

II.

Exh. A

1 A. Barnes & Thornburg.

2 Q. And have you been an attorney with Barnes & Thornburg
3 your entire career as an attorney?

4 A. Yes.

5 Q. And did you work prior to becoming a -- work
6 full-time prior to becoming an attorney?

7 A. Yes.

8 Q. What did you do?

9 A. Um --

10 Q. And let's focus on after college.

11 A. After college, I worked for Bayer Corporation in an
12 iron oxide lab, and I wrote a couple of books.

13 Q. And during the time that you've been an attorney with
14 Barnes & Thornburg obviously, what has been your
15 practice?

16 A. Intellectual property.

17 Q. And do you prepare and prosecute patent applications?

18 A. Yes.

19 Q. Is that a regular part of your job?

20 A. Yes.

21 Q. Has it been a regular part of your job since you've
22 been with Barnes & Thornburg?

23 A. Yes.

24 Q. Have you done -- could you estimate for us how many
25 patent applications you've prosecuted, either

1 vis-a-vis a pickup truck, short bed pickup truck, and
2 the structure in the -- the head. I don't know what
3 the term is now, um, in the cap of the fifth wheel
4 having recesses to allow greater turn radius.

5 Q. Did you discuss prior art at that time with
6 Mr. Tuttle?

7 MR. LADUE: At what time?

8 BY MR. IRMSCHER:

9 Q. At the time that you were preparing the provisional
10 application?

11 A. I don't recall.

12 Q. Okay. What was your understanding of how this
13 invention was different from the prior art?

14 A. Are you asking my understanding?

15 Q. Yes. Well, you prepared the provisional application,
16 correct?

17 A. Right. Yes.

18 Q. That's what I'm asking.

19 A. My -- my understanding -- I just didn't hear the
20 first part, sorry. My understanding was that the
21 prior art didn't have, in the cap, did not have these
22 indentations. They were squared off.

23 Q. Could you look at what's been marked --

24 MR. IRMSCHER: And let me, before we get into
25 this, for the record, can we just make that

1 Cooper Exhibit 2, and we'll just consider all of the
2 pages to be that exhibit to be 1 to -- what is the
3 last page, 636?

4 THE WITNESS: Correct.

5 MR. IRMSCHER: Okay.

6 (Whereupon, Plaintiff's Exhibit 2 was
7 marked for identification.)

8 BY MR. IRMSCHER:

9 Q. Would you take a look at the page that's been marked
10 B&T 276 and 277?

11 A. (Doing as indicated.) Okay.

12 Q. Would you take a minute to review page 276, and let
13 me know when you have done that.

14 A. (Doing as indicated.) Okay.

15 Q. Is page 276 and 277, is that the writing that you
16 were referring to that you received from Mr. Tuttle
17 in connection with preparing the provisional
18 application?

19 A. Yes.

20 Q. Okay. And is this the material that you used, in
21 part, to prepare -- to prepare the provisional
22 application?

23 A. Yes.

24 Q. And did you discuss the material in pages 276 and 277
25 with Mr. Tuttle after you reviewed his writing?

1 A. Yes.

2 Q. Can you tell us what you discussed, as best you
3 recall?

4 A. I don't have any specific recollections. This would
5 be, what, 2004? Um, but it would be the subject
6 matter here, the improved turn radius and then the
7 structure on how that's accomplished.

8 Q. Do you recall discussing with Mr. Tuttle the Glendale
9 product?

10 A. No. I see that here, and I don't recall. No, I
11 don't recall at this time what that -- what that was.

12 Q. Okay. Did you ever see the Glendale product that you
13 can recall?

14 A. No, not that I recall.

15 Q. Would it be fair to say that Mr. Tuttle's writing
16 characterizes the design or the invention as a change
17 in the frame and a change in the end cap?

18 A. As I read it here, it does say revolutionary concept
19 involves both rethinking how the steel frame of the
20 fifth wheel is designed, and how the fiber --
21 fiberglass front cap is designed.

22 Q. And after you received 276 and 277, and the
23 photographs and drawings that you talked about, that
24 was the material that you used, along with your
25 discussions with Mr. Tuttle, to prepare the

1 provisional application; is that -- is that correct?

