

Case No. 2022-2117

**In the United States Court Of Appeals
for the Federal Circuit**

YOLDAS ASKAN,

Appellant / Plaintiff,

v.

FARO TECHNOLOGIES, INC.,

Appellee / Defendant.

**On Appeal from the United States Middle District of Florida
No. 6:21-cv-01366-PGB-DCI, Honorable Paul G. Byron, Judge**

**PETITION FOR REHEARING *EN BANC* OF PLAINTIFF-
APPELLANT YOLDAS ASKAN [PRO SE]**

Yoldas Askan
51 Pinfold Street
Suite 542
Birmingham
B2 4AY
United Kingdom
+44 7539593978
yoldas.askan@gmail.com
Appellant

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STATEMENT PURSUANT TO FED. R. APP. P. 35(B)(1)

A panel of this Court affirmed a district court decision that ". . . *the with-prejudice dismissal in the prior litigation operates as an adjudication of non-liability for infringement under the Kessler doctrine*"

1. Based on my professional judgment, I believe this appeal requires an answer to precedent-setting questions of exceptional importance. Having partially quoted *Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1297 (Fed. Cir. 2001) (*stating that "a dismissal with prejudice . . . is a judgment on the merits"*) the opinion 22-2117, Appx5, have broadened the scope of *Hallco Mfg. Co. v. Foster*.

Caption for the case text of *Hallco Mfg. Co. v. Foster* decision is,

*"Finding that a dismissal with prejudice **supported by a settlement agreement** "is a judgment on the merits"*

Excluding the omitted text, "**supported by a settlement agreement**" has broadened the scope of *Hallco* effectively encapsulating Mr. Askan's case that was not supported by a settlement agreement. Based on my professional judgment, I believe the panel decision is contrary to *Hallco Mfg. Co. v. Foster* and mandates en-banc review.

2. Equally important, despite Appellee's acceptance and the district court's findings that current litigation involved a new product,

Appellee denied these facts in its response brief and impairing this court's decision, "*Mr. Askan asserts that the district court failed to consider that the current litigation involves a new product . . . Mr. Askan did not raise this argument before the district court.*" The record shows otherwise; targeting defendants new product in the second suit was argued, Appx20¹ and accepted Appx49². Such clear omission is the second basis for this court to review the opinion 22-2117 en-banc.

3. Kessler is a necessary supplement to claim and issue preclusion; it grants a “‘limited trade right’ that attaches to the product itself” and “‘bars a patent infringement action against a customer of a seller who has previously prevailed against the patentee because of invalidity or noninfringement of the patent.’” In the opinion 22-2117 this is certainly not the case, writing, "*Here, we affirmed the district court’s with-prejudice dismissal of Mr. Askan’s prior litigation. Askan I, 809 F. App’x at 885. This dismissal, in the context of the Kessler doctrine, operated as an adjudication of non-liability for infringement.*" and bringing a new interpretation of the Kessler Doctrine.

¹ Mr. Askan respectfully asks this court to accept the inclusion of this docket entry for the convenience of panel's review.

² Mr. Askan respectfully asks this court to accept the inclusion of this court order for the convenience of panel's review.

4. Opinion 22-2117 redacted citation from *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1372–73 (Fed. Cir. 2013)), “*stipulated dismissal with prejudice . . . operated as an adjudication on the merits for claim preclusion purposes.*” Because the district court previously decided on the res-judicata, Appx20 and Appx49, and the case was set to continue, the dismissal with prejudice should not of itself count as the actual adjudication of any issue, see *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, No. 2011-1147 (Fed. Cir. Mar. 14, 2012).

Appellant Askan petition this Court to rehear this case en banc, pursuant to Fed. R. App. P. 35. Appellant Askan respectfully submits that the panel opinion is contrary to the following decisions of the Supreme Court and this Court and that full Court review is needed to maintain decisional uniformity: *PersonalWeb*, 961 F.3d at 1376–79; *Hallco Mfg. Co. v. Foster*, 256 F.3d (Fed. Cir. 2001), *Kessler v. Eldred*, 206 U.S. 285., *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.* and *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, No. 2011-1147 (Fed. Cir. Mar. 14, 2012).

Appellant Askan also submit that this case raises questions of exceptional importance concerning basic principles of Kessler doctrine’s “adjudged noninfringer” terminology definition, because this opinion has broadened the application of “adjudged noninfringer” in that there are no

licensees and the defendant has not successfully defeated allegations of infringement.

