION: Counsel, what is -- it's a two-and-a-half-foot drop, the length of this --

MR. KOLISCH: The drop is about one foot per hundred, one or two feet per hundred.

QUESTION: Well, does that not create an enormous pressure?

MR. KOLISCH: No. Actually --

QUESTION: A very fast -- a very fast trout stream will only drop two feet in a mile, more or less, and that would be very fast running water.

MR. KOLISCH: The water moves swiftly, as you can see, but it is not such as to knock an animal, a four-footed animal --

QUESTION: Well, no, I'm not talking about that kind of pressure. But, as was suggested, the very appearance of that wave in this photograph shows that there is a considerable hydraulic pressure exerted here. And that's part of the function of what you claim is the invention, I take it.

MR. KOLISCH: Yes. It is combining that with the other aspects. And as Mr. Justice Marshall said, where are the cows when this is going on?

Well, the one thing you don't want to wash is their bedding, is where the cows are loafing. And you will see from this --

QUESTION: I wanted to ask why they have to get out on the center. Is there something that forces them in the center?

MR. KOLISCH: The cows go there normally to be milked. These cows live in this type of a routine. They have a stall where they lie down and chew their cud. When their milking time comes, they will get up naturally, and they know -- these are creatures of habit -- they are milked twice a day, and they will walk and amble around to where the milking is to take place. And then they will go to another area which is called the loafing area, where they may stay, and then they will come back again to their stalls to be fed, because there is food provided for them.

QUESTION: Well, you haven't answered my question. What's to prevent them from defecating in the stall?

MR. KOLISCH: Because of the position. The stalls, and it's called for in the claims, that the stall is of a size so that only the front portions of the cow can and will be in -- the rear portions of the cow are positioned above the alley-

way.

QUESTION: If it's a small cow, that doesn't work.

[Laughter.]

MR. KOLISCH: There are two answers to that question, Mr. Justice Blackmun. In the first place, in these commercial dairies, they have the same type of cows, they all have Holsteins or Jerseys or whatever it is. Secondly, the stall -- there is a thing that you can put in front of the cows and you can push it back or forth, depending upon the size of the cow, so that it can go in farther, or that it will back up.

And this is adjusted, depending upon --

QUESTION: I think you've argued this case before!

[Laughter.]

QUESTION: Incidentally, are these photographs in the record?

MR. KOLISCH: No. These photographs were added by me, because of -- they are simply photographs -- I didn't know whether or not the Court would look at the movie. I felt that the only possible way that the Court could understand what this is all about is by looking at photographs.

Now, this is --

QUESTION: These are just for illustrative purposes.

MR. KOLISCH: These are illustrative of counsel's argument. They are no different from other photographs in the record. There are plenty of photographs in the record. This --

QUESTION: What about the movie that's here? Is the 15-minute version here?

MR. KOLISCH: Both versions are here.

QUESTION: Where did the two-minute or three-minute one come from?

MR. KOLISCH: The two-and-a-half-minute version came about as follows: We had a long version, Plaintiff's Exhibit 9, which was shown to the district court. Prior to the argument on the merits in the Fifth Circuit, I prepared a short two-and-a-half-minute movie, because I decided that it was -- you couldn't give it a nine or ten-minute --

QUESTION: You prepared it from what? A brand new movie? You went out and took a new movie?

MR. KOLISCH: It was a brand new movie. The same thing as the other one, except it was a condensation.

QUESTION: Did the court receive that as a visual aid, rather than a --

MR. KOLISCH: Yes. Now, what happened with respect to that movie, I petitioned the court to show it, and the court said: Submit it to -- submit a copy of this to counsel for the defendant. Which I did. I prepared a separate and identical copy of the movie, submitted it prior to the argument in the Fifth Circuit, and there was no objection from counsel to the showing of the movie in the Fifth Circuit. It was shown in the Fifth Circuit, and I think it helped the court materially.

QUESTION: How did you file it here?

MR. KOLISCH: I beg your pardon?

QUESTION: How did you file it here?

MR. KOLISCH: I filed it -- prior to argument here I asked Mr. Tatem would it be all right if I used this movie in the Supreme Court, assuming that the Court would look at it. Mr. Tatem said, "It's all right by me, but I will have to talk to Mr. Hulse, he is senior counsel in this case."

Mr. Tatem called me back later and said it's okay.

I understand that since then he has changed his mind.

But it is the identical movie that he has had ever since 1973.

QUESTION: But what I'm trying to get at, did you just file it with the record or --

MR. KOLISCH: No.

QUESTION: -- did you file it in connection with any petition?

MR. KOLISCH: I made --

QUESTION: Because I've never seen any petition.

MR. KOLISCH: Yes. I submitted a motion to the Clerk of the Court and the Clerk of the Court informed me that this Court would not look at a movie during a session of the Court, that it was against the Court's rules.

And he said, "You may lodge it with me, and then you may call it to the Court's attention, and if the Court wishes

to look at the movie, it will do so during its deliberations."

QUESTION: And it wouldn't disqualify any of us if we looked at the 15-minute version?

MR. KOLISCH: Certainly not.

QUESTION: Now, let me get back to these photographs. Are these taken from either movie?

MR. KOLISCH: No, sir. They are not, they were prepared by me --

QUESTION: This is a secondary outfit -- or a secondary classification of visual portrayals not introduced in evidence?

MR. KOLISCH: No. They are simply an aid of counsel's argument. In principle, they are no different from what existed before, and the purpose was visually if you had not looked, or you would not look at the movie, to try and give you some feel for this.

And what we show here is the before, the during and literally it took about a minute, and this is after.

QUESTION: Did you take the photographs yourself?

MR. KOLISCH: My wife took them, and I stood next to her when she took them.

