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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

PSKS, Inc. d/b/a Kay's Kloset...Kay's Shoes; and Toni Cochran, L.L.C., d/b/a Toni's	§	
Plaintiffs,	§	
v.	§	Civil Action No. 02-03CV-107 TJW
Leegin Creative Leather Products, Inc.	§	
Defendant.	§	

PLAINTIFFS' RESPONSE TO LEEGIN'S MOTION FOR NEW TRIAL

Plaintiffs PSKS, Inc. d/b/a Kay's Kloset . . . Kay's Shoes ("Kay's Kloset") respectfully requests the Court deny Leegin's motion for new trial.

I. INTRODUCTION

Since 1911, agreements fixing retail prices between a manufacturer and its retailers have been *per se* illegal as an unreasonable restraint of trade under Section 1of the Sherman Antitrust Act. Notwithstanding this clear prohibition, the defendant in this case systematically proceeded to require its retailers to enter into written agreements fixing retail pricing. When Kay's Kloset refused to go along with the price fixing scheme put in place by Leegin, Leegin stopped shipping Brighton goods to it.

Not only did Leegin stop shipping goods to Kay's Kloset, it undertook to direct customers that had purchased goods at Kay's Kloset to other area retailers. Because of the wrongful conduct of Leegin, Kay's Kloset suffered damages. The evidence fully supported the jury's finding that Leegin violated the antitrust laws, and that Kay's Kloset suffered lost profits of $1,200,000.

II. STANDARDS FOR NEW TRIAL

Granting a new trial is appropriate only when the Court concludes that prejudicial errors during the course of the trial require the court to exercise its discretion to grant a new trial so as to prevent manifest injustice. In support of its motion, Leegin submits a laundry list of nine claimed errors that it asserts justify a new trial. These errors claim problems with admitting or denying the admission of expert testimony; the giving or refusal to give instructions; and the question of whether the verdict was against the great weight of the evidence.

The standards to apply to such a motion were restated in *Pelt v. U.S. Bank Trust Nat. Ass'n*, 2003 WL 193468, (N.D.Tex. 2003):

> In deciding a motion for new trial on evidentiary grounds, the court may not simply substitute its judgment for that of the jury "unless, at a minimum, the verdict is against the great--not merely the greater--weight of the evidence." *Conway v. Chem. Leaman Tank Lines, Inc.*, 610 F.2d 360, 362- 63 (5th Cir.1980); *Bernard v. IBP, Inc.*, 154 F.3d 259, 264 (5th Cir.1998). "Factors militating against new trials in such cases include (1) the simplicity of the issues, (2) the degree to which the evidence was disputed, and (3) the absence of any pernicious or undesirable occurrence at trial." *Conway*, 610 F.2d at 363; see *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir.1992). When all three factors are present, a court should avoid substituting its judgment for that of the jury and instead give deference to the jury's findings regarding witness credibility and demeanor and conflicting testimony. *See Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 931 (5th Cir.1982);*Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 256 n. 6 (5th Cir.1992). Similarly, new trials should not be granted based on an erroneous jury instruction unless "the jury charge as a whole leaves a substantial and ineradicable doubt as to whether the jury has been properly guided in its deliberations." *Hiltgen v. Sumrall*, 47 F.3d 695, 703 (5th Cir.1995) (quoting *Mayo v. Borden*, Inc., 784 F.2d 671, 672 (5th Cir.1986). The test, however, is not whether the charge was faultless but whether the jury was misled by the instruction and whether it understood the issues and its duty to determine those issues.

Bernard, 154 at 264.

Applying these standards, no new trial is justified.

III. ARGUMENT AND AUTHORITIES

A. The Court Properly Excluded Professor Elzinga's Testimony

Leegin's case primarily consisted of an argument that although vertical price fixing agreements have been *per se* illegal since the issue was addressed by the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed.502 (1911), this Court should have not followed the law as it consistently has been applied for over 90 years, and should have adopted a rule of reason approach to vertical price fixing. Instead, the Court followed the law and properly held that the proffered testimony of Professor Elzinga that the law was wrong was not relevant to the issues in this case.