STATEMENT OF THE CASE

In April 2021, the Mr. Askan filed suit against the Appellee in the Eastern District of Pennsylvania, alleging infringement of claims of the ‘841 and ‘255 patents that were at issue in the prior litigation. The case was transferred to the Middle District of Florida. The Eastern District of Pennsylvania transferred the case to this District, because Plaintiff’s previous action (6:18-cv-1122-40-DCI) “involves the same parties, patents, and technology as the present action.” Accordingly, the Court instructed the parties to brief what effect, if any, the prior dismissal with prejudice has on the instant litigation. However, the district court erred in dismissing the case under Kessler doctrine because of its previous ruling had accepted Mr. Askan sued defendant after defendant introduced new product that was not in existence in a prior suit; and, the panel of this court omitted that fact in opinion 22-2117.

ARGUMENT

Contrary to the panel’s view, the errors identified by Appellant are factual challenges and legal in nature, because the district court and this court misapplied governing legal principles to its findings of fact. (“despite Rule 52(a), a court can correct ‘*a finding of fact that is predicated on a misunderstanding of the governing law*’”) (quoting *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984)); see also *Du Pont*, 351 U.S. at 381 (appellate review considers whether “erroneous legal tests were applied to essential findings of fact”); *Empire Gas*, 537 F.2d at 303 (holding that the trial judge had applied an incorrect legal standard in determining the relevant product market). If allowed to stand, the panel opinion would conflict with decisions of the Supreme Court and this Court.

1. LITIGATION ISSUES IN ASKAN I

The panel decision has noted earlier failings during the prior litigation between Mr. Askan and FARO because of presumed Mr. Askan’s behavior during discovery. *Askan v. FARO Techs., Inc.*, 809 F. App’x 880, 883–84 (Fed. Cir. 2020) (per curiam) (Askan I).

Mr. Askan asks this court, respectfully; at one point to recognize that, Mr. Askan's first case was dismissed with prejudice not because of Mr. Askan actions personally per se but because Askan's first representative during Askan I became non-responsive. Following facts are known to the district court and now must be considered by this court and Mr. Askan should not again be accused of any misconduct or being disrespectful towards the United States judicial system, which Mr. Askan strongly refutes. During Askan I, ex- Tampa Bay attorney Wayne Harper represented Mr. Askan. Unbeknown to Mr. Askan, Wayne Harper suffered mental health issues. Whilst promising to service Mr. Askan's case and filing documents on time, Wayne Harper let Mr. Askan down at the last minute.

Soon, Wayne Harper's general behavior and transgression became public. In AVVO website feedbacks left by other clients of Wayne Harper are visible today, Appx16, [<https://www.avvo.com/attorneys/33606-fl-wayne-harper-1273892.html#reviews>]

Appellant suffered pain and stress subjected to by the depraved Wayne Harper. In 2021, the Florida state licensing authority disciplined Wayne Harper [Appx16], following complaints of ex clients, and his license to practice was revoked. With no understanding of the law, having to live and

work in the United Kingdom, Appellant could do nothing timely to save his case.

Appellant took decisive steps to better service his case; one such measure was to file Askan II pro se, eliminating the possibility of corrupt attorneys. In Askan II, Mr. Askan filed all documents within time and travelled internationally to attend all court hearings. As such, Mr. Askan clearly demonstrated that he wants to prosecute his case. Therefore, it is time for district court and Federal Circuit court to give Mr. Askan that chance and bring the infringer to justice.

2. THE PANEL DECISION CONFLICTS WITH THE HALLCO MFG. CO. v. FOSTER, 256 F.3D 1290, 1297 (FED. CIR. 2001) DECISION WHICH HAS BEEN PARTIALLY QUOTED

Claim preclusion, or *res judicata*, is the principle that a cause of action may not be relitigated once it has been judged on the merits. "*Finality*" is the term, which refers to when a court renders a final judgment on the merits. "*On the merits*" refers to a judgment, decision, or ruling that a court will make based on the law, after hearing all of the relevant facts and evidence presented in court.

