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Litigator of the Week: Apple's Wild Ride

BY Scott Graham
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The latest *Apple v. Samsung* appeal reminds William Lee of a Disneyland adventure. "This had more twists and turns than Mr. Toad's Wild Ride," the WilmerHale partner says.

Earlier this year, Apple and Lee saw a $119 million patent infringement judgment wiped out by a three-judge panel of the U.S. Court of Appeals for the Federal Circuit. After some soul searching, and with an assist from two younger WilmerHale partners, Apple decided to ask the full court to review whether the panel overstepped the proper bounds of appellate review.

Good luck with that, right?

Remarkably, an 8-3 majority of the court responded Friday with an emphatic yes, concluding that the panel judges had relied on evidence outside the trial record and decided issues not raised by the parties. The decision lays out new, more deferential rules for reviewing claim construction on appeal—the judges may no longer consult technical dictionaries that weren't introduced at trial—and adds some tweaks to the law of obviousness. It also reinstates Apple's $119 million judgment.

The court did all this without ordering briefing or argument, though both the majority and the primary dissent quote Lee's argument to the panel last January at length.

For engineering this turnaround, and scoring a win that will resonate with appellate lawyers everywhere, Lee is our Litigator of the Week.

"What the opinion really describes is what the appropriate function of an appellate court is as jury verdicts are coming up to it," Lee said Thursday. If the trial judge erred or there's no evidentiary support whatsoever for a verdict, reversal may be appropriate, he said. Otherwise, "the appellate function is more limited. And that is a really important proposition."

Friday's decision comes from the second of two "smartphone war" trials between Apple and Samung in San Jose federal court. (The other trial was before the U.S. Supreme Court on Tuesday.) In the second trial, a jury found that Samsung infringed Apple patents on its "quick links" software that recognizes addresses and phone numbers and converts them to

hyperlinks; its slide-to-unlock feature; and its auto-correct program.

The Federal Circuit panel ruled in February that no reasonable jury could have found that Samsung infringed quick links, and that no reasonable jury could have rejected Samsung's contention that the slide-to-unlock and auto-correct patents are invalid because they're obvious improvements on prior art.

The panel opinion didn't announce any broad new legal principles or set up an obvious conflict with other appellate decisions—the usual prerequisites for en banc review. Lee said WilmerHale attorneys conferred with co-counsel at Morrison & Foerster and with Apple's in-house team. For a time, there was some question as to whether Apple would seek en banc review at all.

Then, Lee says, WilmerHale partners Lauren Fletcher and Andrew Danford dug into the opinion and identified six different placess where the judges relied on evidence that neither party had addressed, at trial or on appeal. "And that changed our view," Lee said.

The team, including Apple litigation chief Noreen Krall, decided, "This is an important enough issue to raise, whether we're successful or not," Lee said.

Lee's March 28 petition for rehearing contended that the panel relied on "dictionary definitions, an encyclopedia, a textbook, and an unrelated patent—none of which was of record and that the panel appears to have located only through independent research." Apple attached copies of all those materials to its petition.

At first, the Federal Circuit clerk's office rejected the petition, ironically on the ground that Apple had submitted materials that were outside the court record. Apple formally supplemented the record, and Samsung filed its response.

Then all went quiet.

After a couple of months went by, Lee began thinking about a moral victory. "Candidly, I think we were hoping for a couple or three opinions dissenting from a denial to rehear en banc that might help identify this as an important issue," he said.

More months went by without any word from the court. "Particularly when you got to the four, five, six-month stage, you knew that there was some disagreement. And that there were some opinions being written. But you didn't know what."

On Friday, Krall visited Lee and WilmerHale partner Seth Waxman to prepare for Tuesday's Supreme Court arguments in the other Apple-Samsung trial. Five minutes before her arrival, the Federal Circuit issued its en banc decision. Judge Kimberly Moore's opinion reinstated the verdicts and chided the panel judges for going outside the trial record. All three panel judges—Timothy Dyk, Sharon Prost and Jimmie Reyna—issued forceful dissents.

Is Lee worried about having to mend fences now with the judges who were deemed to have overstepped?

"We have enormous respect for the judges there," he says. They know that "what we were trying to do is do our job as best we could. So the answer to your question is no, I'm not worried about that. I have an argument Nov. 2 and I'm looking forward to being back there."

Contact Scott Graham at sgraham@alm.com.