

Fed. Circ. Backs J&J Trial Win In Contact Lens Patent Suit

By **Bill Wichert**

Law360 (February 11, 2019, 4:37 PM EST) -- The Federal Circuit has refused to disturb a Florida federal jury verdict that a Johnson & Johnson unit's contact lens does not infringe a patent belonging to Rembrandt Vision Technologies LP, upholding that victory in a new trial after tossing J&J's initial win.

In a two-page judgment issued Friday without an opinion, a circuit panel affirmed the 2017 noninfringement verdict in favor of Johnson & Johnson Vision Care Inc. in Rembrandt's suit, rejecting Rembrandt's arguments that the trial court made improper evidentiary rulings.

The judgment marked the third decision from the appeals court in the nearly decadelong fight over the patent, which covers a type of soft contact lens that can be worn for extended periods of time, according to court records.

A little shy of three years after Rembrandt sued JJVC over JJVC's Oasys contact lens, jurors at the first trial cleared the pharmaceutical giant of infringement in May 2012, court records show.

Following the verdict, U.S. District Judge Timothy J. Corrigan granted JJVC's motion to strike certain testimony from Rembrandt's principal expert, Dr. Thomas Beebe Jr., after that testimony did not match his expert report, according to court records. Judge Corrigan then ruled as a matter of law that JJVC does not infringe and, following Rembrandt's appeal, the Federal Circuit upheld that decision in August 2013.

While that appeal was pending, Rembrandt moved before Judge Corrigan for a new trial on the grounds that one of JJVC's experts, Dr. Christopher Bielawski, had given false testimony at the first trial in connection with his performing testing and that Bielawski did not produce certain documents regarding those tests, according to court records.

Judge Corrigan denied that motion, but on Rembrandt's second appeal in the case, the Federal Circuit in April 2016 reversed the judge's decision and ordered a new trial, court records show. In a 2-1 decision, a circuit panel held that the jury's noninfringement verdict was "irretrievably tainted" by Bielawski's false testimony and his and JJVC's withholding of the documents.

For the second trial, JJVC replaced Bielawski with another expert, but Rembrandt used Beebe as its main expert, court documents state. In August 2017, a jury again sided with JJVC and the judge then entered a final judgment in favor of JJVC, leading to Rembrandt's instant appeal.

In seeking a third trial in the case, Rembrandt asserted that Judge Corrigan improperly barred Beebe from testifying about circumstantial evidence that the JJVC lenses meet the “soft” limitation of the patent, court documents state.

Rembrandt also argued that the judge erred in preventing Beebe from utilizing certain data in making the case that the lenses meet the “surface layer” limitation of the patent, court documents state.

Further, the company contended that the judge was wrong to permit JJVC to offer improper expert testimony through lay witnesses and to present claim construction arguments to the jury.

Referring to the judge’s alleged mistakes, Rembrandt argued in a March 15 brief, “Because those errors caused substantial prejudice, Rembrandt is entitled to a new trial — the trial this court previously ordered.”

“This court has not shied away from ordering a third trial where prejudicial errors in the second trial make a new trial necessary,” the company said.

In a June 8 brief, JJVC countered each of those arguments, saying in part that Judge Corrigan’s evidentiary rulings “were correct and were not an abuse of the district court’s discretion.”

“At bottom, Rembrandt lost the retrial because of compelling evidence from JJVC witnesses and Dr. Beebe’s repeated failings as an expert — not because of the challenged evidentiary rulings,” JJVC said.

Counsel for JJVC declined to comment Monday. Counsel for Rembrandt could not immediately be reached for comment Monday.

U.S. Circuit Judges Kimberly A. Moore, Jimmie V. Reyna and Kara F. Stoll sat on the panel for the Federal Circuit.

The patent-in-suit is U.S. Patent Number 5,712,327.

Rembrandt is represented by Thomas M. Melsheimer of Winston & Strawn LLP, John A. Devault III, Michael Edward Lockamy and John Gabriel Woodlee of Bedell Dittmar DeVault Pillans & Coxe PA, and Gregory R. Booker and John Stephen Goetz of Fish & Richardson PC.

JJVC is represented by Gregory Diskant, Eugene M. Gelernter and Clinton Morrison of Patterson Belknap Webb & Tyler LLP, Charles Davison Hoffmann and Sean Reeves Marshall of Hoffmann Marshall Strong LLP and Timothy Joseph Barron Sr. of Jenner & Block LLP.

The case is Rembrandt Vision Technologies LP v. Johnson & Johnson Vision Care Inc., case number 2018-1015, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Dave Simpson. Editing by Jack Karp.