The Court's ruling that vertical price fixing is *per se* illegal does nothing more than comply with all applicable holdings of the Fifth Circuit and the United States Supreme Court. There is no err in excluding Professor Elzinga's testimony. Nor has Leegin shown how prohibiting Professor Elzinga from testifying prejudiced its case. The conduct by Leegin would still have been illegal, no matter whether Professor Elzinga thought the law was wrong or not. Under these circumstances, and for the additional reasons given in the Plaintiff's Motion to Limit the Testimony of Kenneth G. Elzinga, filed March 18, 2004, and the reasoning and authorities contained in the Court's Memorandum and Order filed March 26, 2004, the Plaintiff submits that no new trial is justified on this ground.

B. The Court Properly Instructed the Jury on the *Per se* Standard

In its continuing quest to suggest that more than 90 years of precedent should be rejected, Leegin argues that a new trial is justified because of the Court's refusal to instruct on the rule of reason. In neither this brief, nor in any other brief the defendant has filed in this case, has

Leegin cited a single case permitting the court to instruct on the rule of reason in a vertical price fixing case. Although Leegin wished that the law would apply different standards to vertical price fixing agreements than are currently in place, that decision is not one for any of the Courts to make. The Sherman Act has been interpreted in a manner that makes vertical price fixing agreements *per se* illegal since 1911. Given that long-standing interpretation, if there is to be a change in the law, that change should be initiated by Congress, not by the Courts.

In concurring in the judgment in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 2378, 79 L.Ed.2d 775 (1984), Justice Brennen stated:

> As the Court notes, the Solicitor General has filed a brief in this Court for the United States as *amicus curiae* urging us to overrule the Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). That decision has stood for 73 years, and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act.

465 U.S. at 769. Obviously, Congress has remained aware of the consistent interpretation of the Sherman Act in the 20 years since Justice Brennen made this observation, and no legislation has been adopted to overrule *Dr. Miles*.

There is no basis for Leegin's claim that the Court erred with respect to its instruction that vertical price fixing is a *per se* violation.

C. <u>There is no Exception to the *Per se* rule for Vertical Price Fixing</u>

As an alternative to the adoption of the rule of reason approach to their vertical price fixing, Leegin also proposed the Court instruct on an exception to the *per se* rule. To justify this approach, Leegin has submitted a modified version of Instruction 6.1 of the Fifth Circuit Pattern Jury Instructions. In that proposed instruction, Leegin has added language from *United States v.*

Realty Multi-List, Inc. 629 F.2d 1351, 1367 (5th Cir. 1980), a group boycott case, in which the Fifth Circuit reversed a grant of summary judgment entered in favor of the defendant. What Leegin does not disclose is that Leegin has substituted the *Realty Multi-List* language for the following additional qualification contained in Instruction 6.1: "or, if you find that this case does not involve a price fixing agreement." By its terms, Instruction 6.1 applies only to situations in which the challenged restraints are essential, or to those that do not involve price fixing agreements. By eliminating this qualification, Leegin has stood this instruction on its head, and is requesting that this Court violate established law.

Leegin refuses to recognize that the price fixing agreements it entered into are "naked" restraints that are *per se* illegal. Even now, Leegin has not cited a single case where such a restraint has been upheld. There is no exception to the *per se* rule for a naked price fixing restraint. The Court was correct in not instructing to the contrary.

D. The Court Correctly Instructed on Antitrust Injury

Leegin does not cite a single case to justify its position that something more needed to be said to the jury on the issue of antitrust injury. Leegin has not suggested how the failure to further define antitrust injury in this particular case harmed Leegin. Clearly, the instructions required the plaintiff to prove both a violation and antitrust injury. And, clearly, that showing was made by the plaintiff. See, e.g., *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975)(decline in profits after termination is sufficient evidence of causation and of antitrust injury); *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118, 123-24 (3rd Cir. 2000)[1] (noting that imposing burden of showing injury to interbrand competition would

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[1] "Finally, we point out that our holding--that a dealer terminated for its refusal to abide by a vertical minimum price fixing agreement suffers antitrust injury and may recover losses flowing from that termination--is consistent with the decisions of those courts which have explored the issue thus far. *See, e.g., Sterling Interiors*

undermine benefits of *per se* rule); *In re Mercedes-Benz Anti-Trust Litigation,* 157 F.Supp.2d 355 (D.N.J. 2001).