Many jurisdictions also find that *res judicata* applies to a "*dismissal for a failure to prosecute.*" This phrase refers to an involuntary

dismissal of a plaintiff's claims when the plaintiff fails to comply with the court's orders in some ways. These dismissals, however, are highly reviewable by appellate courts to ensure that the trial court was not abusing its discretion.

Whilst it is agreed that the Kessler doctrine's "*adjudged noninfringer*" terminology does not create a requirement that the issue be actually litigated in a prior case, in re PersonalWeb, 961 F.3d at 1376-77, Federal Circuit has made clear that the term "*adjudged noninfringer*" is meant to differentiate between licensees and those who successfully defeated allegations of infringement. PersonalWeb, 961 F.3d at 1377-78 (discussing Mentor Graphics, 851 F.3d 1275). Therefore, only two possibilities of "*adjudged noninfringer*", first licensees and second those successfully defeated allegations of infringement, authorize "*dismissals with-prejudice that operates as an adjudication on the merits for claim preclusion purposes*". The panel has not recognized, or overlooked, that decisive factor in opinion 22-2117 rendering Appellants case unique where neither settlement agreement exists nor defendant's have successfully defeated patent infringement. In fact, dismissal with prejudice supported by a settlement agreement was a key element of, Hallco Mfg. Co. v. Foster, 256 F.3d 1290, 1297 (Fed. Cir. 2001),

"Finding that a dismissal with prejudice supported by a settlement agreement "is a judgment on the merits""

It is not understood or clear why the panel omitted text "*supported by a settlement agreement*" from Hallco Mfg. Co. v. Foster decision and provided a partial quote.

In sum, the scope of Hallco Mfg. Co. v. Foster decision cited in the opinion of case 22-2117 has been made broader including Askan II, which was not supported by a settlement agreement, and it is at odds with prior decisions.

3. DISTRICT COURT ALREADY CONSIDERED THAT THE INSTANT LITIGATION INVOLVED A NEW PRODUCT

Appellee filed its Motion to Dismiss for Lack of Jurisdiction under Federal Rules 12(b)(4) and 12(b)(5) and argued Claim preclusion, or res judicata, defenses at Doc. 7, Case #: 6:21-cv-01366, writing,

Merely quashing service would leave the same forum issues and res judicata issues in this Court, wasting this Court's judicial resources.

Appellant responded, Appx20, and argued against claim preclusion.

Court order at Doc 57, Appx49, then wrote,

On September 3, 2021, the Court denied without prejudice Defendant's motion to dismiss and directed Defendant to respond to the Complaint. Doc. 41. Following that Order, Defendant timely responded by filing an answer on

September 17, 2021—and Plaintiff should recognize that Defendant has apparently abandoned its motion to dismiss in filing that answer. Doc. 17. Thus, Plaintiff's case is now set to move forward.

Complaint 6:21-cv-01366 Par. 47 asserted;

"In Oct 27, 2020, FARO introduced a new/revised/updated product SCENE 2020.0.3, after the dismissal of the case 6:18-cv-1122-Orl-40DCI, Exhibit 5."

Appellee responded;

"FARO admits that it released a version of its FARO SCENE software in October, 2020 as Patch Release 2020.0.3 ("SCENE Patch Release 2020.0.3"). FARO admits that the previous litigation, 6:18-cv-1122-Orl-40DCI, was dismissed prior to October, 2020, including October 27, 2020. In all other aspects FARO denies the allegations of Paragraph 47 of the Complaint and demands strict proof thereof."

Appellee therefore accepted that Askan II involved new products that did not exist in the prior suit, later dropping its motion to dismiss. It is therefore Appellee's acceptance and the district court's findings Askan II involved a new product is undisputed.

Appellant raised appropriate preclusive effects arguments once as needed and prevailed on them, setting Appellants case on motion [Appx49]. Therefore, like the *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc., No. 2011-1147 (Fed. Cir. Mar. 14, 2012)* case, the *likeness* of the new and old products should not have mattered because Appellee's new product "*was not in*

existence when the earlier actions were filed and res judicata could not bar a subsequent lawsuit against that design because a claim was not, and could not have been, asserted against that design" [Aspex language].

However, in its response brief at Doc. 24, p. 46 appellee reclaimed, deceptively,

To the extent Askan suggests the district court "did not consider that re filing of the lawsuit targeted [FARO's] new and changed product," Askan Br. at 38 (relying on a website not in the record), Askan did not make that argument or present any evidence supporting it to the district court.

forgetting it was the appellee who destroyed the website evidence. The panel should have made reasonable inferences in favor Mr. Askan but it did not.