2 Is that a complete list?

3 A. Complete list, I don't know if I can warrant complete
4 list, but it's -- it's the materials that I recall.

5 Q. Yeah. I mean, I'm not trying to be unfair to you.

6 A. No.

7 Q. I'm just trying to ask --

8 A. I understand. I just, you know, it is the basic
9 materials, this written materials, the photographs,
10 drawings, our discussions, typically what --

11 Q. And the -- the photographs and drawings that you're
12 talking about, I assume are the ones that were
13 incorporated into the provisional, or ones like it,
14 that showed the improved turning radius of the end
15 cap in the truck; is that right?

16 A. Correct.

17 Q. And were there also frame drawings as part of that
18 disclosure?

19 A. I don't recall. Possibly, but I'd have to look.

20 Q. At any point in your work for Heartland, did you ever
21 speak with or have any direct communication with
22 Brian Brady?

23 A. Direct communication, not that I recall.

24 Q. Okay. How about with Doug Lantz?

25 A. Not that I recall.

1 Q. How about with Tim Hoffman?

2 A. Not that I recall.

3 Q. How about John Rhymer?

4 A. Not that I recall.

5 Q. And those people were the other people that have been
6 named as inventors in this app -- in the utility
7 application. So it's your testimony that you don't
8 remember any direct communication with any of them,
9 except Mr. Tuttle, correct?

10 A. Correct.

11 Q. And I may have asked this, and if I have, I
12 apologize. Did you have any other contact with
13 anybody at Heartland, other than Mr. Tuttle, in
14 connection with your work?

15 A. Not that I recall.

16 Q. Okay. And did anybody here at Barnes & Thornburg
17 assist you in your work, or did you do it all
18 yourself? And when I say assist, I mean like a
19 lawyer, not a --

20 A. Okay.

21 Q. Yeah. Were there any other lawyers involved?

22 A. No, not that I recall.

23 Q. Okay. Could I direct your attention to pages B&T 41?

24 A. Okay.

25 Q. Does B&T 41 indicate that you provided a draft of the

1 provisional application to Mr. Tuttle for his review?

2 A. Yes. That's what it -- this indicates.

3 Q. And is it your normal practice to provide drafts of
4 patent applications, either provisional or utility,
5 to your clients for them to review?

6 A. That's correct.

7 Q. And this would indicate that in this case you in fact
8 did that, correct?

9 A. Correct.

10 Q. And looking just a little further back in that same
11 list of pages, would it be fair to say that pages 48
12 through 66 are that draft provisional application, as
13 best you can tell?

14 A. Not including the reporting letters.

15 Q. Yeah. I'm just trying to look at the -- what was in
16 fact the application.

17 A. Okay. Keep these in order.

18 Q. Yeah, please do.

19 A. 48?

20 Q. 48 through 66, I believe is the draft application. I
21 want you to tell me that.

22 A. Yes, that appears to be correct.

23 Q. Okay. Do you recall any input that you received from
24 Mr. Tuttle with respect to the draft application?

25 MR. LADUE: At what time?

1 BY MR. IRMSCHER:

2 Q. In revising the draft application to prepare it to be
3 actually filed with the patent office?

4 A. Oh, I don't recall. There could have been.

5 Q. Okay.

6 A. Well, actually, it does show here that there is no
7 inventors, so there would be.

8 Q. Could you look at B&T page 67?

9 A. (Doing as indicated.)

10 Q. What does that page show?

11 A. That appears to be the list of inventors.

12 Q. And is it your testimony that Mr. Tuttle provided you
13 the list of the inventors, and that's what you used
14 for filing the provisional application?

15 A. Correct.

16 Q. Did you have any discussions with Mr. Tuttle, or
17 anyone else at Heartland, about what it took to be an
18 inventor?

19 A. Specific discussions?

20 Q. Yep.

21 A. I don't recall that -- well, I don't recall them
22 specifically, but we would have, in order to get this
23 document.

24 Q. What would you have done?

25 A. Simply just discussing what an inventor was. This is

1 a provisional application, so there is no claims.
2 Typically an inventor is one who contributes to the
3 invent of concept of the claimed invention. We are
4 not there yet, so it would just be simply
5 contributing to the subject matter described in the
6 application.

7 Q. So you would have communicated with Mr. Tuttle that
8 requirement, and he gave -- gives you this list back,
9 is that the way you under -- you recall it going?

10 A. Correct.

11 Q. Okay. Do you remember having any discussion about
12 any particular one of the people on that list, or is
13 it just the list comes back, and that's what you
14 used?