Leegin has not shown any error, or any prejudice to Leegin from the Court's instruction.

E. The Jury's Finding of Antitrust Injury was Based on the Undisputed Evidence

Leegin continues to want to lead the Court to apply a rule of reason approach to its *per se* violation of the antitrust laws. Because it cannot provide authority to support applying the rule of reason process to a vertical price agreement, it is trying to "backdoor" the requirement by redefining the "antitrust injury" requirement.

Antitrust injury is shown in a dealer termination case by showing that the terminated dealer has suffered injury as a result of being illegally terminated. *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975)(decline in profits after termination is sufficient evidence of causation and of antitrust injury).

Instead of recognizing what the "antitrust injury" requirement actually is, Leegin requests that the Court construct a new requirement such that to prove "antitrust injury" a person must prove "harm to competition in an economically meaningful sense." New Trial Motion p. 12. Antitrust injury is distinct from injury to competition, which is required to show certain antitrust violation. *See, Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997). Where a *per se* violation is shown, it is not necessary to show any harm to competition as a result of a conspiracy. *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.*, 246 F.3d 752, 756 (5th Cir. 2001). A dealer terminated as a result of an illegal price-fixing

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Group, Inc. v. Haworth, Inc. No. 94-9216, 1996 WL 426379 at *18-*19 (S.D.N.Y. July 30, 1996) ("The anti-competitive dangers of minimum price arrangements flow to both customers who purchase at prices set higher than competitive levels, and to dealers who are effectively foreclosed from competing in the marketplace.")." 213 F.3d at 124.

scheme has shown all the antitrust injury required. Given that it is uncontroverted that Kay's Kloset was terminated as a Brighton dealer because of its discounting Brighton products, the antitrust injury is proven.

F. The Court Correctly Denied giving Leegin's Conspiracy and Ambiguity Instructions

Leegin proposed instructions designed to increase the showing that the plaintiff would have to make in order to show a conspiracy. In support of that proposed instruction, Leegin relies upon *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The issue in neither of those cases involved jury instructions. The issue in *Matsushita* was succinctly stated in the opening statement of that opinion: "This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case." The issue in *Monsanto* involved whether there was sufficient evidence to support a jury verdict finding antitrust liability for a dealer terminated for price fixing. Notably, *Monsanto* found that the evidence was sufficient, and it did not create a requirement that some additional instruction be given the jury about what was to be shown.

Both *Matsushita* and *Monsanto* involved actions in which antitrust violations were claimed to be shown by circumstantial evidence. Both those cases involve when inferences can appropriately be drawn from circumstantial evidence. Neither of those cases dealt with the unusual situation, which existed in this case, in which the agreement violating the antitrust laws is in black and white and signed. The existence of signed price-fixing agreements alone excludes the possibility that Leegin and its retailers were acting independently.

Leegin also requested the Court instruct the Jury that the contracts it entered into with dealers were ambiguous, and so subject to jury interpretation. Again Leegin takes liberties with

the Texas Pattern Jury Charge. Instruction 101.8 is to be given when the Court determines that specific terms of a written contract are ambiguous. It is called "Instruction on Ambiguous Provisions." That instruction begins: "It is your duty to interpret the following language of the agreement: *[Insert ambiguous language.]*" The problem with Leegin's attempt to adapt this instruction is that the agreements to fix prices were not ambiguous. Try as it might, the language contained in the Heart Store Agreements ("I agree to * * * 4. Sell Brighton products for the suggested price every day, 365 days a year") and the language contained in the Brighton Trademark Agreement[2] are clear and not in need of interpretation.

"Well settled Texas law presumes that 'a written agreement correctly embodies the parties' intentions, and is an accurate expression of the agreement the parties reached in prior oral negotiations.'" *Ventana Investments, a Texas General Partnership v. 909 Corp.*, 870 F.Supp. 723, 728 (E.D.Tex. 1994). "Whether a contract is ambiguous is a question of law for the court to decide." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000). Given the clarity with which Leegin expressed the price fixing term in its written contracts, giving any instruction dealing with ambiguity would have been clearly erroneous.