Instead, wrote,

"Mr. Askan asserts that the district court failed to consider that the current litigation involves a new product, ostensibly suggesting that any preclusive effect of the prior litigation does not extend to the accused products in the current litigation. See Appellant's Br. 30–31, 38, 46–47; Appellant's Reply Br. 26–28. Mr. Askan did not raise this argument before the district court . . ."

4. KESSLER IS A NECESSARY SUPPLEMENT TO CLAIM AND ISSUE PRECLUSION

Claim preclusion does not extend to post-judgment acts of infringement, whether or not same or different product. Brain Life (Fed. Cir. 03/24/14) (applying 9th law); Mentor Graphics (Fed. Cir. 03/16/17) (same;

distinguishing *Foster* (Fed. Cir. 09/27/91) (claim preclusion barring invalidity challenge extends to later accused product if “essentially the same” as product determined to infringe)). But, *Kessler* (U.S. 05/13/1907) doctrine does bar allegation of infringement against materially same products post judgment (even where issue preclusion does not apply): “Simply, by virtue of gaining a final judgment of noninfringement in the first suit—where all of the claims were or could have been asserted against Elekta—the accused devices acquired a status as noninfringing devices, and Brain Life is barred from asserting that they infringe the same patent claims a second time.” *Brain Life* (Fed. Cir. 03/24/14) (applying 9th Cir. law). Kessler is a necessary supplement to claim and issue preclusion; it grants a “‘limited trade right’ that attaches to the product itself” and “‘bars a patent infringement action against a customer of a seller who has previously prevailed against the patentee because of invalidity or noninfringement of the patent.’” *Speedtrack* (Fed. Cir. 06/30/15) (aff’g Summ. J. of no equivalents infringement where accused product was not materially different from one found not to literally infringe in suit against a different user of that product; rejecting argument that Kessler right assertable only by product supplier not its customers.) Cf. *Rubber Tire* (U.S. 02/24/1914) (“It is a right which attaches to its product — to a particular thing — as an article of lawful commerce, and it continues only so long as the commodity to which the right applies retains its

separate identity. If that commodity is combined with other things in the process of the manufacture of a new commodity, the trade right in the original part as an article of commerce is necessarily gone. So that when other persons become manufacturers on their own behalf, assembling the various elements and uniting them so as to produce the patented device — a new article — it is manifest that the respondent cannot insist upon their being protected from suit for infringement by reason merely of its right to make and sell, and the fact of its having made and sold, some component part of that article.”); Simpleair (Fed. Cir. 03/12/18) (if cause of action on continuation patents is barred under claim preclusion for alleged infringements before earlier judgment, then also barred under *Kessler* doctrine for provision of essentially same services post judgment). But see Mentor Graphics (Fed. Cir. 03/16/17) (Kessler doctrine does not apply to a defendant who takes a license, leading to dismissal of the suit with prejudice but who not adjudicated as an infringer, and then who later terminates its license and is sued for post-termination infringements). *Kessler* doctrine extends claim preclusion to post-judgment actions even where there was no judgment of non-infringement or invalidity. In re PersonalWeb (Fed. Cir. 06/17/20) (aff’g application of *Kessler* doctrine in favor of Amazon’s customers for use, etc. of Amazon S3 storage service after dismissal with prejudice (without

fact findings) of earlier action against Amazon alleging infringement by S3; distinguishing *Mentor Graphics*).

In the context of Kessler discussion and applicable case laws, opinion 22-2117 is therefore contradictory;

"Here, we affirmed the district court's with-prejudice dismissal of Mr. Askan's prior litigation. Askan I, 809 F. App'x at 885. This dismissal, in the context of the Kessler doctrine, operated as an adjudication of non-liability for infringement."

having overlooked the involvement of a new product that did not exist in a prior suit, and has failed to consider that when *Kessler* doctrine extends claim preclusion to post-judgment actions even where there was no judgment of non-infringement or invalidity.

The language used by Mr. Askan in his opening and reply brief with citation omitted may have caused some confusion, quoting opinion 22-2117:

Mr. Askan asserts that the district court failed to consider that the current litigation involves a new product.