15 A. I don't recall any discussion.

16 Q. After the provisional application is filed, how long
17 do you have to file your utility application?

18 A. One year.

19 Q. And is it Barnes & Thornburg's regular practice to
20 provide letters reminding the client about the
21 conversion date? Is that -- do you call it a
22 conversion date?

23 A. It's not truly a conversion. I think there is a
24 difference, but --

25 Q. Well --

1 A. -- informal discussions, yes, we would.

2 Q. So you would provide regular communication to your
3 client, Heartland in this case --

4 A. (Witness nods head.)

5 Q. -- about the impending date by which they have to
6 file the utility application; is that correct?

7 A. Correct.

8 Q. And that happened here, didn't it?

9 A. I believe so.

10 Q. And the -- the application, utility application, was
11 filed on March 28th, 2005. Do you recall when it
12 was, or approximately when it was you actually began
13 having conversations with Mr. Tuttle about the
14 utility application?

15 A. No, I don't recall when we started the discussions.
16 I believe the letters come out, and you guys may know
17 more now than I do, but usually nine months after the
18 provisional filing, so it would be sometime, I
19 assume, shortly after that, is when those discussions
20 happened.

21 Q. Okay. And can you tell us, as best you can, what
22 communications you had with Mr. Tuttle? And again,
23 just to be clear, I'm asking you now about the
24 preparation of the utility application. Were all
25 your communications with Heartland through Mr. Tuttle

1 --

2 A. Yes.

3 Q. -- in that time period?

4 A. Yes.

5 Q. Okay. And -- so tell me about what communications
6 you had with Mr. Tuttle, as best you can recall, in
7 connection with preparing the utility application?

8 A. I don't recall specific discussions, but the
9 discussions we must have had, since it was on file,
10 would be obviously requesting does he want to convert
11 and any details with that. Often times, and this
12 case would be no different, whether there is anything
13 new to add. Um, those sorts of -- of discussions.

14 Q. Do you recall Mr. Tuttle telling you anything in
15 particular, was there something new to add, or any of
16 those type things?

17 A. I don't recall in particular. There might have been.
18 I -- I think there may have been more photographs
19 possibly, but again, they would be in the stack.

20 Q. Could you take a moment and look at B&T 219 and 220,
21 please?

22 A. (Doing as indicated.)

23 Q. And just read those for a moment, and let me know
24 when you have done that.

25 A. (Doing as indicated.) All set.

1 A. Yes.

2 Q. Would you take a look at B&T 80, please.

3 A. (Doing as indicated.)

4 Q. And is that -- does B&T 80 appear to be your
5 communication of the draft application?

6 A. Repeat the question specifically. I'm sorry. I was
7 --

8 Q. I'm just trying to make sure I understand. Is -- is
9 this the record that shows that you provided the
10 draft application to Mr. Tuttle of Heartland?

11 A. That's what it appears, yes.

12 Q. And would you take a moment to look, I believe pages
13 81 through 115 are actually the draft application.
14 Can you verify that for us, please?

15 A. (Doing as indicated.) It appears to be the draft.

16 Q. Okay. In -- on B&T 80, that page where you provided
17 this material, this draft utility application to
18 Mr. Tuttle, you asked him to let you know if he had
19 any revisions or changes, correct?

20 A. Correct.

21 Q. Did you receive any revisions or changes from
22 Mr. Tuttle?

23 A. That I don't recall.

24 Q. Okay. If you had, what -- what would you have done
25 with them?

1 A. Preparing, yes. Authorization, no.

2 Q. Okay. So what was a little different here, was maybe
3 the authorization came late in the process; is that
4 right?

5 A. That's my recollection.

6 Q. Okay. Would you take a look at B&T pages 143 and
7 144. And let me know when you have had a chance to
8 review them.

9 A. (Doing as indicated.) Okay.

10 Q. What is B&T 143 and 144?

11 A. This looks like a reporting letter of the filing of
12 the patent application.

13 Q. Okay. And does it, in the text of this letter, tell
14 the inventors and Heartland to provide you with
15 information about prior art?

16 A. Yes.

17 Q. Is that a standard practice in your -- in your
18 business to do that?

19 A. Yes.

20 Q. Okay. Did you receive any prior art information from
21 Heartland that you can recall as a result of this
22 letter?