Leegin is wrong in suggesting that *Monsanto* does not prohibit the very type of agreements entered into between Leegin and its retailers. *Monsanto* discussed the difference between independent action – that is permitted by the *Colgate* doctrine – and price fixing, which is illegal:

> The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. **It means as well that evidence must be presented both that the distributor**

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[2] "Licensee shall comply fully with all obligations which arise as a customer of Licensor with respect to its purchases of goods, including without limitation Licensor's 'Brighton Retail Pricing and Promotional Policy' as in effect and as updated from time to time."

communicated its acquiescence or agreement, and that this was sought by the manufacturer.

465 U.S. at 764 n.9 (emphasis added). When Leegin initiated a pricing policy, and then later sought agreements to that policy by retailers, and obtained such agreements in the form of written contracts, it unquestionably committed illegal acts.

Leegin has not shown any error, and has not shown any prejudice from not giving its requested instructions.

G. The Court Properly Admitted Davis' Testimony

For the reasons given in the Plaintiff's opposition to Leegin's Motion to exclude the testimony of James Davis, and as further stated in opposition to Leegin's Motion for Judgment as a Matter of Law, the admission of James Davis' testimony was correct. There has been no error that would justify a new trial.

H. The Court Properly Instructed on Mitigation of Damages

The Court's instruction on damages and mitigation of damages were correct. The Court properly instructed the jury that the plaintiff had the burden to prove "the amount of damages caused by the defendant's violation of the antitrust laws." Charge to Jury p. 7. The jury was to award damages "profits it lost as a proximate result of the violation by the defendant of the antitrust laws." *Id.* The jury was instructed that the plaintiff "may not recover for any item of damage which it could have avoided through reasonable effort." *Id.* at 8.

Read together, these instructions direct the jury to decrease the award to take into account profits from the sale of any substitute goods, or reduced expenses. The profits from the claimed substitute goods would necessarily decrease the amount of damages caused by the defendant's violation, as would reduced costs. Read as a whole, the jury was properly instructed in the manner to calculate damages.

I. The Jury's Award of Damages was Supported by the Evidence

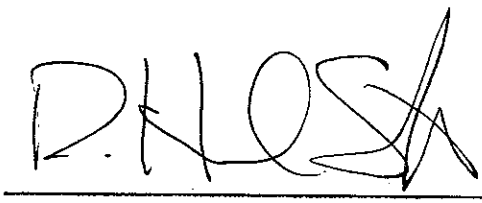
As shown in the Plaintiff's Response to Leegin's Motion for Judgment as a Matter of Law, the damage award made in this case was fully supported and completely in line with damage awards upheld in the Fifth Circuit. That award is not against the weight of the evidence, and, given that Leegin chose as a matter of trial strategy not to submit their own damage calculation, the plaintiff's expert's calculation could be considered the only evidence of any weight.

The jury exercised its duty to determine damages, and awarded only approximately 70% of the damages sought. Clearly, this award was not excessive, and was well within the range of damages shown by the evidence. There is no basis for awarding a new trial as a result of the damage award.

CONCLUSION

Leegin chose to ignore the clear prohibitions contained in the antitrust laws, and enter into written contracts of a type that have been illegal since 1911. After being caught, and after a jury has determined the damages inflicted on Kay's Kloset because of Leegin's illegal conduct, Leegin is seeking a new trial. Leegin, however, wants this new trial conducted not on the basis of what the law has provided since 1911, but rather wants the Court to rewrite the prohibitions of antitrust law to permit its clearly illegal conduct. For the reasons previously stated, that is a step that the Court should refuse. The other arguments contained in Leegin's laundry list of complaints are equally without merit. The motion for new trial should be overruled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served on the parties listed below, by first-class mail, on this 22 day of June, 2004

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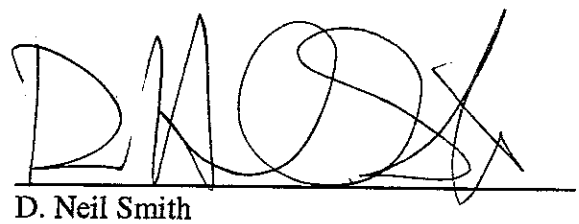

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