When an Expert's Testimony Counters His Own Report

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A federal appeals court has come down hard on a soft contact lens expert who saw fit to change his testimony in the middle of his cross-examination, countering what he had said in his own expert report.

In *Rembrandt Vision Technologies v. Johnson & Johnson Vision Care*, the Federal Circuit Court of Appeals affirmed the lower court's decision to strike the expert's testimony, thereby eviscerating the only evidence the plaintiff had to support its claim of patent infringement.

The lawsuit had originated in Florida, where Rembrandt sued Johnson & Johnson Vision Care (JJVC) alleging that its Advance and Oasis contact lenses infringed Rembrandt's U.S. Patent No. 5,712,327, covering a soft gas permeable contact lens.

In order to make its case, Rembrandt had to prove that the lenses at issue were in fact "soft." To be considered soft, the parties stipulated, the lenses had to measure less than five on a hardness test known as Shore D. To establish this fact, Rembrandt relied on the expert testimony of Dr. Thomas Beebe Jr.

In his expert report, Dr. Beebe explained that he performed the hardness test by stacking the lenses around a stainless steel ball and then probing them. He stacked 24 individual hydrated contact lenses, he wrote, to achieve a thick enough sample to allow full penetration by a probe that was 2.54 mm in length.

Before trial, JJVC filed a motion asking the judge to exclude the expert's tests. JJVC argued that his tests had failed to meet industry-standard protocols, which required probing a thick button of lens material on a flat surface, not around a steel ball. The court deferred ruling on JJVC's motion until after Dr. Beebe testified at trial.

Sudden Change of Course

On direct examination, Dr. Beebe reiterated his account of the testing as he had described it in his expert report. However, on cross-examination, Dr. Beebe began to present a different version of the testing.

The expert's change in testimony began as the attorney for JJVC challenged him on the thickness of the sample he had tested, suggesting that industry-standard protocols required a stack at least 6 mm thick, not the 2.54 mm the expert had described. In response, Dr. Beebe said that he had, in fact, tested a 6 mm stack, not 2.54 mm as he had disclosed in his expert report. That number, he testified, "might be a typo."

On further cross-examination, the expert confirmed that he had tested a stack of 24 contact lenses. JJVC's attorney then pressed him on that point, asking how a stack of 24 lenses, each with a thickness of .07 mm, could add up to 6 mm. Dr. Beebe agreed that such a stack should have a thickness around 1.68 mm.

JJVC's lawyer continued to press the expert, asking him to confirm that he did not test flat samples of the lens material. At that point, according to the trial judge, Dr. Beebe "suddenly changed course in the middle of cross-examination and testified that he did not follow the procedures listed in his expert report." Rather, he testified that he had performed the hardness testing by cutting the lenses into quarters, stacking the quarters on a flat surface to a thickness of 6 mm, and then probing them. To the extent his report described a different procedure, Dr. Beebe said, it was a "typo."

Not surprisingly, JJVC renewed its motion to exclude the expert's testimony and asked the court to enter a final judgment in its favor. The trial judge granted the motion to strike, ruling that the expert's report was "woefully deficient" and that "[t]here is simply no excuse for Dr. Beebe waiting until cross-examination to disclose his testing procedures." With Rembrandt having no other evidence to support its claim, the judge entered a judgment of non-infringement in favor of JJVC.

Clarity on Appeal

On appeal to the Federal Circuit, Rembrandt asserted that the mistakes in the expert's report were unintended and did not prejudice JJVC in any way. It also argued that the expert's actual testing methodology followed industry standard protocols and should have been found to be reliable.

JJVC responded that its ability to prepare for trial was significantly impaired by the expert's late disclosure of his testing methods and change in testimony. It contended that the trial judge was correct in ruling that the expert's undocumented testing methodology lacked sufficient reliability.

The Federal Circuit showed 20/20 clarity about the outcome of the case, ruling that the trial judge was correct to strike the expert's testimony and enter judgment for JJVC.

Under Federal Rule of Civil Procedure 26, the court noted, an expert witness is required to provide a complete statement of his opinions and the basis upon which he reached them. The rule bars an expert from testimony about matters not covered in the report unless the exclusion was "substantially justified or harmless."

Here, there was no such justification. The Federal Circuit noted that the expert had submitted his report nearly six months prior to trial. The report had been the subject of his deposition and had been discussed extensively in pretrial motions. Even so, the expert never attempted to supplement his report.

“Nothing in the record indicates that Dr. Beebe’s failure to disclose his testing methodology was substantially justified,” the circuit court said.

The appeals court also rejected Rembrandt’s argument that the expert’s late disclosure was harmless. “JJVC prepared its noninfringement defense based on the methodology disclosed in Dr. Beebe’s expert report, and opted to challenge that methodology rather than introduce competing expert testimony. Nothing during the course of the proceedings alerted JJVC to the possibility that Dr. Beebe would change his testimony.”

Even though the expert characterized the discrepancies in his report as typos, the court stated, “it is undisputed that the shift in his testimony was both substantive and substantial.” This late change in course “significantly hampered JJVC’s ability to adequately cross-examine Dr. Beebe and denied it the opportunity to develop or introduce competing evidence.”

That the court came down so hard on this soft-lens expert is not surprising. The expert’s change of testimony was far from trivial. However, the case offers a reminder to lawyers and experts alike to review expert reports in advance of trial and disclose any inaccuracies, changes or “typos.”

The case is *Rembrandt Vision Technologies v. Johnson & Johnson Vision Care*, No. 2012-1510 (Fed. Cir., Aug. 7, 2013).

What, if anything, do you think might have alleviated this scenario on cross-examination or perhaps have prevented it? Did the expert just get thrown off course?

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