23 A. Not that I recall.

24 Q. Okay. And was the application somewhat incomplete as
25 it was filed?

1 BY MR. IRMSCHER:

2 Q. Could you review Mr. Brady's signature? Didn't he
3 sign it on July 2nd? I think you said the 4th.

4 A. Did I say that wrong? Oh, you're correct. It's
5 July 2nd, '04.

6 Q. And then pages 156 -- well, page 156 is your
7 response, where you're providing -- filing missing
8 parts; is that correct? Can you tell me which pages
9 go with 156, how far back it goes?

10 A. I believe it would be to BT 172, including all the
11 transmittal forms, the whole package.

12 Q. And that package of material was the material that
13 you filed in order to provide the materials that were
14 missing when you filed the original utility
15 application; is that right?

16 A. The declaration, correct.

17 Q. Was there anything else that was missing at that
18 point?

19 A. That appears it.

20 Q. Okay. And at some point after the utility
21 application was filed, you, Barnes & Thornburg,
22 stopped representing Heartland in this matter; is
23 that correct?

24 A. Correct.

25 Q. Tell us the circumstances of how that came about.

1 A. My understanding was that a conflict arose between
2 Heartland, our client, and another client, and
3 because of that conflict, I had to withdraw --

4 Q. Okay.

5 A. -- representation.

6 Q. Would you take a look at B&T 135, and let me know
7 when you have done that?

8 A. (Doing as indicated.) Okay.

9 Q. Does that refresh your recollection that the conflict
10 that you had was with Keystone?

11 A. Correct.

12 Q. And that was the conflict you were just referring to
13 as to why it was that Barnes & Thornburg ceased
14 prosecuting this patent, correct?

15 A. Correct.

16 Q. Is that the only reason that you know of as to why
17 Barnes & Thornburg stopped prosecuting this patent?

18 A. Yes.

19 Q. And at this point, or about this time, in May, June
20 of 2005, you transferred the file to Mr. Gallagher at
21 Baker & Daniels; is that right?

22 A. That's correct.

23 Q. Did you have any discussions with Mr. Gallagher in
24 connection with doing that?

25 A. Yes.

1 Q. Would you take a look at page 276, B&T 276.

2 A. (Doing as indicated.)

3 Q. That's a document we looked at earlier today, and I
4 just want to be certain. That two-page document came
5 to you from Mr. Tuttle; is that correct?

6 A. Correct.

7 Q. All right. During the break, I asked you to take a
8 look at the prior art, or patents rather, that are
9 included.

10 A. Take one step back.

11 Q. Uh-huh.

12 A. I just wanted to --

13 Q. Yep.

14 A. -- see there is some drawings in front. Okay. Yes,
15 sorry.

16 Q. Do you need to clarify or change your testimony?

17 A. No.

18 Q. Okay.

19 A. No.

20 Q. Again, during the break, I asked you to look through
21 your file and identify the patents that are included
22 in the file. And have you listed them all out by
23 number?

24 A. Yes.

25 Q. And how many patents are included?

1 A. 14.

2 MR. IRMSCHER: And could you make that
3 Cooper Exhibit 3, please. Just give you a sheet of
4 paper.

5 (Whereupon, Plaintiff's Exhibit 3 was
6 marked for identification.)

7 BY MR. IRMSCHER:

8 Q. And is Cooper Exhibit 3 the list of the patents that
9 were included in your file?

10 A. That we wrote out, correct.

11 Q. Yeah. Where did those patents come from?

12 A. I don't recall where these patents actually came
13 from.

14 Q. What are the potential sources?

15 A. The potential sources are either from the client,
16 Mr. Tuttle, or there could be a -- a search that was
17 -- that could have been performed, either a formal
18 search, which I don't think I saw any notification,
19 or reporting out letter that one was done, so that's
20 unlikely, or an informal search, where we were having
21 a discussion, and we looked something up. Those
22 would be the -- the sources, I think, in this case.

23 Q. Do you have any recollection of receiving any prior
24 art from the client?

25 A. I don't have a specific recollection. We have some,

1 but I don't have a specific recollection.

2 Q. And I want to be fair to you, but I want to make sure
3 I understand. You're saying to me, I don't know
4 where these patents that are in the file came from,
5 and these are the sources that are possible; is that
6 -- is that what you're saying?

7 A. What I said I don't know is I don't recall, being so
8 many years later, I think is a more fair statement.

9 Q. And they could have come from the client, from a
10 search, or from an informal search?

11 A. Right.

12 Q. Okay. And did you -- do you have any recollection at
13 all of receiving any prior art from any of the
14 competitors of Heartland?