Here, Appellant Askan merely meant point out that the District Court failed to consider that Order Appx49 had accepted the involvement of a new product but later overlooked that fact. Appellant Askan regrets the misunderstanding caused and offers his sincere apologies to this court and

respectfully asks that the en banc panel of judges to reconsider its decision in accordance with Aspex decision.

5. DISMISSAL WITH PREJUDICE SHOULD NOT OF ITSELF COUNT AS THE ACTUAL ADJUDICATION OF ANY ISSUE, SEE ASPEX EYEWEAR, INC. V. MARCHON EYEWEAR, INC., NO. 2011-1147 (FED. CIR. MAR. 14, 2012).

Opinion 22-2117 Appx4 again seems to have redacted citation from *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1372–73 (Fed. Cir. 2013)), quoting,

“stipulated dismissal with prejudice . . . operated as an adjudication on the merits for claim preclusion purposes.”

replacing crucial text, "*but ordinarily should not of itself count as the actual adjudication of any issue*" with ". . .".

Opinion 22-2117 goes onto write,

Like the dismissal in In re PersonalWeb, the district court’s prior dismissal of Mr. Askan’s complaint did not carry any contingencies. Thus, this dismissal with prejudice was an adjudication on the merits for claim preclusion purposes, and the fact that it was involuntary is irrelevant to its preclusive effect.

In re PersonalWeb, Federal Circuit found that,

The with-prejudice dismissal of PersonalWeb’s action against Amazon in the Texas case is quite different from the licensing agreement that ended the first action in the Mentor case. The dismissal in Mentor was contingent on the license; when the license was terminated, the contingency disappeared, and Mentor was free to re-initiate

its infringement action. In this case, by contrast, there was no contingency attached to the with-prejudice dismissal to which PersonalWeb stipulated.

Therefore, the two separate cases, PersonalWeb and Mentor were dismissed stipulated by the plaintiffs following a license agreement. Federal Circuit viewed these as having operated as an adjudication on the merits for claim preclusion purposes. The text in re PersonalWeb makes it clear that the adverse effects of having no contingency on license. However, it is not understood what is meant by the contingency in Mr. Askan's complaint and how it relates to PersonalWeb and Mentor cases. Mr. Askan has never entered into any license agreement with the Appellee. If the panel is suggesting that then it is clearly erroneous. Askan II was filed to cover Defendant's new products that were not in existence during Askan I and not because defendant has taken out a license and was sued for post-termination infringements after terminating its license.

Nevertheless, Mr. Askan believes the panel progressed with these advanced arguments assuming Mr. Askan has failed to argue that the litigation involved new products that were not in existence in a prior suit. Mr. Askan did. And, absent a decisions on the merits in Askan I which the District Court could have adopted for Askan II, district court erred in dismissing Askan II under Kessler doctrine.

Therefore, Mr. Askan respectfully asks this court to reconsider its decision in the light that present suit involved new products and, in line with the Aspex decision, the panel should dismiss the “*essentially the same*” arguments and respectfully asks, “*view all evidence and make all reasonable inferences in favor of the party opposing summary judgment.*” *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (citation omitted), especially in the light that the appellee has made false declarations in its reply brief at 22-2117 Doc. 24, P. 46.

Appellant notes that *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) (“A dismissal with prejudice operates as a judgment on the merits unless the court specifies otherwise.”) is not patent case.

CONCLUSION

For the foregoing reasons, this Court should rehear this appeal en banc, reverse the district court, and remand for further proceedings.

Appellant opposes awarding of Appellee's costs after the panel based its decision on falsified accounts and redaction of disclosed Rule 408 meeting that was already in public domain.

July 19, 2023

Respectfully submitted,

YOLDAS ASKAN
51 Pinfold Street,
Suite 542,
Birmingham
B2 4AY
United Kingdom
yoldas.askan@gmail.com

A handwritten signature in blue ink, appearing to read 'Yoldas Askan'.

/s/ Yoldas Askan

YOLDAS ASKAN

Appellant,

PROOF OF SERVICE

I hereby certify that on July 19, 2032, I electronically transmitted this Brief on Pacer for electronic notification for all parties.

Appellant



YOLDAS ASKAN

CERTIFICATE OF COMPLIANCE WITH RULE 32

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,883 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

Dated: July 19, 2023

Respectfully submitted,



YOLDAS ASKAN