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The Precedent: Federal Circuit Reverses Exclusion of Expert Testimony and Judgement as a Matter of Law in Barry v. Depuy Synthes Co.

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In this edition of *The Precedent*, we outline the decision in *Barry v. Depuy Synthes Co.*

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Overview

In *Barry v. Depuy Synthes Co.*, the Federal Circuit reversed the district court's exclusion of the patentee's expert testimony and its grant of judgment as a matter of law (JMOL) of noninfringement. The Federal Circuit held that the district court abused its discretion by excluding expert opinions that applied the court's claim construction and clarified that disputes over the credibility or persuasiveness of expert testimony are for the jury, not the judge.

Issues

1. Did the district court err by excluding the patentee's expert testimony on infringement for allegedly contradicting the court's claim construction?
2. Was the exclusion of the survey expert's testimony and results proper?
3. Was JMOL of noninfringement appropriate after excluding the patentee's experts?

Holdings

1. The district court abused its discretion by excluding the technical expert's testimony, which applied the court's claim construction rather than contradicting it; credibility disputes should be resolved by the jury.
2. The district court erred in excluding the survey expert's testimony and results, as alleged methodological flaws went to the weight, not admissibility, of the evidence.

3. JMOL of noninfringement was improper because, with the experts' testimony restored, there was sufficient evidence for a reasonable jury to find infringement.

Background and Reasoning

Dr. Mark Barry sued Depuy Synthes for inducing infringement of patents covering surgical techniques and tools for spinal deformity correction. The patents required certain tools to have a "handle means," defined by the court as "a part that is designed especially to be grasped by the hand." Barry's technical expert, Dr. Yassir, opined that Depuy's accused products met this limitation, explaining that various parts were designed to be grasped by hand and that linked arrays of handles also qualified.

During cross-examination, Depuy's counsel pressed Dr. Yassir on whether his interpretation would make "everything" a handle means and whether assembly steps counted. Dr. Yassir maintained that his opinions were consistent with the court's construction but acknowledged that in a linked system, multiple parts could be considered handle means. The district court later excluded the portion of his testimony relating to "handle means," finding it "contradictory, unhelpful, and unreliable" and inconsistent with the claim construction.

The Federal Circuit disagreed, emphasizing that Dr. Yassir's testimony applied the court's construction and that any tension or ambiguity in his answers was a matter of credibility for the jury. The Federal Circuit explained that exclusion is warranted only for genuine contradictions of claim construction, not for disputes over application or persuasiveness. The Federal Circuit also noted that Depuy had not objected to Yassir's direct testimony during trial as inconsistent with the claim construction despite Depuy's pretrial *in limine* ruling excluding evidence inconsistent with the court's claim construction and further noted that the district court had previously denied a pre-trial *Daubert* challenge on the same grounds.

Barry's survey expert, Dr. Neal, conducted a survey to estimate the number of infringing surgeries. The district court excluded his testimony for alleged methodological flaws, including non-representative sampling and question design. The Federal Circuit reversed, holding that such flaws go to the weight of the evidence, not its admissibility under Rule 702. The Federal Circuit emphasized that the adversary process (e.g., cross-examination) is the appropriate means to challenge "shaky but admissible" expert evidence.

Because the exclusion of both experts left Barry without sufficient evidence of infringement, the district court granted JMOL for Depuy. The Federal Circuit reversed, restoring the experts' testimony and remanding for a new trial. The Federal Circuit underscored that expert testimony applying the court's claim construction is admissible unless it genuinely contradicts the construction. Similarly, the Federal Circuit affirmed that methodological criticisms of survey evidence are for the jury to consider unless "a methodological error is so clear that the court can identify the error on its own, whether through judicial notice or otherwise," which was not the case with Dr. Neal's testimony.

Takeaway

Expert opinions that apply a court's claim construction should be admitted and tested through cross-examination. A dispute over an expert's credibility or methodology is typically for the jury to weigh, not grounds for exclusion.