15 A. No.

16 Q. Did you ever discuss with anyone withholding any
17 references from the patent office?

18 A. No.

19 Q. Did you ever discuss with anyone in characterizing
20 any references in any particular way with respect --
21 with respect to the prosecution of this patent?

22 A. What do you mean by characterizing?

23 Q. Did you make any effort to characterize any
24 particular prior art reference in the process of
25 preparing this application?

1 A. With these in the file, we may have discussed these,
2 but having a recollection of that, I don't.

3 Q. Okay. Did you commit inequitable conduct in
4 connection with the prosecution of this patent?

5 A. As I understand it, no.

6 Q. And did you ever mislead or mischaracterize any fact
7 to the patent office in connection with the patent,
8 this patent application?

9 A. Not that I know of, no.

10 Q. Did you ever discuss, in connection with the
11 prosecution of this patent for Heartland, a reference
12 called The Eliminator reference?

13 A. I don't know what that is.

14 Q. How about a Roadmaster reference, same question?

15 A. No. I don't -- I think I have heard the word before,
16 but I don't know what that is.

17 Q. Okay. Did you ever discuss any V or bullnose, or
18 otherwise tapered trailers, in connection with this
19 patent application?

20 A. Theirs, Heartland's --

21 Q. Any other --

22 A. -- front cap.

23 Q. Any others?

24 A. Like a prior art?

25 Q. Yes.

1 A. No.

2 Q. Did you ever discuss any products that were made by
3 Cobra in connection with this patent application, is
4 the same -- is the same question over and over again?

5 A. No. Well, and that being the case, it would be more
6 not that I recall for any of this.

7 Q. Bison, same answer?

8 A. Correct.

9 Q. Aluminum Trailer Company?

10 A. Not that I recall.

11 Q. Okay. Sundowner?

12 A. No.

13 Q. Do you recall any discussion of a Holiday Rambler
14 product in connection with the prosecution of this
15 patent?

16 A. Not in connection. I think I have heard that word
17 before, but I don't recall.

18 Q. Thanks very much for your testimony. I don't believe
19 I have any further questions at this time.

20 A. Okay.

21 CROSS-EXAMINATION

22 BY MR. FOUNTAIN:

23 Q. Greg, I want to make sure you understand what the
24 stakes are here today. Do you understand that the
25 attorneys involved in prosecuting the 650 patent have

1 Heartland case; did it not?

2 A. It requires you to submit material -- material
3 information.

4 Q. Yes. So to do that, you have to know it's material,
5 right?

6 A. You have to know what's potentially material, because
7 you could be right or wrong. And if it's potentially
8 material, as you and every prosecutor knows, that
9 because you don't know that right line, you err on
10 the side of submitting it.

11 Q. Okay.

12 A. That's how --

13 Q. In the context of the Heartland patent application,
14 what did you consider to be potentially material at
15 the time that you were handling the case?

16 A. That -- well, according to the drawings in the
17 patent, the prior art that was submitted, or I'm
18 sorry, that is represented -- I guess I should say
19 admitted in the drawings -- that is what is material,
20 number one. Number two, as I said before, I don't
21 recall the course of events with this reference. And
22 three, I had to withdraw before I had a chance to
23 investigate that with an information disclosure
24 statement.

25 Q. So are you saying you did not make that determination

1 during the course of your handling this case?

2 A. Well, that's not what I said. I said I don't recall
3 making the determination. And that determination you
4 referenced, Rule 56, Rule 56 is the filing of the
5 information disclosure statement. That comes at
6 first three months after the application is filed.
7 Two, that also continues throughout the prosecution
8 of the file. I had to withdraw because of conflict
9 in the firm shortly after, whether it's one month,
10 two months, you guys would probably know better than
11 I. But when you get to prior art, I had to withdraw,
12 so not only am I not sure, but I was not allowed to
13 participate in the process.

14 Q. And submitting the prior art to the patent office
15 that you did, with regard to that application, you at
16 least made a materiality as to that prior art, right?
17 Materiality determination, right?

18 MR. IRMSCHER: You talking about the prior art
19 that is in the specification?

20 MR. FOUNTAIN: Yes.

21 THE WITNESS: I didn't make a separate
22 materiality, but that's what the prior art was in the
23 situation, where, well, this is material, so I must
24 submit it. We do that for an information disclosure
25 statement, as I said, that we submit after the filing