QUESTION: Mr. Kolisch, what is your position as to the state of the law? Is an inquiry into whether something is inventive or something is nonobvious a question of law or a question of fact?

MR. KOLISCH: I think, Mr. Justice Rehnquist, it's a mixed question. I think you must start by making certain factual findings. And, in the Graham case, this Court went into that quite carefully. And I think that the major substantive question before the Court is the one of obviousness. I don't think there's any question that this was novel, that it was useful.

QUESTION: Well, to pursue a little bit more my brother Rehnquist's question, are findings of novelty, utility and nonobviousness, or their opposites, subject to Rule 52(a) of the Rules of Civil Procedure or not?

MR. KOLISCH: I would say they were.

QUESTION: They are?

MR. KOLISCH: Yes, sir. Those are fact-finding --

QUESTION: Those are pretty well established and accepted in the federal courts?

MR. KOLISCH: Yes.

QUESTION: Well, you don't say that's the rule in most Courts of Appeals, do you?

MR. KOLISCH: Well, --

QUESTION: For ex ample, the Seventh Circuit, it isn't the rule there, very clearly it's not.

QUESTION: And for example, the Fifth Circuit, where you're coming from.

MR. KOLISCH: I think that --

QUESTION: Isn't it quite clear that the issue of obviousness is treated as an issue of law by the Courts of Appeals generally?

MR. KOLISCH: In the end it comes, but there are certain factual bases --

QUESTION: Yes, but that's not what you answered Mr. Justice Stewart. He asked you, on the issue of obviousness, does Rule 52(a) apply?

MR. KOLISCH: No. I think that the ultimate question --

QUESTION: Your answer was no to that, I take it?

MR. KOLISCH: -- the ultimate question is one of law.

QUESTION: And that was the ruling of the Fifth Circuit.

MR. KOLISCH: Yes.

QUESTION: The underlying historical fact questions, they said clear and -- or they -- that was a Rule 52 question.

MR. KOLISCH: Yes.

QUESTION: But the ultimate issue was a law question.

MR. KOLISCH: Yes, I believe it is a law question.

QUESTION: On the second appeal to the Fifth Circuit, did the Fifth Circuit conclude that any of the district court findings on the three parts of the Graham test were clearly erroneous?

MR. KOLISCH: Yes. In fact, the Fifth Circuit found that there was really no evidence to support the findings of the district court.

And that brings me to the question of the newly discovered evidence, which there are good procedural as well as substantive reasons, I think, for rejecting it.

The first one is the jurisdictional question, which I have raised with respect to whether or not this is properly here. And that is in my brief. That's a pure jurisdictional question. I admit I raised it for the first time here. I didn't think about it before. But it's jurisdictional, and the Court, of course, is always interested in jurisdictional questions.

The second one was that the documents which were introduced at the hearing on newly discovered evidence should have been rejected, because those documents were deliberately withheld and not shown to me. There was a Rule 34 motion made to have the defendant disclose all of his evidence, documentary evidence, which he may have on prior art. That would have covered Rovey, Whitmore, and all the rest. That was not disclosed.

Thirdly, with respect to the Mission Dairy and Mr. Meyer's testimony, Mr. Meyer and the Mission Dairy were admittedly the key to all the newly discovered evidence, because Mr. Meyer was the one who knew about it all and tied

the whole thing together.

There isn't any question that the defendant, as well as his attorney, knew about the Mission Dairy in October of 1969. At that time he made a deliberate choice: "I don't need the Mission Dairy to win this case", and therefore he didn't use the evidence.

He went through a motion for summary judgment, didn't use it. Two years later he went through a trial, and he didn't use this evidence.

After the Court of Appeals, for the second time, reversed and said the patent is invalid, he reached back and said, "Ah, but I have some newly discovered evidence, which I want the court to consider."

The court very generously, I think, sent it to back to the district court for a hearing under 60(b)(2), and there simply said, "Oh, we're going to let all the evidence in", and never passed the threshold question, which Mr. Justice Stewart brought up: Is this newly discovered evidence?

Because there are very strict requirements under 60(b)(2).

The threshold questions were never satisfactorily answered. In fact, they were never answered, because under 60(b)(2) you have to show (1) it's newly discovered, (2) it could not have been discovered by due diligence. In this case there isn't any question he knew about it, and it didn't

take due diligence to find out who the owner of the Mission Dairy was, once you knew about the Mission Dairy. All you had to do was to take a deposition.

So, I think that under any test, whether it's even the Cuno test, that very controversial flash-of-genius test which this Court handed down --

QUESTION: Do you think that's still extant?

MR. KOLISCH: I don't think it is, Mr. Chief Justice, but sometimes language from that decision creeps back in, and therefore --

QUESTION: I thought Section 102 had been -- the last sentence of it --

MR. KOLISCH: Was supposedly --

QUESTION: -- was supposedly designed and deliberately enacted to reject that test, wasn't it?

MR. KOLISCH: Yes. I think that that legislation was enacted to dispense with it.

I would say this on the philosophical, ideological: Gribble and Bennett are a classic case of the beneficial effect that the patent system should have. Now, here were two individuals who had nothing except some good ideas, hard work and determination.

Now, with the potential of a legally enforcible right, they went ahead and obtained a patent.

Now, based on this belief, they started with a little

business, they had nothing, and they succeeded in building up a reputable business, which has received good commercial acceptance.

Interestingly enough, this case has none of the odious features which some of the cases before this Court involving patents may have had. They made the patent available to anybody, practically for nothing. All that they asked was that you pay them a fee, a one-time fee of $1500 plus one dollar per cow. And that means that anybody could get it. An installation of 300 cows costs $250,000 and the rent or the charge would be $1800 once, and that's all.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:14 o'clock, p.m., the case in the above-entitled matter was submitted.]

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